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36	Alimuddin v. Emperor ..	22 A. L. J. 678; (1924) A. I. R. (A.) 569.
37	Bahra v. Emperor ..	*Oudh Judicial Commissioner's Court.
39	Maung Po Hmyin v. Emperor ..	3 Bur. L. J. 1; 2 R. 53; (1924) A. I. R. (R.) 241.
42	Blong v. Emperor ..	(1924) Pat. 262; (1924) A. I. R. (Pat.) 767; 25 Cr. L. J. 1178.
45	Ghassu v. Emperor ..	*Nagpur Judicial Commissioner's Court.
49	Varadarajulu v. Emperor ..	20 L. W. 881.
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50	Bhola Singh v. Emperor ..	3 Pat. 638; 5 P. L. T. 622; (1924) A. I. R. (Pat.) 563; 25 Cr. L. J. 1186.
50	Balaram Kundu v. Emperor ..	*Calcutta High Court.
52	Tyaballi v. Emperor ..	26 Bom. L. R. 216; (1924) A. I. R. (B.) 365.
53	Chheda Khan v. Emperor ..	10 O. & A. L. R. 722; 11 O. L. J. 664.
54	Khanjan v. Emperor ..	(1924) A. I. R. (A.) 781.
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58	Makhdum v. Emperor ..	10 O. & A. L. R. 1139.
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63	Shreo Ram v. Emperor ..	(1923) A. I. R. (L.) 603.
64	Amir-ud-din v. Emperor ..	(1923) A. I. R. (L.) 238.
65	Santi Lal v. Raj Narain ..	(1924) A. I. R. (A.) 804.
67	Narayanaswamy v. Thangavelu ..	(1924) M. W. N. 571; (1924) A. I. R. (M.) 800.
68	Lakhraur Singh v. Sheo Prasad ..	(1922) A. I. R. (A.) 316.
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78	Krishna Iyer v. Gyanadikkam Pillai ..	20 L. W. 328; (1924) M. W. N. 693; (1924) A. I. R. (M.) 801.
79	Gayani Das v. Dwarka Mandar ..	3 Pat. 540; (1924) Pat. 269; (1924) A. I. R. (Pa . 557.
80	Dwarka Dass v. Durga Prasad ..	22 A. L. J. 683; (1924) A. I. R. (A.) 752.
81	Sodawaterwala v. Volkart Brothers ..	(1923) A. I. R. (S.) 25.
89	Brij Bhushan Lal v. Municipal Board of Kanauj	22 A. L. J. 599; (1924) A. I. R. (A.) 567; 46 A) 685.
90	Iswar Chandra Nath v. Gour Sundar Nath ..	(1923) A. I. R. (C.) 608; 39 C. L. J. 337.
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141	Ediga Thimmiah, *In re* ..	(1924) M. W. N. 489; 20 L. W. 293; 47 M. L. J. 355.
142	Soosalal v. Emperor ..	*Nagpur Judicial Commissioner's Court.
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151	Tillibai v. Emperor ..	*Sind Judicial Commissioner's Court.
152	Emperor v. Naipal ..	10 O. & A. L. R. 735; 11 O. L. J. 532; (1924) A. I. R. (O.) 448.
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169	Hussain v. Emperor ..	*Lahore High Court.
170	Ram Sri v. Sri Kishan ..	22 A. L. J. 803; (1924) A. I. R. (A.) 777.
172	Hira Lal v. Emperor ..	22 A. L. J. 751; (1924) A. I. R. (A.) 765; 46 A. 828.
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174	Rajpatti v. Emperor ..	22 A. L. J. 806; (1924) A. I. R. (A.) 784.
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178	Magni Ram Bungar v. Sridhar Choudhury ..	*Patna High Court.
180	Bishunath Rai v. Jodhi Rai ..	*Allahabad High Court.
181	Asharfilal Mahtha v. Surajmaya Mishrain ..	(1924) Pat. 253; (1924) A. I. R. (Pat.) 758.
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183	Thithi Kutti v. Nellaya Variath ..	(1924) M. W. N. 526.

184	Balgobind v. Sheo Kumar ..	22 A. L. J. 791; (1924) A. I. R. (A.) 818.
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345	Chairman of Howrah Municipality v. Haripada Roy ..	28 C. W. N. 892; (1924) A. I. R. (C.) 1070.
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351	Firm Peare Lal-Gopi Nath v. East Indian Railway Co. ...	22 A. L. J. 663; 10 O. & A. L. R. 883; (1924) A. I. R. (A.) 574; 46 A. 691.
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359	Ramdas Vishnudas v. Emperor ..	26 Bom. L. R. 713; (1924) A. I. R. (B.) 511.
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364	Chidda Singh v. Emperor ..	(1924) A. I. R. (A.) 766.
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ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 1724 OF 1923.

April 9, 1924.

Present:—Mr. Justice Daniels.

RAM BHAROSAY AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

SOHAN LAL—JUDGMENT-DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), s. 15—Execution of decree—Petition for insolvency by judgment-debtor—Exclusion of time spent in insolvency proceedings.

The mere presentation of an insolvency application by the judgment-debtor does not prevent execution of the decree. [p. 1, col. 2.]

In order to bring section 15 of the Limitation Act into operation it is necessary that execution shall have stayed by an injunction or order. [p. 2, col. 1]

Second appeal from a decree of the District Judge, Budaun, dated the 7th September, 1923.

Mr. *Harnandan Prasad*, for the Appellants.

Mr. *Shiva Prasad Sinha*, for the Respondent.

JUDGMENT.—The question for decision in this appeal is whether the appellants decree-holders' application for execution is time barred. The application in question was presented on 10th January 1923. The last previous application was made on 31st October 1919, considerably more than three years earlier. The previous application was for the arrest of the judgment-debtor. The appellants rely on the fact that when the judgment-debtor was brought before the Court on 17th November 1919 he gave security and applied to be declared an insolvent. As the law stood the Court was obliged to release him from arrest under section 55 (4), Civil Procedure Code. He was released and made an application to the Insolvency Court. While the insolvency proceedings were pending the execution application was struck off. This was on 18th December 1919. On 11th February, 1920, the application to be declared an insolvent was finally rejected. In order to bring their present application within time the decree-holders require to deduct the whole period during which the insolvency proceedings were pending and this is what they claim to do under section 15 of the Limitation Act. The learned District Judge has rejected this plea on the ground that under the Provincial Insolvency Act of 1907, which was then in force, the mere presentation of an insolvency application does not prevent execution of the decree. If an order of adjudication was subsequently passed under section 16 of the Act that adjudication would relate back to the date of the insolvency petition and would prevent any execution proceedings being taken except by leave of the Court. In this case no order of adjudication was ever made and, therefore, the creditor cannot take advantage of this provision. It has indeed been held in a Madras case that even the passing of an order of adjudication does not amount to a suspension of execution under section 15 of the Limitation Act because after the adjudication execution proceedings could still be carried on by leave of the Insolvency Court. That is a much stronger case than the present one where no adjudication was made.

The appellants rely on the language of section 55 (4), Civil Procedure Code. Their learned Counsel argues that on the

language of that clause it was not open to them to apply again for the arrest of the debtor so long as the insolvency application was still undetermined. He argues from this that until final orders were passed by the Insolvency Court execution of the decree must be deemed to have been stayed. It is difficult to reconcile this argument with the actual language of section 15 of the Limitation Act. In the first place in order to bring section 15 into operation it is necessary that execution shall have stayed by an injunction or order. In this case there was no injunction and no order staying the execution. If, however, this be a somewhat technical point the larger objection remains that execution of the decree was not stayed by the provisions of section 55, Civil Procedure Code. The decree-holders may have been debarred from one particular mode of execution but it was still open to them to execute their decree in any other way, *e. g.*, by attachment and sale of any moveable or immoveable property of the judgment-debtor. In my opinion section 15 of the Limitation Act does not apply. The learned Counsel for the appellants puts forward an alternative plea that his present application should be treated as being in continuation of the application of 31st October 1919. Seeing that the application in question was formally dismissed on 18th December 1919 there is no ground for accepting this plea either.

The appeal, therefore, fails and it is accordingly dismissed with costs.

K. S. D. *Appeal dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 91-B OF 1923.
July 21, 1924.

Present:—Mr. Hallifax, A. J. C.

PUNDALIK AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KADTAI BAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 82, 95—Contribution between co-mortgagors.

Section 82 of the Transfer of Property Act deals only with relations between mortgagor and mortgagee and has no application to the case of co-mortgagors which is dealt with by section 95 of the Act.

Appeal against the decree of the Additional District Judge, Akola, dated the 27th November, 1922, in Civil Appeal No. 50 of 1922.

FACTS.—On 15th April, 1909, Honaji, deceased father of the plaintiffs and Bapu, deceased uncle of the defendant No. 1, jointly executed a mortgage bond for Rs. 400 in favour of Hemraj Gyanchand and Gopiram Jitmal. Out of the four properties mortgaged in the bond, three belonged to Honaji, and the fourth, *viz.*, one-fourth share in the field S. No. 85 belonged to Bapu. The plaint alleges that each of the two mortgagors undertook to pay half of the debt. The defendants Nos. 2 and 3 are subsequent purchasers of the one-fourth share in field No. 85. In 1919 the mortgagees brought a suit on their mortgage and obtained a preliminary decree for Rs. 931-11-10 against both the parties to the present suit for contribution. Thereupon the plaintiffs paid the full decretal amount to the mortgagees on 17th August, 1920. In the suit leading to this appeal, they claim half of the amount, *viz.*, Rs. 465-13-11 from the defendants Nos. 2 and 3 and pray that amount be declared a charge on the one-fourth share in the field No. 85, and in the event of non-payment of the amount by the defendants Nos. 2 and 3, the amount be realised by sale of the said share. The defendants denied the mortgage decree and payment and pleaded *inter alia* that Bapu had no right to mortgage one-fourth share of No. 85, and that the defendants Nos. 2 and 3 were liable to contribute according to the principle laid down in section 82 of the Transfer of Property Act and not half of the decretal debt. The lower Court passed a decree against all the three defendants for the full claim, *viz.*, Rs. 465-13-11 and declared the amount as a charge on the one-fourth share of the field No. 85 in possession of the defendants Nos. 2 and 3.

Mr. *M. B. Niyogi*, for the Appellants.

Mr. *V. R. Pandit*, R. B., for the Respondents.

JUDGMENT.—Section 82 of the Transfer of Property Act obviously deals primarily with the relations between mortgagor and mortgagee; if it also deals with those between co-mortgagors, as has been held in the lower Appellate Court, then it is directly contradicted by section 95 of the same Act, which undoubtedly lays down what the relations between co-mortgagors shall be. That is a sufficiently conclusive reason for holding that section 82 has nothing to do with co-mortgagors. The learned Additional District Judge cites the case of *Ramabhadrachar* v. *Srinivasa Ayyangar* (1) to support the proposition that the "contract to the contrary" mentioned in section 82 means a contract between mortgagor and mortgagee and not one between co-mortgagors. The whole judgment is clearly based on the assumption that no other part of section 82 applies as between co-mortgagors, and it is found that even the words relating to a contract to the contrary do not. The absurd inequity and injustice of the result in this case of deciding it according to the provisions of section 82, are in themselves sufficient to make it clear that that section cannot possibly apply. The decree of the lower Appellate Court will be set aside and that of the First Court will be restored. All the costs of the plaintiffs in all the three Courts will be paid by the respondents Baliram and Pandhari, sons of Bhau Singh Kunbi.

G. R. D. *Appeal allowed.*

(1) 24 M. 85.

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 473 TO 475 OF 1924.
May 22, 1924.

Present :—Mr. Justice Pearson and Mr. Justice Graham.

PRAMATHA NATH MULLICK—PETITIONER

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—OPPOSITE PARTY.

Land Acquisition Act (I of 1894), ss. 12, 18—Award—Reference to Court—Matters to be determined—Judge, jurisdiction of.

The Court of the Land Acquisition Judge is a Court of special jurisdiction, the powers and duties of which are defined by Statute. [p. 4, col 1.]

British India Steam Navigation Co. v. *Secretary of State for India*, 8 Ind. Cas. 107; 38 C. 250; 12 C. L. J. 505; 15 C. W. N. 87, relied on. 3

When a reference is made to the Land Acquisition Judge under section 18 of the Land Acquisition Act what has to be determined by the Judge is the matter of the award to the extent comprised within the objections contained in the reference. Apart therefrom the award is final. [p. 4, col. 2.]

Rule against an order of the Court of the Land Acquisition Judge, 24-Perganahs, (Alipur), dated the 16th April 1924.

Dr. *Dwarka Nath Mitra* and Babu *Narayan Chandra Kar*, for the Petitioner.

Babu *Surendra Nath Guha* and Moulvi *Nuruddin Ahmed*, for the Opposite Party.

JUDGMENT.

Pearson, J.—In these applications it is sought to set aside an order of the Land Acquisition Judge refusing to enter upon an enquiry as to the area and measurement of the land acquired.

The declaration was published in August 1920 and objections were put in by the claimant before the Collector in January 1921. In April 1921 the claimant filed a petition, after the Collector had made his award, asking for a reference to the Judge upon the specific ground "for determination of the proper compensation and valuation for the lands acquired." The reference was made accordingly. In April 1924 the petitioner put in a further application before the Judge raising an objection as to the area of the land acquired and asking that either Government should be called upon to admit the area or a local enquiry should be held. This application was refused by the learned Judge, and thereupon the present rules were obtained.

It has been contended on behalf of the applicant that once a reference has been made it is open to the party to attack the award upon any ground even though not forming the subject of objection at the time the reference is applied for. In support of this contention it is pointed out that when a reference is made, it is under section 18 of the Land Acquisition Act which provides that the claimant

may "require that the matter be referred by the Collector." and emphasis is laid upon the expression "the matter" as showing that what is referred is not necessarily limited to the objection. Reference has also been made to certain reported cases as supporting the argument. In the case of the *Hugli Mills Co.* v. *Secretary of State for India in Council* (1), it is said in the course of the judgment that "the whole case is referred, not merely the objection, for determination." The meaning of that must be taken in relation to the facts in that case, and the decision is that where a reference is made on an objection as to compensation, the Judge may go into and decide hat question on its merits even though he reject the principle of assessment put forward by the claimant. The case of *In re the Land Acquisition Act, In re Rustomji Jijibhai* (2) does not carry the matter further, but shows that where an objection has been made and the reference is before the Judge, the claimant is not necessarily to be restricted to the particular ground on which the objection was based in the first instance.

There is, however, no case to which we have been referred which goes to the length of laying down that where an objection has been taken under one of the headings mentioned in section 18, and a reference made in consequence, it is nevertheless open to the claimant to attack the award upon objection falling under some other heading. And although the Court of the Land Acquisition Judge is a Court of special jurisdiction, the powers and duties of which are defined by the Statute: *British India Steam Navigation Co.* v. *Secretary of State for India* (3), I am not persuaded that the proper construction of the Act is that contended for by the applicant. On the other hand as pointed out by the learned Government Pleader the earlier sections of the Act particularly sections 11 and 12 treat the questions of measurement and compensation as distinct. Section 18 recognises the same distinction in setting out the various objections that may be taken, and the distinction is maintained in section 19. Section 20 deals with the service of notice "specifying the day on which the Court will proceed to determine the objection" and section 21 provides the scope of the enquiry is to be restricted to a consideration of the interests of the persons affected by "the objection." Having regard to these considerations, I am of opinion that the construction contended for by the applicant is too wide. I think that what has to be determined by the Judge is the matter of the award to the extent comprised within the objection, and that apart therefrom the award is final under section 12 of the Act. In my opinion the learned Judge took a correct view of the matter and the Rules must be discharged with costs, one gold *mohur* in each rule.

Graham, J.—We are invited in these Rules to set aside an order of the Land Acquisition Judge of the 24-Parganahs refusing to entertain an objection with regard to measurement and to direct a local inquiry in connection with a reference made to him under section 18 of the Land Acquisition Act. The proceedings in the case in question related to certain lands required for the Grand Trunk Canal project, and the declaration was published in the *Calcutta Gazette* of the 4th August, 1920. The usual enquiry by the Collector followed and the petitioner, not being satisfied with the award, asked for a reference to the Land Acquisition Judge for the determination, as therein expressed by him, of "the proper compensation and valuation of the lands acquired." The Collector then referred the case under sections 18 and 19 of the Act and after this and other connected cases had been pending in the Judge's file for about three years, an application was made by the claimant, as already stated above, praying for a local enquiry in order to ascertain the area of the land. The Land Acquisition Judge rejected the application holding that the objection as regards measurement, which did not form part of the reference, could not be entertained at that

(1) 8 Ind. Cas. 899; 12 C. L. J. 489
(2) 30 B. 341; 7 Bom. L. R. 981.
(3) 8 Ind. Cas. 107; 38 C. 230; 12 C. L. J. 505; 15 C. W. N. 87.

stage of the case, and the case was directed to proceed according to law.

The petitioner then moved this Court and obtained the present Rules and the substantial contentions urged by the learned Vakil, who appeared on his behalf, were that the Court below has taken an erroneous view of the law, that it has refused to exercise a jurisdiction vested in it by law and that the learned Judge ought to have held that what was referred to him by the Collector was the whole case, and not merely the particular objection contained in the reference.

In my opinion those contentions are not well-founded. Looking to the scheme of the Act generally and having regard in particular to sections 18 and 19 taken in conjunction with sections 11 and 12, it appears to be reasonably clear that the questions of area and compensation are treated as distinct matters, and that the inquiry before the Judge is restricted to the ground or grounds upon which objection to the award has been taken as stated in the application made under section 18. Section 18 specifies the four grounds of objection in respect of which reference may be asked for, *viz.*, 1. Measurement. 2. Amount of compensation. 3. Persons to whom payable. 4. Apportionments of compensation. Sub-section (2) of section 18 makes it obligatory to state the grounds of objection in the application. This was done in the present instance, and it is clear that the ground taken was only under the second head, *viz.*, the amount of compensation. That being so the scope of the inquiry was restricted to that matter and to that matter only, and I think the Land Acquisition Judge was right in refusing to extend it so as to include a ground which had not been referred to him, or included in the application for reference. As a matter of fact the award of the Collector, except in so far as it related to the question of compensation, had become final under section 12 of the Act long before the application was made for local inquiry.

The learned Vakil for the petitioner has referred to authorities in support of his contention that when once the case is referred to the Court the whole case must be held to have been referred and not merely the specific objection taken in the reference. None of the cases seems to go quite so far as this, though no doubt new objection, provided they belong to the same category, may be allowed to be gone into. This, however, is not a case of that description.

In my opinion the view adopted by the Court below is right, and in any case, even if the fresh objection had been entertainable, I think that in view of the delay which had taken place in making it, the learned Judge would have been justified in refusing to entertain it.

For the reasons stated I agree that the Rules must be discharged.

K. S. D. *Rule discharged.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 405 OF 1921.

April 16, 1924.

Present :—Mr. Justice Mukerji and Mr. Justice Dalal.

Sheikh MUHAMMAD NUH—DEFENDANT—APPELLANT

versus

BRIJ BEHARI LAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Alienation by widow—Reversioners, consent of—Necessity—Presumption, when arises—Recitals in sale-deeds, value of.

There is no legal presumption of legal necessity in favour of an alienation of property by a Hindu widow when the reversioners who consent to the alienation are ladies or distant relations. [p. 8, col. 1.]

Kooer Goolab Sing v. *Rao Kurun Sing*, 14 M. I. A. 176; 10 B. L. R. (P. C.) 1; 2 Suth. P. C. J. 474; 2 Sar. P. C. J. 722; 20 E. R. 753 and *Varjivan Rangji* v. *Ghelji Gokaldas*, 5 B. 563; 6 Ind. Jur. 38; 3 Ind. Dec. (N. S.) 370, relied on.

Vinayak v. *Govind*, 25 B. 120; 2 Bom. L.R. 820 and *Bepin Behari Kundu* v. *Durga Charan Banerji*, 35 C. 1086; 12 C. W. N. 914; 8 C. L. J. 120, referred to.

Rangasami Goundan v. *Nachiappa Goundan*, 50 Ind. Cas. 498; 42 M. 523; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 26 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.), not followed.

The value to be attached to a recital in a sale-deed as to the existence of legal necessity for the sale depends upon the circumstances of the

case. If the circumstances are such as to justify a reasonable belief that an enquiry as to the existence of necessity would have confirmed the truth of the representation made by the vendor, then, when proof of actual enquiry has become impossible, the recital coupled with such circumstances would be sufficient evidence to support the deed. [p. 9, col. 1.]

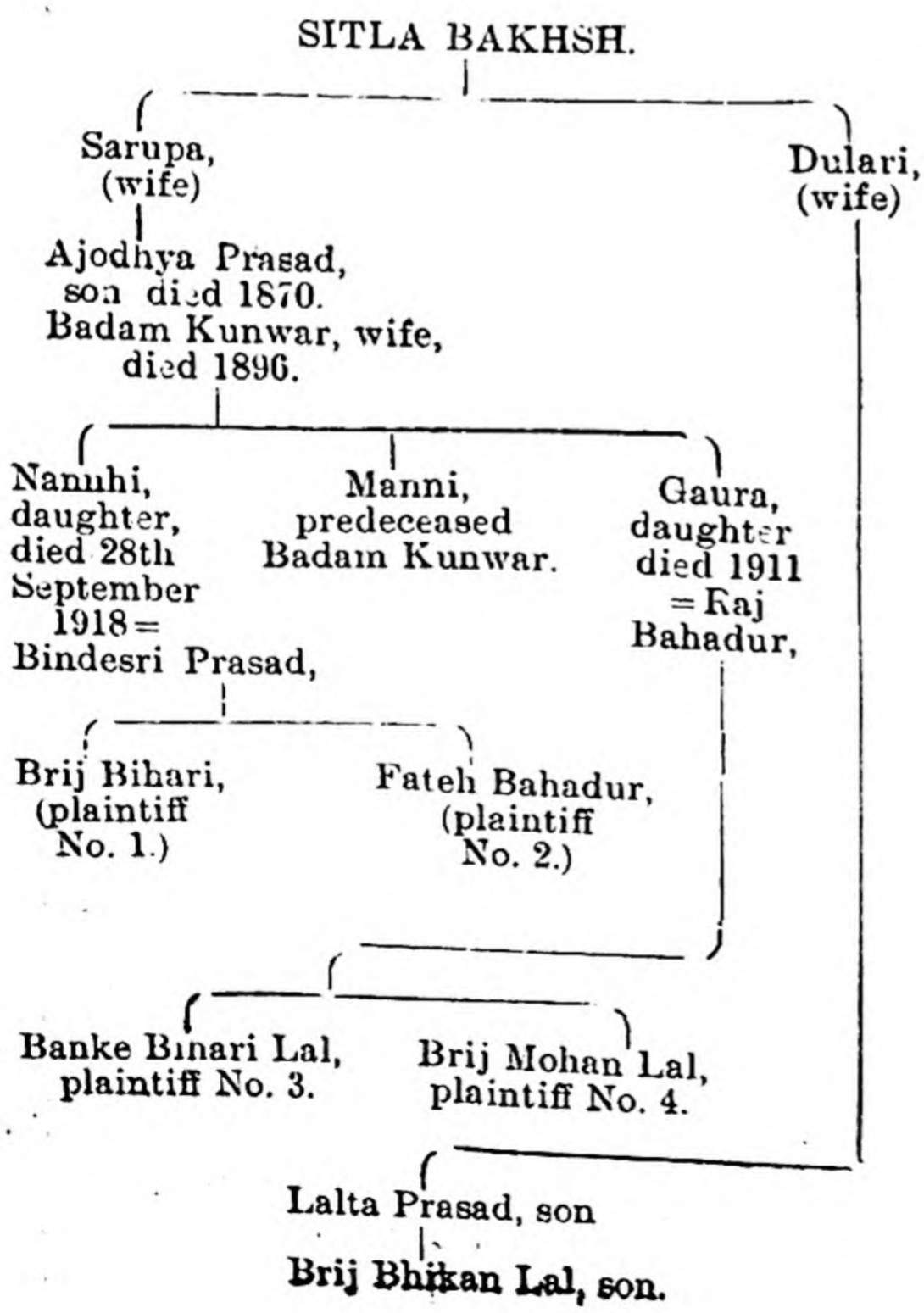
Nanda Lal Dhur Biswas v. *Jagat Kishore Acharjya*, 36 Ind. Cas. 420; 44 C. 186; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177; 43 I. A. 249 (P. C.), referred to.

First appeal against a decree of the Officiating Subordinate Judge, Allahabad, dated the 29th of September, 1921.

Messrs. *B. E. O'Conor*, *J. N. Chaudhri*, *M. A. Aziz* and Dr. *S. N. Sen*, for the Appellant.

Dr. *K. N. Katju* and Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—It will be useful to give below a pedigree showing the relationship of the plaintiffs among themselves and with the transferors of the property in suit which is in dispute in this case :—



The plaintiffs are the sons of two daughters of one Ajodhia Prasad who died in 1870. At the time of his death he left a widow *Musammat* Badam Kunwar and three daughters *Musammat* Nannhi, *Musammat* Manni and *Musammat* Gaura. Brij Bihari the eldest of the plaintiffs is a son of *Musammat* Nannhi who died on 28th September 1918. Plaintiffs sued for the possession of certain properties which were transferred by *Musammat* Badam Kunwar on 17th February 1877 to one Abdul Majid, a Subordinate Judge at the time, and his two wives. Abdul Majid and his wives were in prossession of the property and the present holder of the property is the defendant Shaikh Muhammad Nuh, son of Abdul Majid. The three daughters and two distant reversioners, Lalta Prasad and his son Brij Bhikan Lal, joined in making the transfer. Lalta Prasad was step-brother of Ajodhia Prasad. The case of the plaintiffs was that Brij Bihari was in existence at the time of the transfer in 1877 and the ladies could only transfer their life-interest. On the death of *Musammat* Badam Kunwar her daughters, Mannhi and Gaura, became entitled to a life-interest in the property as Manni had predeceased her mother. *Musammat* Gaura died in 1911 and the right of the plaintiffs to sue for possession came into operation on the 28th of September 1918 on the death of *Musammat* Nannhi.

The defence was that none of the plaintiffs was born in 1877 when the transfer was made and as the transfer was made by the life-holder and all the then existing immediate and presumptive reversioners the sale was binding on the plaintiffs. There was a further plea that the sale was effected for legal necessity. There were other pleas with which we are not concerned in this appeal. The learned Subordinate Judge, in a judgment of considerable merit, held on all these points in favour of the plaintiffs and decreed their suit.

The points urged here in appeal by Sheikh Muhammad Nuh's learned Counsel were :—

(1) That Brij Bihari was not in existence in the year 1877.

MUHAMMAD NUH *v.* BRIJ BEHARI LAL.

(2) That the transfer, having been made by the life-holder with the consent of all the immediate and presumptive reversioners existing at the time, passed a full title to Abdul Majid.

(3) That at this distance of time, the recitals in the deed which went to show legal necessity, should be accepted as good evidence, and the burden lay on the plaintiffs to disprove the existence of legal necessity, and

(4) that legal necessity was proved, having regard to the evidence obtainable after the lapse of so many years.

As regards Brij Bihari's age it is satisfactorily proved that he was in existence in 1877. It is true that his horoscope which was admittedly prepared soon afrer his birth was not produced but an explanation of the non-production has been offered by him. When he was entered at school his age on admission in September 1889 was given as 16. Having regard to the manner in which the age of a person is counted among Indians this would place the birth of Brij Bihari some time in 1874 (Exhibit 31, P. 67). The record of his career at the Kayasth Pathshala shows that he failed in the Entrance examination in 1892. He appears to have been a dull boy at school and if his birth is placed after February 1877 he would be just about 15 years of age at the time of his appearance for his Entrance examination. This was not likely to happen except in the case of boys whose career at school has been brilliant. When Brij Bihari Lal took up service the date of his birth was given as 1st November 1874. In 1877 *Musammat* Nannhi his mother was 28 years of age according to the registration endorsement on the sale-deed in suit, and as a woman who had children, it is not likely that she would be without a child at that age. As regards the oral evidence there is the testimony of a witness for the defence, Ram Sahai, that at the time he gave evidence in 1921 Brij Bihari was two or three years less than 50. That statement would also fix the year of the plaintiff's birth at 1874. It was argued by the appellant's learned Counsel that the witness made a vague statement in cross-examination. If the cross-examination be read it would be seen that the witness had a very good idea of time. He fixed the death of Ajodhya Prasad at a time 50 years prior to 1921 which would be correct as Ajodhya Prasad died in 1870. He not only stated that Brij Bihari was two or three years less than 50 but relatively to the marriage of Gaura Bibi he stated the time when Brij Bihari was born.

On behalf of the plaintiffs Monmohan Lal, 70 years of age in 1921 and a family friend, deposed that Brij Bihari was born three or three and half years after the death of Ajodhya Prasad, that is, after 1870. Another witness, Shiam Kishore, about 80 years of age, and a relation of the family stated, that Brij Bihari was born four or five years after Ajodhya Prasad's death. This Shiam Kishore is father of Raj Bahadur who was married to *Musammat* Gaura. There is no evidence on behalf of the defence in conflict with this overwhelming evidence to prove that Brij Bihari was born in 1874, that is, prior to the execution of the sale-deed in suit.

Next we come to the question of legal necessity and how it is to be considered. It was first argued that there was a presumption of legal necessity as the three daughters of Badam Kunwar and the distant reversioners were parties to the deed. The presumption however is not strong in the present case because Brij Bihari was in existence at the time of the transfer and the daughters of Badam Kunwar were young at the time and capable of bearing childern who would ultimately be full owners of the property in suit. The learned Counsel for the appellant relied on the Privy Council case of *Rangasami Gounden* v. *Nachiappa Gounden*, (1) where one of the results summarised by their Lordships was: "When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then if such necessity is not proved *aliunde*, and the alienee does not prove enquiry on his part and honest be-

(1) 50 Ind. Cas. 498; 42 M. 522; 36 M. L. J. 493; 17 A. L. J. 536; 29 C. L. J. 539; 21 Bom. L. R. 640; 23 C. W. N. 777; (1919) M. W. N. 262; 23 M. L. T. 5; 10 L. W. 105; 46 I. A. 72 (P. C.).

lief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction, will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one".

In the present case the one important person Brij Bihari who was to be expected to be interested to quarrel with the transaction was not a party to it. There are cases of the Bombay and Calcutta High Courts based on the Privy Council ruling in *Koocr Goolab Singh* v. *Rao Kurun Singh* (2) which lay down that such a presumption does not arise when the reversioners who joined in the transfer were ladies or life-holders. The first case which we may refer to is that reported in *Varjivan Rangji* v. *Ghelji Gokul Das* (3). In this case the widow had made alienation with the consent of her daughter Bai Vakhat, and the Court observed:—

"Nor can the mere concurrence of Bai Vakhat although the nearest in succession (having regard to the state of dependence in which all women are supposed by Hindu Law to have their being) be regarded as affording the slightest presumption that the alienation was a justifiable one."

It may be mentioned that in this Bombay case Bai Vakhat would have been full owner of the property on her succeeding thereto. This view was re-iterated by the Bombay Court in *Vinayak* v. *Govind*, (4) and followed by the Calcutta High Court in (2) *Bepin Behari Kundu* v. *Durga Charan Banerji* (5). In the Calcutta case also the learned Chief Justice referred to the position of dependence of women in India and refused to hold that their joining as reversioners in a transfer by a Hindu widow raised any presumption of the validity thereof. As already pointed out, Lalta Prasad and Brij Bhukan were very distant reversioners with very small hope of reversion, having regard to the youth of the three daughters of Badam Kunwar existing in 1877. On a point of law, therefore, we are of opinion that there is no presumption of legal necessity in favour of the defendant-appellant and the evidence on the record must be examined without any bias in the defendant's favour.

It was pointed out by the appellant's learned Counsel that it was no fault of the defendant that the matter was delayed so long before it was brought to Court. On this ground he desired sympathy of the Court with the position of the defendant who would find considerable difficulty in proving the validity of a transaction nearly 50 years old. At the same time, it may be remarked, that it was not the fault of Brij Bihari that the litigation was delayed. A suit for declaration could be brought by him only before he attained the age of 21 when presumably he would not have sufficient funds to start upon an expensive litigation. If he was not capable of bringing a suit for declaration before he attained the age of 21 he had to wait till the reversion fell to him on the death of the last surviving daughter of Badam Kunwar. This happened in September 1918 and the suit was instituted about two years later in November 1920. The learned Counsel, on account of the great lapse of time since the transaction, submitted that the declaration made in the deed of sale should be accepted by the Court at its face value. Reference was made to the observations of their Lordships of the Privy Council in *Nanda Lal Dhur Biswas* v. *Jagat Kishore Acharjya* (6). At page 196 of the report those remarks are printed:—

"But in such a case as the present their Lordships do not think that these recitals can be disregarded, nor, on the other hand, can any fixed and inflexible rule be laid down as to the proper weight which they are entitled

(2) 14 M. I. A. 176; 10 B. L. R. P. C. 1; 2 Suth P. C. J. 474; 2 Sar. P. C. J. 722; 20 E. R. 753.
(3) 5 B. 563; 6 Ind. Jur. 38; 3 Ind. Dec. (N. S.) 370.
(4) 25 B. 129; 2 Bom. L. R. 820.
(5) 35 C. 1086; 12 C. W. N. 914; 8 C. L. J. 120.

(6) 36 Ind. Cas 420; 44 C. 186; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 110?; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 77; 43 I. A. 249 (P. C.).

to receive. If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available, the recitals would deserve but slight consideration, and certainly should not be accepted as proof of the facts."

Then they refer to the lapse of time leading to the disappearance of evidence and proceed to observe:—

"It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and if the circumstances are such as to justify a reasonable belief that the enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed".

We have, therefore, to enquire as to the nature of the recitals and the circumstances existing at the time those recitals were made. In the present case when we come to examine the contents of the document we find that the vendee, a man learned in law, has not confined himself to a narration of the actual existing circumstances of the time but has taken pains to stop all possible attack in future on the transfer. First of all the deed starts with a declaration that *Musammat* Badam Kunwar alone, on purchase of the property *benami* in the name of one Lala Chandi Din, became owner of the property. In case this should not prove correct, it is recited that on the death of Ajodhya Prasad, Badam Kunwar alone became full owner and not only a lifeholder. A third position is then taken up that if *Musammat* Badam Kunwar was considered to be lifeholder there was the consent of all the near and distant relations to the transfer and so the transfer will inure as of full title. Even if the consent of the reversioners be not sufficient then a detail is given of alleged legal necessities which led to the making of the transfer by a Hindu widow. Obviously the vendee did not believe in all these recitals which were only put in by way of precaution to ward off every possible attack. At the time of the sale there was a mortgage of Rs. 2,000 on the property executed by the *benami* holder Chandi Din. No mention is specifically made in the sale-deed as to why that mortgage had been executed. The amount due at the time of the sale on that mortgage is not stated. The recital regarding legal necessity is in the following words:—

"I have sold these shares for the payment of the money borrowed for the marriage of my daughters, for the funeral ceremonies of my husband, for the payment of Government revenue and for other things which I, *Musammat* Badam Kunwar have done and am about to do for the benefit of the soul of M. Ajodhya Prasad with the consent of Lalta Prasad, Brij Bhukan Lal and the daughters."

It is admitted that two of the daughters, Namchi and Manni, were married during the lifetime of Ajodhya Prasad. The case of the defendant was that Gaura was married and her *gauna* ceremony was performed subsequent to the death of Ajodhya Prasad. The oral evidence however is in favour of the plaintiffs' contention that Gaura also was married during the lifetime of Ajodhya Prasad. In the recital no mention was made of any *gauna* ceremony. The defence witness Ram Sahai places the marriage of Gaura about the time of Ajodhya Prasad's death. He stated that the marriage took place more than 51 or 52 years prior to the time of his making the deposition and that Ajodhya Prasad died 50 years before that time. The plaintiffs' witnesses Manmohan Lal and Shiam Kishore deposed that this lady was married during the lifetime of Ajodhya Prasad. Looking at the age of *Musammat* Gaura to be about 20 years in 1877 when the sale-deed in suit was registered, it does not seem likely that in 1870 when she was about 13 years of age she would have remained unmarried when she belonged to a respectable Kayastha family which was not indigent. The plural number as regards daughters, used in the de-

claration indicates that the recital was a random one and did not originate from any particular knowledge or enquiry. As regards the funeral ceremonies, it is not likely that money would be due for expenses thereon, for seven years later, when no documentary evidence is forthcoming. The payment of Government revenue is not supported by any evidence. The two witnesses Abdul Ghani and Hari Prasad produced to depose to an enquiry regarding the necessity make no mention of any arrears of revenue. It is also significant that revenue and realisations of the current year of sale were taken into consideration and adjustment was made by a small deduction from the price of the property. As to the performance of religious ceremonies for the benefit of the soul of Ajodhya Prasad the only evidence is that the lady built a temple near her house in 1874 or 1875. It is not clear that this building of a temple was intended to give repose to the soul of Ajodhya Prasad.

Reverting to the Privy Council case quoted by the appellant's learned Counsel the circumstances there were that the lady who made the transfer did not have sufficient funds. Enquiry as to the circumstances of the widow who made the transfer is discussed at pages 197 and 198 of the report. In the present case there is no suggestion whatever that Ajodhya Prasad left any debt behind him. The defence witness Ram Sahai has stated that the income from the property at the time of the death of Ajodhya Prasad was about Rs. 2,000 or Rs. 2,500 per annum. The daughters were all married and this would be sufficient income to support a Hindu widow. In 1873 she received Rs. 7, 394 from Government who acquired a certain house belonging to her (Exhibit 6, p. 51). It is said that subsequently she built a house whose value was assessed by a Commissioner at Rs. 2,000 and a temple which Ram Sahai defence witness states cost Rs. 1,500 or Rs. 1,600. Even taking this expense into account we find she had Rs. 4,000 to spare out of the money received as compensation. Such a sum would be sufficient to perform the *gauna* ceremony, even if one was performed by her of *Musammat* Gaura. Taking the expense at the highest as stated by the plaintiffs' witness Manmohan Lal to be Rs. 1,500 (Ram Sahai would fix it at a much smaller figure) the widow would have sufficient funds independently of the *zemindari* property to defray such an expense. In the present case, therefore, there is no question about the widow lady having sufficient property to support herself. It appears that even after the sale of the property in suit, when she made a gift to her daughters in 1899 (p. 77) she had property on which revenue of Rs. 503 per annum was paid at the time. We hold that there was no legal necessity for the widow to make the transfer.

The appeal fails and we dismiss it with costs including in this Court fees on the higher scale.

K. S. D. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 33 AND 43 OF 1923.

July 3, 1924.

Present:—Mr. Kendall, A. J. C.

IN F. A. NO. 33 OF 1923.

B. ONKARESHWAR PRASAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

B. DUSHYANT PRASAD AND OTHERS—PLAINTIFFS AND CHANDRA CHUR PRASAD—DEFENDANT—RESPONDENTS.

IN F. A. NO. 43 OF 1923.

HARISH CHANDRA AND OTHERS—DEFENDANTS—APPELLANTS

versus

B. CHANDRA CHUR PRASAD—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family property—Separation—Minor sons living jointly with father, effect of—Re-union, whether established—After-born sons, rights and liabilities of.

When a separation has taken place in distinct shares between a father and sons forming a Hindu joint family but the minor sons continue

to live jointly with their father (who remains in possession) even after attaining majority and conduct business for him, it is sufficient to establish a reunion as between the father and these sons. [p. 13, col. 2.]

Ram Pershad Singh v. *Lakhpati Koer*, 30 C. 231; 30 I. A. 1; 7 C. W. N. 162; 5 Bom. L. R. 103; 8 Sar. P. C. J. 330 (P. C.), referred to.

After-born sons are entitled to a share in the property left in the hands of the father after separation and are similarly bound by his acts. [p. 14, col. 1.]

Appeal against a decree of the Sub-Judge, Gonda, dated the 30th April, 1923.

Mr. *P. L. Banerji*, for the Appellant.

Mr. *Bisheshwar Nath Srivastava*, for Respondents Nos. 1 and 3.

Mr. *Ghulam Hasan* holding brief of Mr. *Haider Husein*, for Respondent No. 4.

JUDGMENT.—These appeals arise from two suits which have been brought together in the lower Court and this judgment will govern both appeals. The circumstances, from which the suit arose, have been stated clearly and concisely in the judgment of the learned Subordinate Judge. Gurcharan Lal had three wives; by the first one, *Musammat* Tulsa, he had seven sons by the second *Musammat* Gobinda, he had one son Chandra Choor, the plaintiff in Suit No. 43 and by the third wife *Musammat* Lakhrani, he had three sons Chandra Moul, Dushyant and Srinivas, who are the plaintiffs in Suit No. 33. In 1891 the seven sons of *Musammat* Tulsa brought a suit against the other five members of the family (*Musammat* Gobinda having died and Dushyant and Srinivas not yet having been born) for partition of the joint family property. They got a decree for 7/12th of the property and actual partition of the 7/12th shares from the 5/12th shares took place by means of a compromise in 1897. By this compromise the decree-holders took the properties Nos. 1 to 25 in Schedule (*a*) of the plaint and the judgment-debtors, *i. e.*, Gurcharan Lal, his two surviving wives and his two sons Chandra Moul and Chandra Choor, took the properties Nos. 26 to 38 of that schedule. In 1901 *Musammat* Tulsa brought a suit against her husband for a declaration that 1/5th of the five shares allotted to the judgment-debtors in the compromise of 1897 represented her *stridhan* and also that she be given Rs. 11,000 odd by way of arrears of profits of this share. This matter was compromised in 1902 after a decree had been given in the First Court, granting the declaration claimed by the plaintiff together with Rs. 5,000 odd profits and proportionate costs. The compromise was entered into nominally by *Musammat* Tulsa and her husband Gurcharan Lal by which certain specified property was given into the possession of *Musammat* Tulsa by way of *stridhan*, while she on her part agreed to forego arrears of profits and costs. The problem to be decided in the present proceedings is the effect which this compromise has on the rights of the parties. *Musammat* Tulsa remained in possession of the property allotted to her in it until 1910 when she died. On her death, her sons obtained mutation in spite of an objection lodged by Gurcharan Lal and they remained in possession up to the institution of the present suits. Gurcharan Lal died about 1920. His sons by his second and third wives have claimed shares in the property allotted to *Musammat* Tulsa on the grounds that it was not her *stridhan*, and that they are not bound by the compromise entered into by Gurcharan Lal. They obtained a decree in the lower Court. The defendants-appellants are the sons of *Musammat* Tulsa and their representatives who were in possession when the suit was brought.

As regards the nature of *Musammat* Tulsa's interest in the property allotted to her, the learned Subordinate Judge has rightly pointed out that according to the decisions of the Allahabad High Court in *Chhidu* v. *Naubat* (1) and *Debi Mangal Prasad Singh* v. *Mahadeo Prasad Singh* (2) of 1901 and 1909 respectively, the share allotted to *Musammat* Tulsa on partition would be regarded as her *stridhan* but that these decisions were overruled by their Lordships of the Privy Council in 1911, see *Debi Mangal*

(1) 24 A. 67; A. W. N. (1901) 171
(2) 5 Ind. Cas. 203; 32 A. 253 at p 256; 7 A. L. J. 269.

Prasad Singh v. *Mahadeo Prasad Singh* (3). It is not suggested now, that the compromise of 1897 which decided the partition proceedings resulted in *Musammat* Tulsa being presented with 1/12th of the joint family property by way of *stridhan*. Further, it is admitted on behalf of the appellants that when the First Court gave a decree to *Musammat* Tulsa in the suit which she brought in 1901 that Court interpreted the law correctly as it stood at the time, *i. e.*, although we now know that *Musammat* Tulsa's share was not her *stridhan*, yet the Courts in this Province were at the time bound to regard it as such. This point is of some importance in considering the effect of the compromise by which that suit was settled.

Now there is no doubt, that the compromise entered into by *Musammat* Tulsa and her husband in 1902 purported to give *Musammat* Tulsa not only a specified share but a certain definite property as her *stridhan*. If that compromise and the decree which it followed be held to bind the present plaintiffs, then it is clear that the suits filed by the latter must fail as *Musammat* Tulsa's personal property must undoubtedly descend to her sons to the exclusion of her step-sons. It is necessary, therefore, to consider what the position of the family was when *Musammat* Tulsa filed her suit.

The compromise of 1897 in the partition proceedings was to the effect that Tulsa's sons were to be in possession of 7/12ths of the property while the remaining 5/12th was to be in the possession of Gurcharan Lal. The latter undertook to pay to his two surviving wives the profits from their shares by way of maintenance. As for the two sons Chandra Choor and Chandra Moul, who had been joined as parties in the partition proceedings they were minors when the partition proceedings were started and it appears from the compromise of 1897 (Exhibit 8) that they were still minors when compromise was signed. It is not denied that Gurcharan Lal himself would have been bound by the compromise into which he had entered with *Musammat* Tulsa. It is urged, however, on behalf of the plaintiffs-respondents that they are not bound, and that the compromise is only personally binding on Gurcharan Lal. It should be stated here that a distinction has to be made between Chandra Choor and Chandra Moul, who were minors at the time of the compromise of 1897 when the property was finally partitioned and Dushyant and Srinivas, who were not born at that time and who were minors when Gurcharan Lal entered into the compromise with *Musammat* Tulsa in 1902. The plaintiffs' claim that the first two were separate from Gurcharan Lal from the time of the partition and could, therefore, not be bound by the latter compromise made by Gurcharan Lal alone. The lower Court has held that these two elder sons were separated from their father by the partition proceedings. It has already been said that these sons were minors at the time. The compromise deed refers in the first paragraph to the share of the decree-holder as distinct from the share of Babu Gurcharan Lal *waghairah*, but goes on, as I have already remarked, in paragraph 4 to speak specifically of the shares of *Musammats* Tulsa Dei and Lakhrani, the profits of which are to be given to them by way of maintenance. No specific mention is made of the shares of these two minor sons, but it may be said that as it was necessary for purposes of the partition to specify their shares, and as 12 shares were specified their shares were, therefore, separated. The legal position then was, according to the argument of the learned Subordinate Judge, based on the Privy Council ruling reported in *Ram Pershad Singh* v. *Lakhpoti Koer* (4) that these minor sons were definitely separated. The learned Counsel for the respondents has also referred to Gour's Hindu Code, 2nd Edition, paragraphs 1693 and 1694 and apparently the learned Subordinate Judge relied on this

(3) 14 Ind. Cas. 1000; 34 A. 234; 9 A. L. J. 263; 11 M. L. T. 217; 16 C. W. N. 409; (1912) 324; 14 Bom. L. R. 220; 15 C. L. J. 344; 22 M. L. J. 462; 39 I. A. 121 (P. C.).

(4) 30 C. 231; 30 I. A. 1; 7 C. W. N. 162; 5 Bom. L. R. 103; 8 Sar. P. C. J. 380 (P. C.).

for his decision that the minors could not reunite. All the evidence that there is in this case, however, shows that in practice these minors never did separate. They continued to live with their father. One of the defendants B. Muthra Prasad has made very definite statements on this point, which have not been met by any evidence on the other side. From this evidence it appears that Gurcharan Lal continued to live with these two sons, that he retired to live at Jhuoi, and that they did most of his business for him. They conducted the proceedings for him in *Musammat* Tulsa's case, they suggested the compromise between their father and step-mother and in fact did everything except sign the compromise which of course had to be done by the father. That compromise distinctly shut them off from succession to their step-mother's property. The only thing, that can be said to point to a separation between these two sons and their father is a statement by the Pleaders appearing for them that they were not joint in estate with Gurcharan Lal after the first partition. This is not evidence, and what is more, it is an admission in their own favour by their Counsel, and in my opinion it is of no value whatever in face of the definite evidence on the file. It has been suggested with further reference to Gour's Hindu Code that where a separation has taken place in distinct shares among brothers, some of whom are minors, and the minor brothers continued to live jointly with one of the adult brothers that fact would not constitute a reunion but the reason given is that the minors were incapable of exercising any volition in favour of reunion. The learned Subordinate Judge's argument apparently is that where a separation has taken place in a joint family some of the members of which are minors, these minor members never can reunite with any member even after they have attained majority. This is a proposition for which I can find no authority and which is contrary to common sense. Here we have a case in which the separation was between not brothers but a father and sons. It was a purely formal separation, for Gurcharan Lal continued in possession of the shares, there was no separation by metes and bounds, and the minors continued to live with their father. They continued to do so after attaining majority, they conducted business for him, they conducted litigation for him, and they suggested the very compromise by which they now refuse to be bound on the ground that they were separate in estate from their father. In my opinion the evidence is sufficient to establish reunion.

The question of the afterborn sons is rather different. There is no doubt that they were always joint with Gurcharan Lal until his death. It is strongly argued for the appellants that they are, therefore, even more strongly bound by the compromise entered into by their father than the two elder sons. Something has been said as to the advantage derived by them from the compromise or the reverse. It must be remembered that at the time when the compromise was made the law in India was that the property in dispute was *Musammat* Tulsa's *stridhan* and that Gurcharan Lal was, according to the best advice available then, giving nothing away when he admitted that the property was *Musammat* Tulsa's personal property, while on the other hand he relieved himself of the duty of paying over Rs. 5,000 in arrears of profits and costs. It is true that if he had appealed against the decision of the First Court he would ultimately have been successful. It is, therefore, impossible at this time to calculate whether the compromise was an advantageous one or not. At any rate, it is clear that the estate did derive certain immediate benefit from it. The main argument on behalf of the respondents, however, is that these two younger sons did not derive their rights through Gurcharan Lal and that they, therefore, are not bound by any agreement that he entered into. To argue in this way, however, is to go behind the partition. According to the view I have taken, these two sons were born into a joint family of which Gurcharan Lal was the manager. The an-

cestral property remaining to him after the partition was 5/12ths of the original ancestral property. Neither he nor his two unborn sons had any claim to the 7/12ths that had been allotted to the present appellants. Of this 5/12th that was left to him and his sons and wives, he gave 1/5th to *Musammat* Tulsa as her *stridhan*, after these two younger sons had been born. The latter are in the circumstances bound by his compromise. I think, therefore, that the appellants' contentions must prevail. I allow the appeals, set aside the orders and decrees of the lower Court and direct that the plaintiffs' suits be dismissed with costs in both Courts. The cross-objections relate to the extent of the share allotted to the plaintiffs-respondents in the property in suit. As I have held that the plaintiffs-respondents are not entitled to any shares the cross-objections fall to the ground and are dismissed with costs if any.

K. S. D. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1053 OF 1921.
March 14, 1924.
Present:—Mr. Justice Krishnan.
IVATURI BRAHMAYYA LINGAM—PLAINTIFF—APPELLANT
versus
KAMISETTI MALLAMMA *alias* KANAKAMMA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 23—Gift for immoral purpose—Immorality carried out—Property, whether can be recovered.

If a person transfers his property to another for an illegal or immoral purpose, he cannot get the transfer annulled, if the intended purpose has been carried out. [p. 15, col. 1.]

Therefore, if a person gifts his property to his concubine in consideration of past and future co-habitation he is not entitled to recover the property. [p. 15, col. 2.]

Ayerst v. *Jenkins*, (1873) 16 Eq. 27; 42 L. J. Ch. 690; 29 L. T. 126; 21 W. R. 878, and *Deivanayaja Padayachi* v. *Muthu Reddi*, 59 Ind. Cas. 1003; 41 M. 329; 12 L. W. 291; (1920) M. W. N. 547; 39 M. L. J. 525; 28 M. L. T. 255, relied on.

Thasi Muthukannu v. *Shunmugavalu Pillai*, 2 M. 415; 15 M. L. J. 286, distinguished.

Second appeal against the decree of the Court of the Subordinate Judge, Kistna at Ellore, in A. S. No. 374 of 1920, preferred against the decree of the Court of the Additional District Munsif, Tanuku, in O. S. No. 92 of 1919 (O. S. No. 148 of 1919 on the file of the Principal District Munsif, Tanuku.)

Messrs. *V. Ramadoss* and *V. Krishna Mohan*, for the Appellant.

Messrs. *A. Venkatanarasiah* and *L. Venkatanarasiah*, for the Respondents.

JUDGMENT.—In this case the plaintiff sues to recover certain items of property which he conveyed to the 1st defendant under Exhibit I. The finding of the lower Courts is that though a consideration of Rs. 800 is recited in it and it purports to be a sale for that consideration, the transaction was really one by which the plaintiff made a gift of the property to the 1st defendant for past co-habitation and for future co-habitation with her which she promised. The plaintiff is the appellant before me and the contesting defendant is a transferee for value from the 1st defendant. The First Court decreed the suit in favour of the plaintiff holding that the sale to the 1st defendant by the plaintiff was an invalid transaction as the consideration was an immoral and illegal one and that the second defendant was a transferee for value, but with notice and was thus not a *bona fide* purchaser. On appeal the Subordinate Judge, though he agreed in the first finding that the consideration for the sale was past and future co-habitation of the woman with the plaintiff, he held that it was not shown that the 2nd defendant was not a *bona fide* purchaser and hence he dismissed the suit against him. In second appeal it is contended before me that in deciding the 2nd point the Subordinate Judge has laid the burden of proof wrongly on the plaintiff and that the 2nd defendant should have been called upon to prove that he was a *bona fide* purchaser. But before considering this question, it is necessary to decide what the plaintiff's rights

are on the finding that the sale-deed Exhibit I was for past and future co-habitation. The sale no doubt is invalid, but it is a different question whether any relief should be given to the plaintiff in the circumstances of the case even as against the 1st defendant. There can be no doubt that, if the principle laid down in *Ayerst* v. *Jenkins* (1) applies, the plaintiff cannot set aside this transaction as he was a party to it. The principle of that case was given effect to in a very similar case in *Deivanayaga Padayachi* v. *Muthu Reddi* (2) where it is laid down that it is a well-established rule of equity that a person who has transferred a property to another for an illegal or immoral purpose cannot get it annulled if the intended purpose has been carried out. There can be no doubt that, in the case before me, the purpose has been carried out as part of the consideration was for past cohabitation and the woman continued as a concubine of the plaintiff for at least six or seven months after the sale-deed was executed. On the other side my attention has been drawn to the ruling in *Thasi Muthukannu* v. *Shunmugavelu Pillai* (3) where it was laid down that the plaintiff there who was a young and inexperienced man and assigned to the defendant, a dancing girl, a mortgage for Rs. 1,500, the consideration stated in the deed being payment in cash and jewels to the plaintiff and the discharge by the defendant of debts due by the plaintiff, was entitled to have the assignment set aside on the ground that no consideration really passed as recited therein but that the real consideration was the future continuance of immoral relations between himself and the sister of the defendant. The attention of their Lordships was drawn to the case in *Ayerst* v. *Jenkins* (1), but their Lordship were of opinion that the case related only to gifts of property and that the principle laid down by Lord Selbourne in it would not apply to cases of sales and assignments like the one they were dealing with. They were in that case able to hold that the transaction was not a gift but a sale. Whether that is right or wrong I need not pause to consider and I need not also consider whether their Lordships' ruling that the case in *Ayerst* v. *Jenkins* (1) should be confined to cases of gifts alone and would not apply to cases of sales and other transfers, should be followed or not, for, I think that the present case is distinguishable from that case. Here it is perfectly clear that the transaction between the plaintiff and the 1st defendant was in reality a gift and nothing else. According to the plaintiff, the transfer was without any consideration whatsoever and the recital of consideration in the document was a false recital. In fact his case was that he made over the property to the 1st defendant solely in consideration of her past co-habitation and future co-habitation with him and that it was not intended that he should receive any other consideration for the transfer. It follows, therefore, that, even if the way in which *Thasi Muthukannu* v *Shunmugavelu Pillai* (3) distinguishes the case of *Ayerst* v. *Jenkins* (1) is correct, this case fails. The principles recognised in *Ayerst* v. *Jenkins* (1) are followed in the case of *Deivanayaga Padayachi* v. *Muthu Reddi* (2). In the *Thasi Muthukannu* v. *Shunmugavelu Pillai* (3) case it must also be noted that Their Lordships do not express a confident opinion but say at page 419:—

"Even if this conclusion (that is, the case of *Ayerst* v. *Jenkins* (1) is confined to case of gift) were not right it must be held that the case of the plaintiff is hardly one in which he can be said to be *in pari delicto*." They were able to arrive at that conclusion on a consideration of the fact that the plaintiff in that case was a youth of about 20 years of age and that the assignment was brought about by the influence of persons acting in complicity with the defendant and her sister who led the plaintiff into evil ways. There is no such evidence in this case. The plaintiff is a man of about 30 or

(1) (1873) 16 Eq. 27; 42 L. J. Ch. 690; 29 L. T. 126; 21 W. R. 878.
(2) 59 Ind. Cas. 1003; 44 M. 329; 12 L. W. 291; (1920) M. W. N. 547; 39 M. L. J. 525; 28 M. L. T. 255.
(3) 28 M. 413; 15 M. L. J. 286

31 and on the facts here it cannot be said in any way that he was not *in pari delicto* with the 1st defendant in this transaction. That being so, his case even as against the 1st defendant should have failed. It is not necessary, therefore, to consider whether if the plaintiff was entitled to succeed against the 1st defendant he could succeed against the 2nd defendant. The question whether the 2nd defendant was a purchaser for value without notice does not really arise.

The second appeal is dismissed with the costs of the 2nd defendant.

V. N. V.
S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 27 OF 1923.
April 29, 1924.

Present :—Mr. Cecil Henry Walsh, Actg. Chief Justice, and Mr. Justice Ryves.

GOBIND SINGH AND OTHERS—DEFENDANTS—APPLICANTS

versus

BHIRGUNATH SINGH AND OTHERS—PLAINTIFFS—OPPOSITE PARTY.

Arbitration—Award—Application to set aside award—Applicant, what must prove—Onus—Court, failure of, to exercise jurisdiction—High Court, whether can interfere—Civil Procedure Code (Act V of 1908), s. 115.

The burden of proving that the arbitrators in arriving at an unfair award either refused to hear somebody or heard the matter without giving notice of the hearing lies on the party who wishes to set aside the award on these grounds. [p. 17, col. 1.]

When an application for setting aside the award is refused and the Court commits a material irregularity in doing so, or refuses to exercise jurisdiction, the High Court can interfere under section 115 of the Civil Procedure Code. [p. 16, col. 2.]

Civil revision from an order of the Subordinate Judge, Benares, dated the 20th December, 1922.

Messrs. *A. Sanyal* and *L. M. Banerji*, for the Applicants.

Sir *T. B. Sapru* and Mr. *K. K. Varma*, for the Opposite Parties.

JUDGMENT.—This is a plain case. An attempt was made in the lower Court to destroy the award by alleging misconduct against the arbitrators in the sense that they did not give the parties, or one of the parties, or some of the parties, a proper hearing, or adequate notice of the date of the hearing of the matter in which they were engaged. There are only two ways in which you can get rid of an award—either by getting it set aside in accordance with the provisions of paragraphs 15 and 16 of the Code, in which case it is the duty of the Judge to refuse to file the award and grant a decree in the terms of the award; or if the learned Judge to whom application is made commits material irregularity in the course of the hearing, when he has the parties before him to decide whether or not the award filed was objectionable, then an application in revision may be made to this Court. These matters are really so elementary that it is hardly necessary to repeat them but the distinction, so far as the powers of the High Court are concerned, cannot be better expressed than in the headnote in the well known Privy Council case, *Ghulam Khan* v. *Mohammad Hassan* (1). The Privy Council there pointed out that the award having been made and an application to set it aside on the ground of misconduct or any other illegality having been refused, the Subordinate Judge has no option but to pronounce a decree in accordance with it. On the other hand they recognise that if the Subordinate Judge commits a material irregularity or refuses to exercise jurisdiction, for example as Mr. Lalit Mohan suggested here, refuses to hear a valid objection properly raised before him or entertains matters which are outside his jurisdiction, then undoubtedly this Court can interfere under section 115 of the Civil Code—not with the arbitrators nor with the award but with the exercise of the jurisdiction of the Subordinate Judge in dealing with the application. Those general observations cover the question we have to determine in this revision. No serious attempt is really

(1) 29 C. 167; 6 C. W. N. 226; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 190 (P. C.).

made to show that the learned Subordinate Judge did anything which can be brought within the terms of section 115. On the other hand, he gave the parties a very full hearing. In dealing with the application to him to set aside the award, he took evidence, he heard the statements of the arbitrators, and he formed a definite opinion on adequate material. After fully considering the matter and setting out his reasons clearly, he comes to the conclusion that no misconduct on the part of the arbitrators had been made out. The result is that he exercised his jurisdiction properly, and having arrived at certain findings of fact, those are conclusive. Mr. Lalit Mohan suggested that somewhere or other latent rather than patent objections might be found to what the arbitrators did which the learned Judge had not dealt with. These subordinate allegations are so vague that they are extremely difficult to handle. But the answer to them is that if there was any evidence of them at all the parties failed to satisfy the learned Judge of their credibility. On the face of it the award is an admirable and careful document. Any party wishing to set aside an award on the ground that the arbitrators in arriving at an unfair award either refused to hear some body or heard the matter without giving notice of the hearing, undertakes the burden of satisfying the Court that this is what really happened. The objectors in this case have utterly failed to do so and the application in revision must be dismissed with costs. The stay order will be discharged with costs. Costs will include fees on the higher scale.

K. S. D. *Appeal dismissed.*

MADRAS HIGH COURT.

CASE REFERRED No. 1 OF 1924.
March 27, 1924.
Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, and Mr. Justice Ramesam.
THE COMMISSIONER OF INCOME-TAX, MADRAS—REFERRING OFFICER
versus
MESSRS. BINNY & CO., LIMITED, MADRAS—ASSESSEE.

Income Tax Act (XI of 1922), ss. 3, 58—Super-tax—Assessment—Share-holder in limited company—Surplus profits—Distribution as additional shares—Capital or income—Liability to pay super-tax.

If a limited Company, having a surplus accumulation of undistributed profits, takes, by special resolution, power to capitalise undivided profits and in pursuance thereof allots new additional shares to the share-holders representing their share in the surplus and issues scrips for the purpose, the share-holders are not liable to pay super-tax on the value of such newly issued shares, as such profits do not constitute "income" but are part of the capital. [p. 19, col. 2.]

Inland Revenue Commissioners v. *Blott*, (1921) 2 A. C. 171; 90 L. J. K. B. 1028; 125 L. T. 497; 65 S. J. 642; 37 T. L. R. 762, followed.

Swan Brewery Co. v. *Regem*, (1914) A. C. 231; 83 L. J. P. C. 134; 110 L. T. 211; 30 T. L. R. 199, *Trevor* v. *Whitworth*, (1887) 12 A. C. 409; 57 L. J. Ch. 28; 57 L. T. 457; 36 W. R. 145, referred to.

Case stated under section 66 (2) of the Indian Income-Tax Act for decision of the question whether the assessee, Messrs. Binny & Co., (Madras) Limited as a shareholder in the Deccan Sugar and Abkari Co., Limited, is liable to pay super-tax on the value of bonus shares newly issued by the Deccan Sugar and Abkari Co., Limited, in the year 1921.

Mr. *Nugent Grant*, instructed by Mr. *M. L. M. Taylor*, Attorney, for the Assessee.

The Government Pleader, for the Government.

JUDGMENT.

Coutts Trotter, C. J.—This is a Reference by the Commissioner of Income Tax which raises a very simple point in the sense that it can be put within a narrow compass on a very few indisputed facts, in another sense it raises a subtle question of law, for it has given rise to a great variety of judicial opinion in very high quarters.

Now the facts are these. A Company called the Deccan Sugar and Abkari Co.,

Limited was incorporated in 1897 with a share capital of ten *lakhs* in shares of Rs. 500 face value each. In May 1908 the capital was increased to 22 *lakhs* by adding 7,000 preference shares of the A class, of Rs. 100 face value each and 5,000 preference shares, of the B class also of Rs. 100 face value each. In 1908 in pursuance of a resolution passed in June the ordinary share capital was reduced, to Rs. 1,66,672, thus making the total capital of the company something over 13 *lakhs*. Messrs. Binny & Co., Limited, held 200 ordinary shares of Rs. 125 each in this Company. In 1921 the Deccan Company had on its books a surplus accumulation of profits undistributed of practically 5 *lakhs* of rupees. In July 1921, by a special resolution, which was confirmed in the following month, the articles of the Company were amended, and the two important amendments were these; the first was a preliminary one enabling the Company, by a special resolution, to subdivide or consolidate its shares or any of them. The other was a new article, 133A by which the Company, by a special resolution may at any time take to itself the power to capitalise undivided profits or reserve fund; and that is what purported to take place in this case. Each holder of a share of Rs. 125 became the holder of three additional shares. The capital of the Company was increased by 1,328 shares of Rs. 375 each; and, therefore, the result was that Messrs. Binny & Co. for 200 shares of Rs. 125 each got 200 shares of Rs. 500 each, and in 1921 scrip carrying that change of position was issued.

The question we have to decide is whether this issue of new shares to the share-holders representing their share in the accumulated surplus is taxable as income. I propose to say very little about this matter, because, to my mind it crystallises for our purposes into two questions. The first is, are we concluded by the decision of the Privy Council in *Swan Brewery Co.* v. *Regem* (1). The next is, are we at liberty, or is it desirable if we are not covered by the Privy Council decision, to decide contrary to the majority of the House of Lords in *Blott's case* [*Inland Revenue Commissioners* v. *Blott* (2)].

Now, it is best that I should deal with the first contention at the outset. It is suggested that *Swan Brewery's case* (1) directly covers the present point. But with great respect to certain observations of Lord Summer in *Blott's case* (2) I am unable to say that it does cover. If it does, of course, we as an Indian Court are not at liberty to say, as some of the members of the House of Lords did in *Blott's case* (2), that it was erroneously decided. If it does not decide the point finally for the House of Lords, it decides that finally and conclusively for this Court. That was a decision on an Act known as the Dividend Duties Act of Western Australia, which, to put it shortly, taxed dividends and contained a definition of "dividends" which covered every profit, advantage or gain intended to be paid or credited to or distributed among any members of any Company. It is quite obvious that a distribution of what was conveniently called bonus shares is an advantage to the share-holders and, therefore, one may conclude that, on the words of the Act, their Lordships of the Privy Council had no option but to hold that this was a dividend within the meaning of the Act. Lord Sumner in delivering the judgment of the Board said this:—"In ordinary language the new shares would not be called a dividend, nor would the allotment of them be a distribution of a dividend" (it has to be observed that what is made taxable by the Act is a dividend and nothing more) "The question in issue," His Lordship goes on, "here is whether or not the new shares were a dividend under the Act above mentioned." Now, if that judgment stood alone unexplained by any subsequent utterance of his Lordship, I should infer that not merely was it a decision on the words of that Statute but that was carefully confined to be a decision on the words of the Australian Statute with an intimation that, for that Statute the word could not be capable of bearing the meaning required to

(1) (1914) A. C. 231; 83 L. J. P. C. 134; 110 L. T. 211; 30 T. L. R. 199.

(2) (1921) 2 A. C. 171; 90 L. J. K. B. 1028; 125 L. T. 497; 65 S. J. 642; 37 T. L. R. 762.

be put upon it before the Crown could succeed. But in *Blott's case* (2), there is no doubt about it that Lord Sumner undoubtedly said that he had intended to lay down a wider principle which so far, as I can see, is this. Ever since the decision in *Trevor* v. *Whitworth* (3), it has been the accepted law that a Company cannot buy its own shares. That is used, as I follow the reasoning of Lord Sumner and Lord Dunedin, to found this contention, that, as a Company cannot buy its own shares, that is to say cannot pay its funds into its own coffers and issue scrip to itself, what must be supposed to have taken place, as Lord Sumner says, notionally is that although no such thing in fact happned, the Company paid its profits over to the share-holder and that the share-holder re-paid them and in return got scrip handed to him, which of course would give him a draft on the capital of the Company. In my opinion that reasoning is completely answered by the reasoning of Viscount Haldane and Viscount Finlay. I will just refere very briefly to one or two passages in Lord Finlay's judgment at page 192 of the report. He says this "The general scope and effect of these transactions is beyond dispute. There was an increase in the capital of the Company by the retention of the amounts available for dividends. Though the number of shares was increased by the issue of the new preference shares to the ordinary share-holders, this did not affect the proportions to which they were entitled in the undertaking and in any profits. All the share-holders received these new preference shares, so that the proportion in which they were to share in any profits remained the same. The use of the sums which had been available for dividend to increase capital would enable the Company to carry on a larger and more profitable business, which might be expected to yield larger dividends. These dividends, however, were to be in the future. So far as the present was concerned there was no dividend out of the accumulated profits; these were devoted to increasing the capital of the Company". Then again at page 194, "The effect of this operation (that is the one which he described) was that the amount of the bonus was retained by the Company as additional capital, and that the share-holders got the new preference shares. No option was left to any particular share-holder. He was compelled by the action of the Company to take the preference shares. He could not have sued for the bonus in money, as the resolution which gave the bonus *uno flatu* declared that it was to be satisfied by the distribution of preference shares. Under these circumstances it seems to me impossible to treat the share-holders for the purpose of super-tax as having received the bonus and paid it back to the Company to be retained as capital. They never received it at all. The case appears to stand exactly as Rowlatt, J., put it in *Inland Revenue Commissioners* v. *Blotts* (4), 'I do not think that there is a payment of a dividend to a share-holder unless a part of the profits of the Company is thereby liberated to him in the sense that the Company parts with it, and he takes it." If, I may humbly add a word in such a distinguished company I think it might be put in this way. "That you cannot say that there is a notional payment of a dividend to a share-holder when the position is that, if he sued for it, his action must be dismissed," that is to say, when the whole conception that he is entitled to the dividend is one that the law refuses to countenance. That being so, it is enough for me to say that I think that this Court having regard to the fact that the words of the Indian Statute are for all practical purposes, identical with those of the English Statutes; should respectively follow the opinion of the majority of the highest Court in the Empire.

I must add this that in doing so, the learned Lords were confirming the unanimous decision of a very stong Court of Appeal of three very eminent Lords Justices. I may also add that, of the majority of the House of Lords whose view prevailed, two at least were eminent and distingu-

(3) (1887) 12 A. C. 409; 57 L. J. Ch. 28; 57 L. T. 457; 36 W. R. 145.

(4) (1920) 1 K. B. 114 at p. 133; 89 L. J. K. B. 58.

ished company lawyers, and the dissentients were in the same unfortunate position, as myself, of being only common law lawyers. I should also like to add this, that I think it is extremely improbable that this arrangement about the distribution of these profits and the manner in which the transaction should be carried through was drafted without reference to the English cases. I do not know whether at the time the resolution was drafted the decision of the House of Lords was available, but, at any rate, the decision of the Court of Appeal in *Inland Revenue Commissioners* v. *Blott* (5) was available. I have looked at that decision and it expresses the opinion that that decision was determined by the decision in *Bouch* v. *Sproule* (6), itself a House of Lords' decision, available to the learned gentleman who drafted these articles and amendments to articles. I also observe that both Viscount Haldane and Viscount Cave agreed with the Court of Appeal in thinking that the matter before them in *Blott's case* (2) is concluded by the previous decision of the House of Lords. In these circumstances, although I have treated the matter as one of law, I think that it would be an undesirable and inequitable result if we had to come to any other conclusion than that which I have arrived at. Our answer to the reference is that the Company Messrs. Binny & Co., is not liable to pay super-tax on the value of shares newly issued by the Deccan Sugar and Abkari Company, Ltd., in the year 1921. The Company will have its costs on the Original Side scale.

Ramesam, J.—I agree, there are three features in this case as in *Blotts' case* (2), which make it difficult for a Court to say that the additional shares issued amount to income. The first is that there was no option to the share-holders, and it was not open to them, to sue for the additional dividend in the shape of cash or in the shape of other chattles or goods. The resolution of the Company compelled them to take it only in the form of additional shares and in no other. This feature was emphasised by all the Law Lords who formed the majority in *Blott's case* (2).

The next feature which perhaps is a corollary from (1) is this: The relative situation of each share-holder to the other share-holders in the Company remains unaltered. His proportion out of the total earnings that may be set apart for distribution as dividends among the share-holders remains the same after this operation of the Company. To explain it further if, for instance, in any year, the amount of profits that is set apart available for distribution among the share-holders is one *lakh*, the proportion which a particular share-holder gets remains the same after the increase in shares as before. If formerly a share-holder got 32 per cent. on shares of Rs. 125 each, now he will be getting Rs. 40 for each share of Rs. 500, *i.e.*, 8 per sent. on shares of Rs. 500, the total income would be the same amount.

The third feature which again may be regarded as a corollary from the other two, is that the effect is the same as if the Company passed a resolution for expanding its operations and for increasing its machinery. This has been pointed out by Viscount Finlay at page 196 in *Inland Revenue Commissioners* v. *Blott* (2). It is true that, as Lord Sumner points out, there was a payment in *Bouch* v. *Sproule* (6) a dividend warrant was sent out in the form of a negotiable instrument, which had it been presented payment must have been made. But this fact only served to distinguish *Bouch* v. *Sproule* (6) from the case before the House of Lords in *Inland Revenue Commissioners* v. *Blott* (2). If that distinction is emphasised, it follows that we ought to agree with the decision of the majority in *Blott's case* (2). It may be that the effect of the operations in question by the Company is to increase the value of a share and, if a particular share-holder sells his enhanced share, he may realise more in the market as pointed out by Viscount Cave. This amounts to only realising his assets in the shape of capital and not in the shape of income.

(5) (1920) 2 K. B. 657; 89 L. J. K. B. 677; 123 L. T. 516; 64 S. J. 548; 36 T L. R. 575.
(6) (1887) 12 App. Cas. 385; 56 L. J. Ch. 1037; 57 L. T. 345; 36 W. R. 193.

I agree with the answer proposed by my Lord.

V. N. V. *Reference answered.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1644 OF 1922.
July 9, 1924.

Present:—Mr. Justice Mukerji and Mr. Justice Dalal.

DIKSHIT & CO. LTD.—DEFENDANT—APPELLANT

versus

MATHURA PRASAD—PLAINTIFF—RESPONDENT.

Company—Director's position—Director's duty—Agent—Fiduciary relation—Remuneration—Articles of Association—Company formed to promote other Companies—Directors, whether entitled to extra remuneration for doing promoting work.

The Directors of a Company are agents of the Company, and, therefore, stand in the same position as an agent to the principal. They stand in special fiduciary relations to the shareholders, and, therefore, it is highly incumbent on them to act without raising the slightest suspicion of dishonesty, and not to claim any remuneration for doing something which it is their duty to do. [p. 22, col. 1.]

Where one of the objects of a Company is to promote other Companies and consequently it takes upon itself the promotion of another Company a Director is not entitled to claim any remuneration for performing any duties in connection with the promotion of the new Company, over and above what has been fixed as his remuneration by the Articles of Association. [*ibid.*]

Second appeal from a decree of the Subordinate Judge, Cawnpore, dated the 10th July 1922.

Messrs. *M. A. Aziz* and *Shambhu Nath Chaube*, for the Appellant.

Mr. *U. S. Bajpai*, for the Respondent.

JUDGMENT.—This small case presents an interesting question of law.

The respondent to this appeal was the plaintiff in the Court of first instance. He sued for recovery, *inter alia*, of a sum of Rs. 551. He was one of the Directors of the defendant Company who are now appealing in this Court. In paragraph 2 of the plaint the respondent says:—

"The defendant Company was constituted promoter and Managing Agent of the National Transport Service Company, Ltd. In this capacity, the defendant Company entrusted this work to the plaintiff that he should select other Directors for the said Company and perform all the work in connection with the registration and promotion of the said Company. As regards remuneration for this work, it was settled that the defendant Company would pay Rs. 551 to the plaintiff besides travelling allowance".

It is for recovery of this sum of Rs. 551 and for recovery of some other sums with which we are no longer concerned that the suit was brought.

Numerous grounds of defence were set out and among these, one was to the effect that the plaintiff himself being a Director of the defendant Company it was his duty to perform the work of the Company and he could not, therefore, get any remuneration beyond what was sanctioned by the Articles of Association The learned Judge in hearing the appeal did not frame express issues as to whether the work for doing which the plaintiff claimed remuneration over and above the remuneration fixed by the articles of Association was or was not within the scope of the business of the Company. But he remarked that the plaintiff was asked to do a work which was not within the scope of his general duties and he did it. We do not feel bound by this so-called finding of the learned Judge. We have already mentioned that the plaintiff himself admitted that the Company took it upon themselves to promote another Company and it was to perform the duties in connection with the promotion of this new Company that the remunerations are claimed.

The proposition of law that, a Director of a Company is not entitled to any remuneration beyond what has been sanctioned by the articles of Association for doing an act which would be his duty as a Director to do, has not yet been questioned by the learned Counsel for the respondent. This is a clear proposition of law. The Directors are

KUMUDINI DASI *v.* SURENDRABALA DASI.

agents of the Company, *viz*: all the share-holders who constitute the Company, and, therefore, stand in the same position as an agent to the principal. Further, they stand in special fiduciary relations to the share-holders. The case might be slightly different if there were one agent and one principal. The share-holders leave all the business of the Company in the hands of the Directors and it is, therefore, highly incumbent on the Directors that they act without raising the slightest suspicion of dishonesty. On the facts, it is clear that, the plaintiff is claiming remuneration for doing something which it was the duty of the Directors to do. We find in the evidence of Jagannath Prasad Dikshit that one of the purposes for which the Company was formed was the promotion of other Companies. The plaintiff cannot, in our opinion, claim any thing over and above what has been fixed as the remuneration by the articles of Association and the claim was, therefore, not maintainable. Other points raised do not require decision.

We allow the appeal, modify the decrees of the Courts below and dismiss the claim as regards the sum of Rs. 551 with proportionate costs. The costs in this Court will include Counsel's fees on the higher scale.

S. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 104 OF 1922.

April 17, 1924.

Present :—Mr. Justice Walmsley and Mr. Justice Mukerji.

Srimati KUMUDINI DASI, WIDOW OF GIRISH CHANDRA MITRA—PLAINTIFF—APPELLANT

versus

Srimati SURENDRABALA DASI WIDOW OF MONMATHANATH BOSE AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Tenancy in existence—Suit for khas *possession, whether competent—Declaration of title.*

A landlord has no cause of action to sue for *khas* possession of lands forming part of his tenants' holdings until the tenancies are determined, but he can get a decree declaring his title to the land and giving him possession through the tenants by receipt of rent. [p. 24, col. 2.]

Bissesuri Dabeea v. *Baroda Kanta Roy Chowdhry*, 10 C. 1076; 9 Ind. Jur. 226; 5 Ind. Dec. (N. S.) 719 and *Raj Kumar Mandal* v. *Ali Mia*, 70 Ind. Cas. 792; 37 C. L. J. 91; (1923) A. I. R. (C.) 192, distinguished.

Davis v. *Kazee Abdool Hamed*, 8 W. R. 55, *Sita Ram* v. *Ram Lal*, 18 A. 440; A. W. N. (1896) 162; 8 Ind. Dec. (N. S.) 999, *Hedayetunnessa Begum* v. *Shibdayal Singh*, 8 W. R. 512 and *Womesh Chunder Goopta* v. *Raj Narain Roy*, 10 W. R. 15, referred to.

Where a man, whether the owner or merely a tenant, creates a tenancy under him which entitles the tenant to the exclusive use of the land or of the house, as it may be, the man creating the tenancy cannot have any right to actual possession, unless he has by the lease or by agreement with his tenant reserved to himself a right to re-enter and take possession. [p. 24, col. 1.]

Sita Ram v. *Ram Lal*, 18 A. 440; A. W. N. (1896) 162; 8 Ind. Dec. (N. S.) 999, followed.

Appeal against the decree of the Subordinate Judge, Second Court, Hooghly, dated the 2nd of August 1921, modifying that of the Munsif, First Court at Serampore, dated the 20th of December 1919.

Dr. *Dwarka Nath Mitter*, Babus *Narendra Chandra Bose* and *Satyendra Nath Mitter*, for the Appellant.

Babus *Charu Chandra Biswas*, *Bireswar Bagchi* and *Jitendra Kumar Sen Gupta*, for the Respondents.

JUDGMENT.

Walmsley, J.—This appeal is preferred by the defendant, and it relates to a small strip of land measuring about ten *kattas*. The plaintiff's case is that she and defendant No. 3 are owners of an estate No. 165 of the Hooghly Collectorate, immediately to the east of some railway 'B' class land, and that the land in suit lies within their estate and not in the 'B' class land, that the land was in possession of their tenants, defendants Nos. 4 to 10, but the first and second defendants have entered on the land, and cut trees, dug a tank and built a privy and established a *bazar*. On those allegations she claimed *khas* possession.

The suit was resisted by the second defendant, who asserted that the land

was really situated in the 'B' class land of which he is the owner. The first Court found that the land was in the plaintiff's estate and gave her a decree for possession through the tenants along with her co-partner, the defendant No. 3.

The second defendant appealed and the plaintiff preferred a cross-appeal, and the learned Judge dismissed the cross-appeal, and modified the decree of the First Court by allowing the plaintiff possession through tenants of only that portion which lay immediately to the east of the holdings of the tenants Mohes and Hari Das within the estate: in regard to the remainder he gave the plaintiff nothing more than a declaration of her title.

The finding that the land lies within the estate belonging to the plaintiff and defendant No. 3 is final, and the appeal has been argued before us on that footing. The question which is raised is whether the plaintiff as landlord is entitled to demand *khas* possession of the whole area.

The land in suit must be treated as forming part of those holdings of the plaintiff's tenants, to which it is contiguous. Those holdings are still in existence, and the tenancies have not been determined. The respondent contends that until those tenancies are determined, the plaintiff as landlord has no right to sue at all, and he has preferred a cross-objection urging us to deny to the plaintiff even the partial relief that has been granted to her.

For the present I leave out of consideration the parcels of land adjoining the holdings of Hari Das and Mohes. So far as the rest is concerned I think that there is abundant authority for the proposition that the plaintiff cannot claim *khas* possession. Decisions like those of *Bissesuri Dabeea* v. *Baroda Kanta Roy Chowdhry* (1) and *Raj Kumar Mandal* v. *Ali Mia* (2) do not help her when they are examined. On the other hand there is the case of *Davis* v. *Kazee Abdul Hamed* (3) followed by many others, and never, so far as I can find, doubted. One decision of particular value is the Full Bench decision of the Allahabad Court in the case of *Sita Ram* v. *Ram Lal* (4) in which the vigorous if erroneous exposition by the one dissentient Judge drew from Edge, C. J., a very clear statement of the law. On the authorities I think that plaintiff cannot get more than she has got. On the same authorities I think that she is entitled to the decree which has been made and the cross-objection must be dismissed.

Then regarding the parcels adjoining Mohesh and Hari Das holding the finding is that those plots have been in possession of the tenants within twelve years of the suit, that fact may justify the slight difference which has been made in the relief granted to the plaintiff; practically I think this difference will amount to nothing, for the decree does not direct that either the plaintiff or the tenants will be put in physical possession. There is, therefore, no need to allow the defendant's cross-objection in regard to these two portions any more than in regard to the remainder.

The result is that the appeal and the cross-objection must both be dismissed with costs.

Mukerji, J.—Plaintiff instituted the suit out of which this appeal arises for declaration of title and recovery of possession in respect of a strip of land which is claimed by her as appertaining to her Touzi No. 165 and which the principal defendants *viz.*, Nos. 1 and 2 claim as appertaining to their Railway 'B' class land. The piece of land is made up of portions of holdings of certain tenants of the plaintiff five in number. As the result of two local investigations held by a Commissioner the boundary was ascertained and a map showing the encroachment was prepared. The learned Munsif made a decree declaring the plaintiff's title to

(1) 10 C. 1076; 9 Ind. Jur. 226; 5 Ind. Dec. (N. S.) 719.
(2) 70 Ind. Cas. 792; 37 C. L. J. 94; (1923) A. I. R. (C.) 192.
(3) 8 W. R. 55.
(4) 18 A. 440; A. W. N (1896) 162; 8 Ind. Dec. (N. S.) 999.

the portion found by the Commissioner to have been encroached upon by the defendant No. 2 and awarding the plaintiff possession thereof through the tenants by receipt of rent. The defendant No. 2 preferred an appeal from the said decision. The plaintiff too preferred a cross-appeal, but the same need not be further considered. On the appeal of the defendant No. 2, the learned Subordinate Judge made a variation in the decree, upholding it so far as it declared the plaintiff's title but limiting it, so far as possession is concerned, to the portion of the holdings of two out of the five tenants which had been found to have been encroached upon by the said defendant. The plaintiff thereupon has preferred the present appeal.

Upon the case as laid by the plaintiff herself, the tenancies of the different tenants have not been determined and they are still in possession of portions of their holdings. The plaintiff, therefore, has no cause of action for a suit for *khas* possession and so far as that relief is concerned the suit must be held to be premature. This principle was enunciated in the cases of *Davis* v. *Kazee Abdul Hamed* (3), *Hedayetunnessa Begum* v. *Shibdayal Singh* (5) and *Womesh Chunder Goopta* v. *Raj Narain Roy* (6) and has been followed ever since in all the Courts in this country. The principle has been very clearly explained in the Full Bench decision of the Allahabad High Court in the case of *Sita Ram* v. *Ram Lal* (4) in which Sir John Edge, C. J., observed as follows:—"The principle, it appears to me, must be the same all the world over, and certainly must be the same in India as in England. That principle is that where a man, whether the owner or merely a tenant, creates a tenancy under him which entitles the tenant to the exclusive use of the land or of the house, as it may be, the man creating the tenancy cannot have any right to actual possession, unless he has by the lease or by agreement with his tenant reserved to himself a right to re-enter and take possession."

(5) 8 W. R. 512.
(6) 10 W. R. 15.

In that judgment the learned Chief Justice has also pointed out the circumstances under which a landlord whose title has been questioned by any one else than the tenant may institute a declaratory suit, and if any one enters on the receipt of the rents and profits of the land and takes from his tenants the same which were due to him he may also be entitled to a decree putting him into possession, that is, what is known as formal possession as contradistinguished from actual or *khas* possession. In the same case Bannerji, J., observed that if actual possession was taken during the currency of the lease by a trespasser, such a person would be a trespasser as against the tenants, and not as against the landlord so as to justify the latter in claiming ejectment of the trespasser; if his title is denied he may certainly defend that title by a suit for a declaration of his right; but so long as he does not himself possess the right to enjoy physical possession he cannot eject the trespasser. In the present suit, the tenants never relinquished possession before suit; they filed statements after the institution of the suit, to the effect that they had no objection to the plaintiff getting a decree. This, in my opinion, did not improve matters in any way; and the learned Subordinate Judge in my judgment was right in refusing the plaintiff a decree for *khas* possession. The learned Subordinate Judge has upheld the decree declaring the plaintiff's title, and this, in my opinion, was the utmost that the plaintiff could get in the present suit. He has, however, given the plaintiff a decree for possession through two of the tenants in respect of the portions of their holdings encroached upon by the defendant No. 2. I am very doubtful if he was justified in making a differentiation in respect of these two holdings from the others, having regard to the fact that the present suit is a simple action for possession based on trespass, alleged to have been committed during the subsistence of the tenancies. It must be remembered that this is not a claim based on an allegation that the trespass is injurious to revision. Even though the trespass is accompanied by

a claim of right, it is not necessarily injurious to the reversion [*Ram Chandra Sil* v. *Ramanmani Dasi* (7).] Nor has it been alleged that the plaintiff's right to receive rents from these two tenants has been affected in any way or that her rents and profits have been intercepted by the contesting defendant in a manner justifying such a decree. See the case of *Raj Kumar Mandal* v. *Ali Mia* (2) where all the authorities on the point have been discussed. As, however, the learned Subordinate Judge has found that the plaintiff has succeeded in proving that she has received the rents of these two portions within twelve years before suit, and the effect of the decree will be that, he will be in possession through her said tenants and not in *khas* possession, I do not think that it matters much.

I, therefore, think that the judgment of the learned Subordinate Judge is substantially correct and I agree that the appeal and the cross-objection should both be dismissed with costs.

K. S. D. *Appeal dismissed: Cross-objection dismissed.*

(7) 36 Ind. Cas. 890; 20 C. W. N. 773.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 933 OF 1922.
April 14, 1924.
Present:—Mr. Justice Daniels and Mr. Justice Neave.
Thakur BEHARI LAL AND OTHERS —DEFENDANTS—APPELLANTS
versus
Thakur SHIB LAL AND OTHERS—PLAINTIFFS AND THAKUR MOHAN SINGH AND ANOTHER—DEFENDANTS —RESPONDENTS.

Mortgage—Profits in lieu of interest—Stipulation to pay fixed sum as malikana*—Mortgagee, whether liable to account—Transfer of Property Act (IV of* 1882), *s.* 77.

The principal terms of a mortgage-deed were that the mortgagees were to take possession and to receive the profits in lieu of interest, but they were to pay to the mortgagors an annual sum of Rs. 25 described as *malikana*. In a suit for redemption of the mortgage:

Held, (1) that the fact that a fixed sum was stipulated every year instead of a variable amount to be determined after calculating the profit or loss of the particular year did not affect the question of the mortgagee's liability; [p. 26, col. 1.]

(2) that the mortgagees were bound to account to the mortgagors for the *malikana* they had undertaken to pay. [*ibid.*]

Shafi-un-nissa v. *Fazalrab*, 7 Ind. Cas. 293; 7 A. L. J. 787, distinguished.

Second appeal from a decree of the Officiating District Judge, Agra, dated the 24th March 1922.

Mr. *N. P. Asthana*, for the Appellants.

Mr. *Baleshwari Prasad*, for the Respondents.

JUDGMENT.—This was a suit for redemption of a mortgage, dated the 23rd November 1880. There had been a previous mortgage, dated the 17th November 1860, between the ancestors of the parties but this was superseded by the later mortgage. The principal terms of the later mortgage-deed were that the mortgagees were to take possession and to receive the profits in lieu of interest. They were however to pay to the mortgagors an annual sum of Rs. 25 described as *malikana*, the mortgagors agreeing that they had no further claim against the mortgagees beyond this *malikana*. It is further stipulated in the deed that there shall be no accounting except as to the Rs. 25 which the mortgagors were to receive every year. It is not disputed that this *malikana* was never paid. Both the Courts below have granted a decree for redemption on payment of the principal mortgage-money after deducting Rs. 25 a year from 1886 to the date of suit.

In appeal three points have been taken by the learned Counsel for the appellants.

The first is that as the mortgage was a usufructuary one the mortgagees were not bound under section 77 of the Transfer of Property Act to account to the mortgagors.

The second is that if this view is accepted the mortgagors' only means of recovering the arrears is by a separate suit and that the claim in respect of it is barred by limitation.

The third point relates to an area of 7 *bighas* 18 *biswas* which was taken up by Government at some time between 1860 and 1880 for the Canal Department.

Compensation was paid for this to the mortgagees. Later on the land was restored to the original owners on repayment of the compensation money. The defendants' case was that they took this land back as owners and not as mortgagees.

The learned Counsel for the appellants has relied on a ruling in *Shafi-un-nissa* v. *Fazalrab* (1), in support of his contention that under section 77 of the Transfer of Property Act there can be no accounting between the parties. In our opinion the ruling has no application to the facts of the present case. In that case the mortgagor had undertaken to pay a certain amount annually in addition to the profits of the land. In the present case the mortgagees undertook to pay Rs. 25 a year out of the profits. But the fact that a fixed sum was stipulated every year instead of a variable amount to be determined after calculating the profit or loss of the particular year does not appear to affect the question. In this view of the case no question of limitation arises.

In view of our finding on the first point the second point taken by the appellants must be decided against them.

Dealing with the third point it is clear that the intention of the Government was to return the property to the parties from whom it had been originally taken including the mortgagees, but in any case it appears from the recital in the second mortgage-deed that the property mortgaged was the same as in the earlier deed. From this it must be inferred that the parties had arrived at a settlement among themselves with regard both to the property acquired by Government and restored to them and as to the compensation money paid.

The result is that the appeal fails on all three points and it is dismissed with costs including in this Courtfees on the higher scale.

K. S. D. *Appeal dismissed.*

(1) 7 Ind. Cas. 293; 7 A. L. J. 787.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 331 OF 1923.

July 9, 1924.

Present:—Mr. Justice Neave.

BIKRAMAJIT RAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

Mahanth DARSHAN DAS—PLAINTIFF AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 4 (3), 11—Several respondents in appeal—One respondent dying during pendency of appeal—Representatives of deceased not made parties in time—Court passing decree against all respondents—Decree, whether null and void against all—Test—Contradictory decrees not permissible.

Where during the pendency of an appeal one of the several respondents dies and no application is made in time to have his legal representatives made parties, if the interests of the several respondents can be distinguished and separated, then the appeal shall abate as against the deceased respondent only, but if no such determination is possible, it shall abate against them all. [p. 27, col. 1.]

Therefore, where several persons buying property jointly by a joint sale-deed are sued for recovery of possession and during the pendency of appeal against them one of them dies, and the Court passes a decree against all of them, without representatives of the deceased being made parties, the decree is null and void against all of them and not only against the deceased, otherwise there will be two inconsistent or contradictory decrees relating to the same subject-matter. [p. 27, col. 1.]

Second appeal from a decree of the District Judge, Azamgarh, dated the 30th November 1922.

Dr. *M. L. Agarwala*, for the Appellants.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by *Mahanth* Darshan Das for possession of certain property on the ground that it belonged to the *math* of which he had been duly elected *Mahanth*. The property in suit had been sold by one *Musammat* Subhagi to Gobind Rai and five other persons. *Musammat* Subhagi's claim to the property was that it had been given to her by Sheoraj Das a former *Mahant*.

The Trial Court found that the property belonged to the *math* and should not have been transferred by Sheoraj Das but holding that plaintiff had failed to prove his own due election as *Mahant* dismissed his suit.

Darshan Das appealed and made *Musammat* Subhagi and all her transferees respondents. During the pendency of the appeal Gobind Rai died. No application was made to have his legal representatives made parties to the suit and no notice was taken of his death in the lower Appellate Court.

The learned Judge found that Darshan Das had proved his title and decreed his suit against all the respondents including Gobind Rai.

Only one point has been argued in this Court. That is that the whole appeal had abated as against all the respondents and the decree of the Court below had become null and void.

Order XXII, r. 4 (3), provides that when no application is made to cause the representative of a deceased defendant to be made a party, the suit shall abate as against the deceased defendant, and rule 11 of the same Order makes the order applicable to appeals.

The appellants' contention is that though the rule in question only provides that the appeal shall abate as against the deceased respondent, there are cases such as the present one in which it must abate as against all the respondents. The test is whether the result of leaving the decree to stand would be to have two inconsistent or contradictory decrees relating to the same subject-matter. Where the interest of the respondants can be distinguished and separated then the appeal will abate as against the deceased respondent only, but where no such determination is possible it must abate against them all. Several rulings of the Calcutta High Court have been cited in support of this proposition; in particular *Sheikh Dendoo* v. *Shaikh Sachoo* (1), *Sarat Kamini Dasi* v. *Chaitanya Chandra Prohoraj* (2) and *Kali Dayal Bhattacharjee* v. *Nagendra Nath Pakrashi* (3). In the present case the sale-deed is a joint one in favour of six defendants. If the present appeal is not allowed then there will be two decrees both of them final—under one of which the right of Gobind Rai to any part of the property in suit has been denied while in the other it has been allowed. At the same time it will be impossible for any body to ascertain without a suit for partition over what part of the property this right extends.

In my opinion this view is the correct one and must prevail. It has been taken by the Lahore High Court in *Sirdari Lal* v. *Ram Lal* (4) and the principle underlying it has been more than once affirmed by this Court in cases under section 368 of the former Code of Civil Procedure *e. g.*, *Hem Kunwar* v. *Amba Prasad* (5). In that Code the words "as against the deceased defendant" did not find a place, but the Courts generally held that a distinction ought to be made between the case in which a suit on appeal could proceed in the absence of legal representatives and those in which it could not. It is clear that this is an instance of a case in which the absence of any representative of Gobind Rai makes it impossible that the lower Appellate Court's decree should be allowed to stand.

The appeal is allowed, the decree of the Court below is set aside and that of the Court of first instance restored. The appellants will get their costs in both Courts including in this Court fees on the higher scale.

S. D. *Appeal allowed.*

(1) 72 Ind. Cas. 2; (1924) A. I. R. (C.) 399.
(2) 67 Ind. Cas. 290; (1923) A. I. R. (C.) 289.
(3) 54 Ind. Cas. 822; 30 C. L. J. 217; 24 C. W. N. 44.

(4) 57 Ind. Cas. 199; 1 L. 225.
(5) 22 A. 430; A. W. N. (1900) 136; 9 Ind. Dec. (N. S.) 1324.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 613 OF 1920.
November 9, 1922.
Present :—Mr. Justice Marten and Mr. Justice Fawcett.

RAMACHANDRA SADASHIV SIDRAS OKA—PLAINTIFF—APPELLANT
versus
KESHAV DHONDU NARVEKAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss. 107, 108, scope of

—Presumption as to person's death—Suit for possession—Burden of proof.

Where a person sues for possession, the onus of proof is on him to make out his title to the property. [p. 28, col. 2.]

Sections 107 and 108 of the Evidence Act only relate to the date when the suit is brought, that is to say, as to whether a man is alive or dead, as the case may be, at the date of the suit, and not at some particular period anterior to the suit. Thus, when a person has not been heard of for thirty years prior to the institution of a suit, there is no presumption that he was dead at any time within the period in question. [p. 29, col. 2.]

Narayan Bhagwant v. *Shriniwas Trimbak*, 8 Bom. L. R. 226, *Moolla Cassim* v. *Moolla Abdul Rahim*, 33 C. 173; 32 I. A. 177; 7 Bom. L. R. 892; 2 C. L. J. 236; 10 C. W. N. 33; 2 A. L. J. 798; 15 M. L. J. 317, relied on.

Second appeal against the decision of the Assistant Judge, Ratnagiri, in Appeal No. 289 of 1917.

Mr. *P. V. Kane*, for the Appellant.

Messrs. *H. C. Coyajee*, *A. G. Desai* and *S. R. Parulekar*, for the Respondents.

JUDGMENT.

Marten, J.—The point in this appeal is one of the onus of proof as to the date of the death of one Baji. The suit is an ejectment suit. The defendants have been in possession under a Court sale since 1889. The plaintiff, who is the appellant, relies for his title on a conveyance in 1910 by one Dwarkabai, who was a sister of Baji. The suit was brought as long ago as February 1911, and has already been remanded once by the High Court for an amendment of the pleadings. On that amended case, the plaintiff's case is that Annapurnabai, the wife of Baji, was a widow at the date of her death in 1908, and that Dwarka accordingly was a reversioner, and the plaintiff sues in right of Dwarka as reversioner. A further amendment was asked for on the remanded trial, which will be found in parapraph 28 of the judgment of the learned Trial Judge, *viz.*, to add Dwarka as a co-plaintiff. But that amendment was refused.

Now the plaintiff is suing for possession, and the onus of proof is on him to make out his title to the property. It is clear that that property was at one time in the ownership of Baji, he being a son of one Anant, who died prior to 1872. Baji married Annapurnabai about 1872, and it appears that some time after that date he left the village. He apparently came back after two years, stayed only a couple of months, and then went away again. There is some conflict of evidence as to when he was last heard of, but it appears that on a judicial enquiry held in Miscellaneous Application No. 64 of 1880, it was held that he was then alive. Next in a mortgage-deed of 1886, Exhibit 64, there is a recital that Baji was wandering from home for many years. That recital is relied on as showing that he had not been then heard of for over seven years, but the learned Judges came to the conclusion that that recital in the face of other evidence was not sufficient to establish that fact.

We come then to the question on whom the onus of proof lies. The appellant contends that defendants must prove that Baji was dead in 1889 when the defendants purchased the property. But it is clear, to my mind, that that is not the right way in which to begin the consideration of this case. Baji is the last person proved to have been the owner. If the plaintiff claims under some reversioner or heir of Baji, the onus is on him to establish his title. That being so, the plaintiff next asks the Court to presume that Baji was dead in 1910 when the plaintiff purchased the property from Dwarka.

It has been held in a large number of cases in India, and only recently by this Appellate Court in Second Appeal No. 856 of 1920 [*Gopal Bhimji Arte* v. *Manaji Ganuji Padval* (1)], that the only presumptions in Indian law as to the fact of death are contained in sections 107 and 108 of the Evidence Act. It has further been held that sections 107 and 108 only relate to the date when the suit was brought, that is to say, as to whether a man is alive or dead, as the case may be, at the date of the suit, and not at some particular period anterior to the suit. Accordingly on those decisions it would or might be

(1) 81 Ind. Cas. 449; 25 Bom. L. R. 134; (1923) A. I. R. (Bom.) 163; 47 B. 451.

presumed in the present case, that Baji was dead in 1911 when this suit was filed. But those decisions also establish that there is no presumption as to whether a particular person was dead at any time within the period in question. Consequently, stopping there, there would be no presumption that Baji was dead in 1910, because that was a date anterior to the date of the filing of the suit.

I may quote from what Mr. Justice Crump says in the above recent case. "The result in the present suit would be that the burden of proving that Rakhama was dead at the date of the suit would lie upon the defendants. Therefore, in the absence of evidence the Court would hold that Rakhama was dead at that date. This result does not assist in any way the determination of the question whether Rakhama predeceased Ahilau who died four years before that date. This is the reasoning of the lower Appellate Court, and it is supported by authority apart from the apparent meaning of the section itself. Assuming that this is the correct view the result is that section 108 is inapplicable and the question must be considered apart from it. In that case there is no special rule in the Indian Evidence Act and the burden of proof would lie on plaintiff. Though it is proved that Rakhama disappeared twenty years ago, there is nothing to authorise the presumption that he was dead at the end of the first seven years of that period."

Assuming then in favour of the present appellant that section 107 does not apply for the above reason or for the reason that it is not shown that the appellant was alive within 30 years from the date of the suit, and assuming further in favour of the appellant that section 108 is not applicable either, then we are brought to consider the matter irrespective of sections 107 and 108. The appellant asks us to say that, because according to his view Baji was not heard of for 30 years prior to 1910, that, therefore, the presumption under section 114 is that he was dead at the end of those 30 years.

It seems to me, however, in the first place that the appellant has taken the wrong period. On his case as he has framed it after due deliberation on the remand by the Court, it is necessary for him to prove that Annapurnabai was a widow at her death in 1908, for otherwise Dwarka would not be a reversioner. Therefore, the 30 years would be the 30 years prior to 1908. On the other hand, as I have already pointed out, by the judicial finding in 1880, Baji was found to be alive then, and, therefore, the appellant does not satisfy the test of 30 years which he asks us to adopt.

But irrespective of that, and even assuming we have to take the period as being 30 years before 1910, admittedly there is no authority that he can produce for the proposition that under Indian law when a man has not been heard of for 30 years, he is presumed to be dead at the end of that time. On the contrary the passage I have already quoted from Mr. Justice Crump's judgment would appear to negative that proposition. There can hardly be any magic in 30 years as compared with 20 apart from the fact that 30 years is mentioned in section 107.

Further in *Narayan Bhagwant* v. *Shriniwas Trimbak* (2) it will be found that over 30 years had elapsed between the disappearance of Trimbak, the person in question there, and the date when that suit was brought. There Sir Lawrence Jenkins held that the lower Court arrived at no error of law in holding that it was not proved that Trimbak had predeceased his brother Appa who died in 1880.

Then in *Moolla Cassim* v. *Moolla Abdul Rahim* (3) which was an appeal from Burma, it will be found on reading the judgment of the learned Judges of the Burma Court at page 176 that on the dates there, more than 30 years had

(2) 8 Bom. L. R. 226.
(3) 33 C. 173; 32 I. A. 177; 7 Bom. L. R. 892; 2 C. L. J. 236; 10 C. W. N. 33; 2 A. L. J. 798; 15 M. L. J. 317.

elapsed. They say, for instance, "Moolla Ahmed" "had not been heard of for more than seven years in fact for more than 30 years—before the date of the institution of the suit." Notwithstanding that, they held the onus of proof was on the person there who alleged that Moolla was alive at the particular date.

In the present case the question is of proving the man was dead, but in my opinion it is merely an accident as to whether the particular fact that has to be proved, is whether the person is alive or has survived at particular period or whether he is dead. In each case we have merely to consider on whom the onus of proof lies.

The point as to these 30 years is dealt with in the judgment of the learned Trial Judge in paragraph 8 and the conclusion he arrived at is this. "So I simply presume that Baji is dead and there is absolutely no evidence in the case directly or indirectly proving when he died. On the contrary plaintiff's own admission shows that apart from the legal fictions of presumptive death or civil death Baji's wife till her death conducted herself as a wife of a living husband in private life, and in legal business with others as regards her property. Men of Baji's age are yet alive and so there is no presumption of his death, but for the rules in sections 107 and 108. Plain it is that I simply presume Baji's death for this trial, but make no presumption as to the time of his death either after the expiry of seven years or after the expiry of 30 years.'

In my opinion on the Indian authorities the learned Judge arrived at a correct conclusion. Speaking for myself I wish to say that sitting in this Court I merely follow the previous decisions on these points without expressing any opinion of my own on law in question. Nor do I express any opinion on the qestion as to what is the corresponding law in England, *viz.*, whether the period of seven years may be any period of seven years, or whether, as has been held in India, it must be confined to a period of seven years before suit. There is a conflict of opinion on that point between the Allahabad and the Calcutta Courts as to the English law on the point, and for the purpose of this case the matter may rest there. Whatever the law may be in England, I am sitting here as an Indian Judge, and all we have to do is to administer Indian law as laid down by the Courts of this country. In view of the carefully considered judgments of my brothers Shah and Crump in the recent case, I think that it is quite unnecessary for us in the present case to consider the whole questien *de novo*. It is sufficient for us to say that this latest decision is one binding on us in this Court.

The result is that, in my opinion, the appellant has failed to discharge the onus of proof which lies on him to show either that Baji was dead in 1908 or in 1910. Consequently in my judgment the judgments of the lower Courts, were correct, and this appeal should be dismissed with costs.

Fawcett, J.—I concur that the appeal should be dismissed with costs, and agree generally with the reasons given by my learned brother.

The appellant's main ground of appeal is that lower Courts were wrong in their interpretation of sections 107 and 108 of the Evidence Act. But this is certainly not correct in regard to the judgment of the Subordinate Judge who tried the suit, for in paragraph 17 of his judgment he has referred to the main cases that deal with the construction of sections 107 and 108 and he has rightly held that under those rulings all that he can presume under those sections is that Baji was dead at the date of the suit, and that he could not presume that he had died at any particular time. The Assistant Judge in dealing with this part of the case says that in February 1911 when the plaint was filed Baji will have to be taken to be no longer living and that in March 1889 Baji was alive. The latter conclusion is no doubt one which is not justfied by section 108 under the rulings already referred to. But this does

not vitiate the judgment he has given against the appellant, and as has been shown fully in my learned brother's judgment, sections 107 and 108 do not really help the appellant's case. His first difficulty is that he has to show that Annapurnabai was a widow in 1908, and that throws on him the burden of proving that Baji had died prior to 1908. I fully concur with my learned brother that there is no ground for answering that issue in the affirmative.

It was said by Mr. Kane that the claim in the plaint as a reversioner of Baji was one of mere false description and that the plaintiff should also be held to be claiming as an heir of Baji. But that argument is clearly not open to the appellant, in view of the proceedings under which he was allowed to amend the plaint so as to claim as a reversioner, but the request to add Dwarka as a co-plaintiff was disallowed.

Then it was said that the onus of proving the date of Baji's death should fall upon the respondents, because if he was dead in 1889, they merely purchased Annapurnabai's interest in the property as a widow and the suit being within twelve years of her death would be in time. On the other hand, if he was alive in 1889, they could only claim by a title from adverse possession as against Baji, so that the burden would be on them to show that Baji was alive in 1889. There seem to me to be two objections to allowing this argument. First of all, the plaintiff has not got over the initial stage of sustaining his title as a reversioner of Baji, to which I have already referred. Secondly, supposing the question of adverse possession by the respondents arises, the Evidence Act clearly puts them in a better position than the appellant. For under section 110 of the Evidence Act their admitted possession from 1889 throws the burden of proving that they are not the owners of property upon the plaintiff-appellant. And apart from that, I think, that, under section 103 the burden of proving that Baji was not alive in 1889 would really lie on the appellant, for there is a strong probability, that he was alive in 1889, and if so, the respondents clearly obtained a good title to the property by reason of adverse possession.

W. C. A. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 186 OF 1922.

March 26, 1924.

Present:—Mr. Justice Mukerji.

EKABBAR ALI SHAH PAGAL PANTHI FAKIR—DEFENDANT—APPELLANT

versus

Shaikh KON ALI AND OTHERS—PLAINTIFFS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Co-sharers—Ouster—Restoration of possession—Partition—Equity.

The equitable principle that one co-sharer cannot disturb possession of the other cannot be called in aid unless it is found that the co-sharers are in possession of separate portions by mutual arrangement for the sake of convenience. Unless such mutual arrangement is proved a co-sharer who is dispossessed cannot recover possession and his only remedy lies in a suit for partition. [p. 32, cols. 1 & 2.]

Appeal against the decree of the Officiating Subordinate Judge, Fourth Court, Mymensingh, dated the 6th of September, 1921, reversing that of the Munsif, Second Court at Netrakona, dated the 30th of June, 1920.

Babu *Jatindra Nath Sanyal*, for the Appellant.

Babu *Nagendra Nath Bose*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for *khas* possession of a piece of land upon declaration of plaintiffs' *jote* right thereto. The plaintiffs alleged that the said land togethor with other lands belonged to one Ishan Chandra Lahiri in his *zemindari* right and was in his exclusive possession, and that they took settlement of *jote* right therein from him and thereafter were wrongfully dispossessed by the defendants. The contesting defendant on the other hand alleged that Ishan Chandra Lahiri had no *zemindari* right in the said land

nor was he in possession thereof and that the land formed part of a *chawk* belonging to him and his predecessors and had been in possession for three generations.

The Trial Court found that the *chawk* in question in which the disputed land was included had been in the joint possession of the said Ishan Chandra Lahiri, the contesting defendant and other co-sharers and that Ishan Lahiri had only $\frac{1}{6}$th share therein, and accordingly it gave a decree to the plaintiffs for joint possession with the defendants to the extent of the $\frac{1}{6}$th share of Ishan Lahiri.

Against this decision the plaintiffs and the contesting defendant filed an appeal and a cross-appeal. The plaintiffs' appeal was based upon the grounds that as the disputed land had been in exclusive possession of Ishan Lahiri and as the plaintiffs were *bona fide* tenants under him, they were entitled to the exclusive possession of the land and also that there having been no issue framed as to the share of Ishan Lahiri in the land in suit the determination of an $\frac{1}{6}$th share in his favour was wrong. The contesting defendant's cross-appeal was based upon his alleged right to the 16 annas of the *chawk* and exclusive possession thereof for upwards of twelve years.

The learned Subordinate Judge held that Ishan Lahiri was in separate possession of the disputed plot, but that possession was not adverse to the contesting defendant or the other co-sharers, and that Ishan Lahiri as well as the contesting defendant were in separate possession of separate parcels of joint properties and applying the equitable principle that one co-sharer cannot disturb the possession of the other without a suit for partition decreed the plaintiffs' suit for *khas* possession.

The principle relied upon by the learned Judge is well-settled and has been laid down in a long series of cases; but in my opinion, it cannot be called in aid unless it is found that the co-sharers are in possession of separate portions by mutual arrangement for the sake of convenience. Unless such mutual arrangement is proved the co-sharer who is dispossessed cannot recover possession, and his only remedy lies in a suit for partition. The plaintiffs, in my judgment, cannot have higher equities than their lessor whose only remedy lies in a suit for partition. I have been referred on behalf of the respondent to the decision of this Court in S. A. No. 296 of 1020 [*Shiam Lal Saha* v. *Fulia* (1)] decided on the 10th March 1922 but it will be seen that the decision in that case was based on the finding that the co-sharers were each in possession of some property exclusively for convenience, and the cases of *Kumudini Mazumdar* v. *Rasik Lal Mazumdar* (2) and *Jagannath Prasad* v. *Badri Prasad* (3), which that decision purports to follow, were also cases in which a mutual arrangement was proved. As no such arrangement has been proved or even alleged in the present case, the equitable principle above referred to does not apply here. The view taken by the learned Munsif seems to me to have been the right one; but as the plaintiffs themselves dispute the share which was found in favour of their lessor, Ishan Lahiri, and they claim exclusive possession and not joint possession and claim it on the footing that their lessor was entitled to the 16 annas share in the land and was in exclusive possession thereof, the plaintiffs are not entitled to any relief in this suit.

The result is that the appeal must be allowed, the decrees of the Courts below reversed and the plaintiffs' suit dismissed with costs in all the Courts.

M. B. *Appeal allowed.*

(1) (1922) A. I. R. (C.) 147.
(2) 11 C. W. N. 517.
(3) 11 Ind. Ca 4 A. 113; 9 A. L. J 48

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 87 OF 1924.
August 4, 1924.
Present:—Mr. Pullan, A. J. C.
PRAG AND ANOTHER—ACCUSED—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 147, 296 Common object—Single motive—Series of attacks—One offence—Criminal Procedure Code (Act V of 1898), ss. 423, 439—Right of appellant's Counsel to reply—Practice—Revision—Incorrect view of evidence.

A continuous series of attacks made with the same common object by the members of a crowd actuated by a single motive, constitutes a single riot and not a number of separate riots, even though the composition of the crowd may vary. [p. 33, col. 2.]

Where the common object of the members of an unlawful assembly is to insult and attack *tazias* and they commit a riot in prosecution of that object, they commit one offence only and not two and are not liable to be punished separately under sections 147 and 296, Penal Code. [p. 36, col. 1.]

The Counsel for the appellant in a criminal appeal has no right to reply to the arguments addressed on behalf of the opposite party, but permission to do so is a privilege which should not ordinarily be refused by the Court. [p. 34, col. 1.]

Ordinarily the Judicial Commissioner's Court does not interfere in revision in criminal cases where the only question to be decided is whether the lower Court has not taken a correct view of the evidence. [p. 33, col. 2.]

The principle *falsus in uno falsus in omnibus* cannot be universally applied in India. [p. 34, col. 2.]

Application for revision under sections 435 and 439, Criminal Procedure Code, against the order of the Sessions Judge, Gonda, dated the 3rd July, 1924, in an appeal preferred against an order of the Joint Magistrate, Gonda, dated the 11th April, 1924.

Messrs. *R. Alston* and *A. P. Sen*, for the Applicants.

The Government Pleader, for the Crown.

JUDGMENT.—These applications have been made in revision of the orders of the Sessions Judge of Gonda upholding the convictions of the applicants for offences connected with the Gonda Muharram riots of 1923. It is admitted that on the 23rd of August 1923, certain Muhammadans entered a Hindu temple and caused some damage. As the result Hindu feeling stirred up and on the following day when the procession of *tazias* went through the city stones were thrown along the route and ultimately the Police were compelled to fire on the mob. Thirty-four persons were tried by the Joint Magistrate of whom twenty-three were convicted and of those 23 the Sessions Judge upheld the convictions of the 16 persons who have now moved this Court in revision. Although there are 10 separate applications filed by Counsel, the grounds stated for revision are for the most part the same.

In the first place it is pleaded that the applicants are prejudiced by a joint trial. This plea is based on the argument that this was not a single riot but a number of separate riots. I find, however, that all the persons who attacked the *tazias* were actuated by a single motive, and, in my opinion, a continuous series of attacks with the same common object, even though the composition of the crowd may vary, constitutes a single riot and not a number of separate riots. The mere fact that one of the accused threw stones at the *tazias* in one street and another in another street a few minutes later does not prevent them from being tried jointly as long as they were both members of the same crowd actuated by the same motive.

The only other legal point is, whether separate sentences should have been inflicted under sections 147 and 296, Indian Penal Code, and to this point I will refer later.

Ordinarily speaking this Court is not disposed to interfere in revision in criminal cases where the only question to be decided is whether the lower Court did not take a correct view of the evidence. In the present case, however, I have been asked to go further into the evidence than is usual in a revision proceeding because the learned Sessions Judge refused to allow the Counsel who represented the accused in his Court to reply to the arguments addressed on behalf of the Crown. It is not alleged, that the action of the lower Court was illegal and as I understand section 423 of the Code of Criminal Procedure, an Appellate Court is not required by law to give a second hearing to the appel-

lant. I am aware that an opposite view has been taken by the Calcutta High Court based on an interpretation of section 421, but whether that view is or is not right is immaterial, for I have not been asked to remand these cases to the lower Appellate Court, but only to give greater latitude to Counsel in my own Court. In my opinion an appellant has not got a right under law to reply in an Appellate Court, but permission to do so is a privilege which should not ordinarily be refused. I have, therefore, at the request of Counsel allowed wider scope to the arguments than should ordinarily be granted in revision, in order to ascertain whether there was in the mind of the Judge any misunderstanding or misapprehension of the evidence which might have been removed had he granted a further opportunity to Counsel.

I have heard the case of each appellant on these lines, and have considered whether the lower Court has based the conviction in each case on a proper appreciation of the evidence both for the prosecution and the defence. I am not prepared to take account of the objection that the lower Appellate Court's orders are too brief or summary. He has dealt with each case separately and all his orders read together form a judgment of considerable length and there is no question that he has dealt with each case on its merits. Nor can I interfere in any case where the lower Court has given proper consideration to the evidence and come to a reasonable conclusion. Thus where the lower Court has convicted persons who were known to but not identified by more respectable prosecution witnesses, I am not prepared to find that the Court acted unreasonably or with material irregularity. Obviously in a riot where several thousands of persons are engaged and brickbats are flying in all directions there can be no presumption that any of the officials protecting a procession would identify any particular rioter. Again where the lower Courts have agreed in believing the statements of witnesses against some and not against the other accused persons, I find no ground for interference, first, because the principle *falsus in uno falsus in omnibus* cannot be universally applied in India, and, secondly, because many of the persons named were really present but mistakenly supposed by the witnesses to be rioting.

I shall now deal with the individual applications in order.

(1) Banwari Lal is a cloth merchant whose shop is on the route of the procession. At this point there was a fusillade of brickbats and no less than 24 witnesses affirm that they saw this Banwari Lal taking an active part in the attack. This man pleads an *alibi* which has not been accepted by the lower Courts and I must presume it to be false. He gives no satisfactory reason for being falsely charged, and I have no doubt that he has been rightly convicted.

(2) Faqir Chand *alias* Dallu. This man was injured in the attack on the temple the night before, and went to the *Thana* in the morning to make a report. His defence is that he was too ill with fever to take part in the riot, but in view of the fact that he had already gone to the *Thana* this defence on the face of it is unsatisfactory and there is good evidence that he also took part in the riot.

(3) Prag and Kedar who are father and son live in a village, a short distance from Gonda. There is ample evidence that both of them among many other villagers took part in the riot and presumably came into the town for that purpose. Their defence was that they spent the day in their fields, but the discrepancies in the evidence which they produced were clearly pointed out by the Court of first instance. It is alleged that the lower Appellate Court disregarded the *alibi* evidence, but it appears that only one witness is now relied upon by these applicants, and I cannot bind that the evidence of this one witness answers the ample evidence given on behalf of the prosecution. No doubt like several of the other accused these persons are men of some substance, but that unfortunately is no reason for their not participating

in a religious riot. I find that the case against these two men was sufficiently proved.

(4) Bindeshwari Prasad who is a *Zemindar's Karinda* is stated by no less than seven witnesses to have been seen throwing bricks at the procession. It appears that at the same part of the route there was a Mr. Tandon a respectable Pleader who was also named as one of the rioters. Both Courts have believed that Mr. Tandon took no part in the riot, but, on the other hand, was himself in danger from the stones. This applicant suggests that he should receive the same benefit of the doubt as Mr. Tandon but I do not find that the two cases are similar or that the lower Courts came to a wrong conclusion in convicting him.

(5) Chhotey Lal is a shop-keeper who was seen by numerous witnesses, but he cannot rely on the same defence as Bindeshwari Prasad because he states that he was confined to his bed and unable to get up. I consider that the lower Courts were fully justified in declining to accept his defence.

(6) Mukhdum is not a person of any position and his main line of defence is that he is an enemy of the Police. His defence is worthless and the prosecution evidence against him is strong. The only point in his favour is that he is 60 years of age, and he, therefore, pleads for a lenient sentence. I do not, however, think that the sentence already passed when modified in the manner which I contemplate will be excessive.

(7) Kashi Ram is a liquor contractor. His house and shop is situated at the place where the first attack was made upon the procession. The Muhammadan Deputy Magistrate who accompanied the procession saw no bricks thrown from this man's house and his next door neighbour has already been acquitted by the Sessions Judge. The applicant produced evidence which does not appear to have been appreciated by the lower Court. He says that a number of ladies were sitting on his roof being members of his own family and their friends. The reasons given by the lower Court for doubting the evidence of Dr. Sadi Lal are not correct. The reason why this gentleman went to the house of the applicant is quite clear, and the lower Court seems to have been wrong in supposing either that his own dispensary is directly on the route, or that it was a suitable place from which ladies could view the procession. Further there is medical evidence that this man was ill; there is the evidence of the Excise Inspector that he is not a person who would be likely to take part in a religious riot; there is the presumption that a publican is the last person to engage in an exploit of the kind, and there is also a suspicion that he might have annoyed those members of the *Khilafat* party who at about this time were strongly advocating prohibition. Lastly I must admit that I think it very improbable that a person in Kashi Ram's position would throw bricks from the roof of his own house where a number of ladies were sitting. On these grounds I feel that I should interefere in the case of this applicant and give him the benefit of the doubt.

(8) Mulhu. This man has no special ground for interference with the orders of the lower Court. Eighteen witnesses saw him throwing stones and his defence that he is an enemy of the Muslims and a supporter of the *Sudhi* movement renders his participation in the riot extremely probable.

(9) Bindeshwari Pujari is the custodian of the temple which was attacked by the Muhammadans on the previous night. Several witnesses saw him taking an active part in the crowd near the door of the temple and he was hit with buckshot in the mouth. All persons who were actually hit by the fire of the Police are *ipso facto* probably rioters, for it is proved that the shots were only fired at the prominent members of the crowd and although possibly some persons who had no guilty intention may have been accidentally wounded, there is no reason to suppose that Bindeshwari was one of them.

(10) Ghirrao Singh and five others were all wounded by buckshot and filed a joint application. Of the others

I need only say that there was ample evidence in corroboration of their injuries to prove that they were active members of the crowd, but Ghirrao Singh's case is peculiar. Both the Magistrate and the Sessions Judge have stated that he produced no defence. This is incorrect. He produced his defence witnesses to prove that he was an innocent spectator. The fact that both the lower Courts were ignorant of this defence is sufficient to bear out his claim that he was not properly tried. As a re-trial under the circumstances is undesirable I consider that the only proper course to pursue is to order his acquittal.

In my opinion the applicants have made out a good case when they say that separate punishment under sections 147 and 296, Indian Penal Code, should not have been awarded. A riot denotes a common object and the common object of all these persons was to insult and attack the *tazias*. Their object, therefore, is expressed in the charge under section 296 and when they rioted in prosecution of that object they committed one offence only and not two. Doubtless they are liable to separate punishment under section 323 for the injuries caused in the course of the riot but they are not liable to two consecutive sentences under sections 147 and 296, Indian Penal Code.

On these grounds I pass the following orders on these applications:—

Kashi Ram and Ghirrao are acquitted and their convictions and sentences are set aside. The convictions of all the other applicants are upheld but the substantive sentences of imprisonment passed under sections 147 and 296 will be concurrent and not consecutive; and one fine and not two will be levied in each case.

S. D. *Sentences modified.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 169 OF 1924.

April 30, 1924.

Present:—Mr. Justice Ryves.

ALIMUDDIN *alias* ALLIA—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 110, 439—Security for good behaviour—Evidence, nature of—Prosecution, what must prove—Failure to furnish security—Order directing imprisonment of accused—Revision—High Court, when will interfere.

It is very difficult for the High Court to interfere in revision in cases under section 110 of the Criminal Procedure Code, but when a person is sentenced to imprisonment for failure to furnish security under that section, the High Court has to be satisfied that the evidence is of a character which will reasonably support the inference that it is necessary in the interests of public security to send the accused to prison or to bind him down.

Criminal revision against an order of the Sessions Judge, Agra, dated the 26th November 1923.

Mr. *Saila Nath Mukerji*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This is an application in revision by one Alimuddin *alias* Allia who was sentenced to three years' rigorous imprisonment on failure to furnish security under section 110 of the Criminal Procedure Code. It is very difficult for this Court in revision to interfere in these cases, but this Court has to be satisfied that the evidence is of a character which will reasonably support the inference that it is necessary in the interest of public security to send the man to prison or bind him down. Alimuddin was convicted of theft in 1916. That cannot have been a very bad case as he was sentenced only to 15 days' imprisonment. However, a history sheet was started and he came under the suspicion of the Police. In April 1921 he was bound down for one year under section 110 although the order was not enforced. Evidently he has been a marked man ever since. Between February and May 1923 four dacoities were committed in the Agra District within the Police Circle of Khalil-uddin, Circle Inspector. In the last of

these dacoities, one Beni Singh was caught on the spot and he made a confession in which he indicated that the four dacoities were the work of one gang. Among the members of that gang, it is said was a Muhammadan from Agra. He was not able to name the Muhammadan and was not able to identify him. The result was that the Muhammadan from Agra was not put on his trial for dacoity. The Police have come to the conclusion that the accused is the Muhammadan from Agra. As he was neither named nor identified by Beni Singh it seems to me there is no justification for the inference that Allia had anything to do with these dacoities.

I think the reason why the Police have taken proceedings against this man is because they believe that he was connected with these dacoities. The other evidence in the case seems to me to be too vague to support the charge. On two occasions in September and October, 1922, he was charged of having committed offences, but his house was not searched and the complainants in those cases have given the reasons why they suspected Allia and the reasons really are very unsubstantial. None of the witnesses can say anything recent about the accused. There is evidence that he associates with two bad characters, but this evidence is very unsatisfactory. One witness, for instance, says that he learned this fact from a statement made to him by the accused himself. In cross-examination he denied that he ever had any conversation with the accused. Another witness who testified against the accused when asked to identify him in the Court pointed to a Pleader's clerk.

All this evidence, however, even if believed is to the effect that the accused has the reputation of dealing in stolen cattle or stealing cattle. He says of himself that he is a butcher by profession and this is admitted by some of the prosecution witnesses. Many butchers rightly or wrongly are suspected of dealing in stolen cattle, but the evidence, in my opinion, against Allia is much too vague. I cannot help thinking that but for the fact that the Police suspected that in spite of Beni Singh's failure to name and mention Allia in connection with the dacoits, they believed he was concerned with those dacoits, and hence this case. I must accept the application and set aside the order under section 110 and the applicant will be released.

K. S. D. *Order set aside.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 95 OF 1924.
August 6, 1924.
Present:—Mr. Pullan, A. J. C.
BAHRA AND OTHERS—PRISIONERS IN JAIL—APPLICANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 423—Right of accused to reply—Penal Code (Act XLV of 1860), ss. 295, 447—Offences under sections, whether separate offences—Consecutive sentences, propriety of.

An accused has no right of reply under section 423, Criminal Procedure Code, but the privilege of replying should never be refused by an Appellate Court.

When a Hindu temple is entered into and its property damaged, the offence under section 447, Penal Code, cannot be dissociated from the offence under section 295, Penal Code, which only had expression in the entry into the temple. The two offences are really one and it is improper to pass consecutive sentences of imprisonment for each of them.

Criminal revision under section 435, Criminal Procedure Code, against the order of the Sessions Judge, Gonda, dated the 7th July 1924, in an appeal preferred against an order of the Joint Magistrate, Gonda, dated the 11th April 1924.

Mr. *Niamat Ullah*, for the Applicants.

The Government Pleader, for the Crown.

JUDGMENT.—This is an application in revision of the order of the Sessions Judge of Gonda upholding the conviction of seven persons by the Joint Magistrate of Gonda of offences under section 295-149 and 457-149, Indian Penal Code. The first ground of revision is that the learned Sessions Judge erred in law in refusing a right of reply to the applicants on their appeal. I have already discussed this point in connection with the application* made by certain Hindus who were convicted of another riot at Gonda on the 24th of August, 1923. In my opinion accused persons have no right of reply under section 423 of the Code of Criminal Procedure, but the privilege of replying should never be refused by an Appellate Court. The refusal leaves it open to the appellants to urge that they might have been able to reply to the arguments brought against them on behalf of the Crown, and so have induced the Court to change its opinion as to their guilt. I have, therefore, as in their case, permitted Counsel to address arguments on the question of evidence in order that I may make sure that the Sessions Judge has not misappreciated any of the points which might have been raised in reply by the appellants.

It appears that the learned Sessions Judge took a somewhat more lenient view of this case than the Magistrate. The latter considered that Muhammadans broke into a Hindu temple without provocation on the night of the 23rd, 24th of August and damaged some of the temple property. The Sessions Judge considered that the case was exaggerated, and that the Muhammadans entered an open temple irritated by the sounds of Hindu Music when they were themselves engaged in mourning. I have been asked to hold that the Sessions Judge has failed to appreciate the evidence at its right value and that he ought not to have convicted any of the applicants I have been through the evidence and I see no reason to believe that the learned Sessions Judge made any mistake in his appreciation of the value of the evidence or convicted any person on insufficient perjured testimony.

On the other hand I find that the learned Sessions Judge made two mistakes. On his own view of the evidence no offence was committed under section 457 but only an offence under section 447, Indian Penal Code. This offence, namely the entering of the temple, cannot be dissociated from the offence under section 295, Indian Penal Code, which only had expression in the entry into the temple. Consequently it was improper to pass consecutive sentences of imprisonment for these two offences which are really one. The second mistake, a technical one, was made by the learned Sessions Judge when he bound over the applicant Tasadduq under section 106 of the Criminal Procedure Code. The sections under which Tasadduq was convicted do not justify the application of section 106 of the Criminal Procedure Code, and this part of the order of the lower Court must be set aside.

I have been asked to reduce the sentences still further on the ground that in the view of the Sessions Judge himself the case was much exaggerated and was really a more or less trivial matter. I am not of opinion that an entry into a Hindu temple at night by a band of Muhammadans themselves engaged in a Muhammadan religious ceremony can ever be a trivial matter, and in this particular case it gave rise to a very serious riot in which many persons were injured and many more have been sent to prison. The orders of the Court are that the convictions be altered in each case to convictions under sections 295 and 447, Indian Penal Code, read with section 149, Indian Penal Code, and the separate sentences of imprisonment be made to run concurrently. In each case one order of fine only will be maintained. Further in the case of Tasadduq the order binding him over under section 106 of the Code of Criminal Procedure is set aside.

G. H. *Sentences altered.*

*See 82 Ind. Cas. 33.—[*Ed.*]

MAUNG PO HMYIN *v.* EMPEROR.

RANGOON HIGH COURT.

CRIMINAL APPEAL No. 985 OF 1923.

December 24, 1923.

Present:—Mr. Justice May Oung.

MAUNG PO HMYIN AND ANOTHER—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 107, 420, 511 —Attempt to cheat—Abetment—False claim against Insurance Company—Conspiracy—Attempt and preparation, distinction between.

Accused No. 1 effected insurances of his stock of paddy said to be lying at a mill belonging to accused No. 2, with three Insurance Companies. The mill and the paddy were subsequently burnt. Accused No. 1 gave notice of the fire to the Insurance Companies and followed this up by loss claims in which a much larger quantity of paddy was stated to have been destroyed by the fire than could possibly have been stored in the godowns of the mill. In the enquiry which followed accused No. 2 supported the statement of accused No. 1 as to the quantity of paddy which had been destroyed, although he must have known that the quantity destroyed was considerably less:

Held, (1) that the act of accused No. 1 in sending in a claim to the Insurance Companies which was false to his knowledge amounted to an attempt to cheat the Companies and was not merely a preparation to cheat: [p. 42, col. 1.]

(2) that the accused No. 2 having engaged in a conspiracy with accused No. 1 to cheat the Insurance Companies and an act (*i.e.*, the sending in of false claims) having been done in pursuance of the conspiracy and in order to the cheating, accused No. 2 was guilty of abetment of the offence committed by accused No. 1 under the second clause of section 107 of the Penal Code. [*ibid.*]

A mere act of preparation for the commission of an offence is not such an act towards its commission as amounts to an attempt to commit the offence within the meaning of section 511 of the Penal Code. [p. 40, col. 1.]

Whether any given act or series of acts amounts to an attempt of which the law will take notice, or merely to preparation, is a question of fact in each case. [*ibid.*]

In the matter of R. MacCrea, 15 A. 173; A. W. N. (1893) 71; 7 Ind. Dec. (N. S.) 829, relied on.

Criminal appeal from the order of the District Magistrate, Rangoon, in Criminal Regular Trial No. 155 of 1923.

Mr. *Glanville*, for the Appellants.

The Government Advocate, for the Crown.

JUDGMENT.—On various dates in the month of February, 1922, the first appellant, Po Hmyin, effected three fire insurances on his stock of paddy said to be lying in the mill premises at Impalwe belonging to the second appellant Tun Aung, and his father. These insurances were as follows:—(*a*) one for Rs. 50,000 in the West of Scotland Insurance Office, Ltd.; (*b*) one for Rs. 75,000 in the Yorkshire Insurance Co.; and (*c*) one for Rs. 25,000 in the Sphere Marine and Fire Insusance Co., Ltd.

At the time of making his proposals, the first appellant produced cover notes, issued by Messrs. Gillanders Arbuthnot & Co., showing that the mill premises themselves were insured against loss by fire. These cover notes were issued to the second appellant and his father, and were doubtless, lent to the first appellant to enable him to prove that the buildings in which he had stored his stock were protected.

On the 3rd March, 1922, the mill buildings and everything therein were burnt down and this fact was communicated by the mill owners to their Insurance Company. This was by letter, Exhibit J, which is dated Rangoon, the 5th March, 1922.

On the same date, Po Hmyin wrote Exhibits V and Y to the Sphere and the West of Scotland Companies respectively, communicating the same information regarding the stock of paddy in the mill.

A significant point with respect to these two letters is that they are type written on paper of the same size and quality as Exhibit J; the entire method of typing, including the dating, is also exactly similar.

There is no such letter on the file addressed to the agents of the Yorkshire Company, but in all probability one was sent to them as well.

Exhibits U, Z and DD are fire or loss claims on the three Companies, signed and forwarded by Po Hmyin. They are on printed forms and all contain a declaration to the effect that 75,040 baskets of paddy, valued at Rs. 1,72,558 were destroyed or damaged by the fire which consumed the mill.

These declarations formed the basis of three charges of attempted cheating against Po Hmyin, the case for

the prosecution being that the declarations were false. The second appellant was charged with abetment of the three offences. Both were convicted and sentenced to suffer two years' rigorous imprisonment on each charge, the sentences to run concurrently. Both appeal.

The first point taken is one of law, *viz.*, that even assuming the falsity of the declaration, there was no "attempt" as contemplated by section 511, Indian Penal Code. That section provides that whoever attempts to commit an offence and in such attempt does any act towards the commission of the offence shall be punished. It has been judicially held that a mere act of preparation for the commission of an offence is not such an act towards its commission as amounts to an attempt. The learned Counsel contends that Po Hmyin's acts in this case did not amount to more than preparation for an attempt to cheat.

Whether any given act or series of acts amounts to an attempt of which the law will take notice or merely to preparation, is a question of fact in each case: *In the matter of R. Mac Crea* (1).

In the same case, Knox, J., said, "It is, no doubt, most difficult to frame a satisfactory and exhaustive definition which shall lay down for all cases where preparation to commit an offence ends and where attempt to commit that offence begins. The question is not one of mere proximity in time or place. Many offences can easily be conceived where with all necessary preparations made, a long interval will still elapse between the hour when the attempt to commit the offence commences and the hour when it is completed. The offence of cheating and inducing delivery is an offence in point. The time that may elapse between the moment when the preparations made for committing the fraud are brought to bear upon the mind of the person to be deceived and the moment when he yields to the deception practised upon him may be a very considerable interval of time. There may be the interposition of inquiries and other acts upon his part. The acts whereby those preparations may be brought to bear upon the mind may be several in point of number, and yet the first act after preparation completed will, if criminal in itself, be beyond all doubt, equally an attempt with the ninety and ninth act in the series."

These weighty and opposite observations exactly fit the case before me. It is urged that the act of Po Hmyin in approaching the Insurance Companies with his claim represented only another stage in his preparation to cheat them and that the real attempt would have begun when, the Companies having called upon him to produce his evidence in support of his claim, he proceeded to do so.

In support of this contention the Counsel points out that insured persons who have suffered loss or damage by fire often put forward exaggerated or inflated claims, that Insurance Companies do not admit such claims forthwith but invariably institute inquiries with a view to assessing the damage, and that, therefore, an attempt to deceive them does not take place until false testimony in support of the claim is adduced.

This argument would, I have little doubt, carry considerable weight in cases where the insured has merely overvalued his property in his claim. But the allegation in the present case was not that the claimant had grossly misrepresented the value of his stock in the mill, but that his statement as to the quantity of paddy he had stocked before the fire was false. According to him, he had 75,040 baskets; according to the prosecution he could not possibly have had one-fifth of that quantity, since the mill godowns could not contain much more. Hence if the Crown had succeeded in establishing its case, Po Hmyin, when he presented his claims to the Insurance Companies, made a deliberately false statement. This was an act done in pursuance of the preparations he had made for committing a

(1) 15 A. 173; A. W. N. (1893) 71; 7 Ind. Dec. (N. S.) 829

fraud and it was an act which was brought to bear upon the mind of the persons to be deceived. The appellant might have held back after he had sent Exhibits V and Y, the notices regarding the fire; the sending of these notices was another act of preparation. But when he followed up these notices with the actual claim papers he, in my view, definitely "crossed the Rubicon" and committed himself to a representation of fact which, if proved to be false to his knowledge, must be regarded as an overt act towards the commission of the offence of cheating, an act which had gone beyond the stage of preparation.

I hold, therefore, provided the necessary facts are established that Po Hmyin attempted to cheat the Insurance Companies.

As to the facts, one of the outstanding features of the case, one which was strongly relied upon by the appellants, was the assessor's report when the claim papers were presented. The Companies acting in consultation, appointed an assessor to proceed to the scene of the fire and to report on the loss caused. He did so and his firm submitted the report, Exhibit O, which contains the following passage. "On our arrival there we found the mill and godowns completely gutted and the paddy still blazing. The paddy was in three different piles and in our opinion must have been well over 65,000 baskets." There is also a quotation from the owner's "Stock Book" showing a total of 75,040 baskets, which the assessor valued at Rs. 1,58,632.

I am unable to place any reliance on this report. The evidence shows that the inquiry, if it can be called an inquiry, was most perfunctory, and it is more than probable that the assessor's estimate of the quantity of burnt and burning paddy was based very largely on what he saw in the Stock Book. In any case, the estimate was that of a person whom, I cannot, on the evidence, regard as an expert. He does not give any satisfactory explanation as to how he arrived at his figures. He took no measurements himself, either of the heaps of burning paddy or of the godowns, the outlines of which he saw, and he made no notes of what he observed. Only two hours were spent at the place; part of this was taken up in making inquiries as to the origin of the fire.

The next important point is in connection with the godowns, of which there were three. The second appellant admitted that he had handed a ground plan of the mill buildings to Messrs. Gillanders Arbuthnot at or about the time he insured them, and Mr. Griggs of that firm deposed that Exhibit A is the plan. Tun Aung denied it but I see no reason to disbelieve the witness, who is in no way interested, seeing that the cover notes for the mill were cancelled before the fire. The plan shows two godowns, each measuring 50 feet by 10 feet, and a third measuring 61 feet by 35½ feet. Elevations are not given, but the evidence establishes the fact that the godowns were not more than 12 feet high while the two smaller ones sloped down to 9 feet. Taking these measurements and judging by the estimates given by Mr. Thorn, an Engineer, of Messrs. Steel Brothers & Company, who has had long experience of mill godowns, the capacity of the Impalwe godowns could not have been much more than 15,000 baskets. There is a considerable body of evidence in support of this estimate. The most notable of the witnesses being Po Hlaing and Ba Gyaw, the former owners of the mill. They both swear that the two small godowns could not hold more than 3,000 baskets each, and in this they are corroborated by others As to the large godown, the most liberal estimate places it at 10,500 baskets.

We have it then that the three godowns, when full, were capable of holding some 15 or 16 thousand baskets of paddy. Of these there were at least 4,000 baskets belonging to various small traders, thus leaving some 12 thousand as Po Hmyin's as compared with his claim of 75 thousand.

The latter figure appears, it is true, in Po Hmyin's Stock Book, but there is no entry in this of the place where the paddy was stored, and since Po Hmyin is a resident of Daiku, which is far away from Impalwe, it is more than possible that a large portion of his stock was at the former place. Be that as it may, I am unable in

the face of the conclusive evidence as to the size of the godowns, to accept the statement that such a large quantity of paddy was stored in a small out-of-the-way mill.

For the same reason I must reject the evidence for the defence relating to alleged extensive purchases of paddy made by Po Hmyin. Rebutting evidence has been adduced to show the falsity of much of this defence but in the circumstances, it is, in my view, unnecessary to consider it.

I should mention here that the defence, at very late hour, deputed a trained surveyor to prepare a plan of the mill buildings; this was done in January 1923, about nine months after the fire and no weight can be attached to it

On the evidence I hold it fully proved that Po Hmyin had less than 15,000 baskets of paddy at the mill when the fire took place and that he must have known this. His declaration that he had 75,040 baskets was, therefore, deliberately false and I must confirm the convictions.

The second appellant was held guilty of abetment in that he (1) let Po Hmyin use his mill for storing paddy, (2) lent him his cover notes on the mill, (3) stated to witnesses that 75,000 baskets of Po Hmyin's paddy were in the mill when it was burnt, and (4) stocked 'kauk-hmaw' (refuse) in the godowns and pretended it was paddy.

Of these points, it is unnecessary to deal with any besides the third. It is quite clear that Tun Aung told several persons that Po Hmyin had stored 75,000 baskets and to the Police he said (when reporting the fire)—" over 60,000 and about 70,000." Knowing the capacity of his godown as he must have done, it must be held that he also was stating what he knew to be false. Remembering also the remarkable similarity between Exhibits J, V and Y, as pointed out above, I am irresistibly led to the conclusion that he engaged with Po Hmyin in a conspiracy to cheat the insurance Companies ; and since an act (*i. e.*, the making of the claim by Po Hmyin) took place in pursuance of the conspiracy and in order to the cheating, he was guilty of abetment under the second clause of section 107. The convictions in his case also will, therefore, be confirmed.

As to the sentences, the claim was an impudent one for a very large sum of money and there can be no doubt that a substantial sentence of imprisonment was called for. I have been asked to consider the facts that the appellants were for a long time under trial that they have suffered mentally, and that they have incurred much expense ; they were, however, on bail during the trial and their sufferings were brought on themselves by their own act.

At the same time, I take into consideration the circumstances that this appears to be the first prosecution of its kind, at least in this Province and the facts that the appellants belong to a class of society to whom even a short term of rigorous imprisonment would be a severe deterrent.

In the case of each appellant, therefore, I reduce the sentence on each charge to one year's rigorous imprisonment, the sentences to run concurrently.

The appellants will be called upon to surrender to their bail and will be recommitted to prison.

Z. K. *Appeals dismissed.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 352 OF 1924.
June 18, 1924.

Present:—Mr. Justice Kulwant Sahay.

MR. R. E. BLONG—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 144, object of—Liberty of individual, respect for—Magistrate, duty of—Proper procedure—Vague and indefinite order.

Section 144, Criminal Procedure Code, is not intended to restrict the liberty of an individual if there is no apprehension of a breach of the peace on account of any act to be done by him. [p. 44, col. 1.]

The object of section 144 is to enable a Magistrate in cases of emergency to make an immediate order for the purpose of preventing an imminent breach of the peace ; but it is not intended to relieve him of the duty of making

BLONG *v.* EMPEROR.

a proper enquiry into the circumstances which make it likely that such breach of the peace will occur. [*ibid.*]

If it is found that a man is doing that which he is legally entitled to do and that his neighbour chooses to take offence thereat and to create a disturbance in consequence, it is clear that the duty of the Magistrate is, not to continue to deprive the first person of the exercise of his legal right but to restrain the second from illegally interfering with that exercise of legal right. [*ibid.*]

Abdool v. *Lakhi Narain Mandal*, 5 C. 132; 2 Ind. Dec. (N. S.) 695, followed.

An order under section 144, Criminal Procedure Code, merely reciting that in the opinion of the Magistrate there is sufficient ground for proceeding under that section does not sufficiently comply with the requirements of the law. [p. 43, col. 2.]

A vague and indefinite order which does not state any facts relating to the case or does not define the limits within which it is to operate is bad in law. [p. 44, col. 2.]

Criminal revision from an order of the District Magistrate, Monghyr, dated the 20th May 1924.

Messrs. *Atul Krishna Ray* and *Raghu Nandan Prasad*, for the Petitioner.

JUDGMENT.—This is an application in revision against an order passed by the District Magistrate of Monghyr, dated the 20th May, 1924, purporting to be one under section 144 of the Criminal Procedure Code. The order runs thus: "From an information received I consider there is a very serious danger to Mr. R. E. Blong and an imminent likelihood of a disturbance of the public peace if he proceeds back to Mahal Maheshri or Charkapathar, accordingly I issue an order under section 144, Criminal Procedure Code, forbidding him to return to Mahal Maheshri or Charkapather and as it is a case of emergency I pass this order *ex parte*.". It appears that after this order was served on the petitioner he filed a petition objecting to the order. The learned District Magistrate heard the Pleader for the petitioner, but by his order dated the 26th May, 1924, he upheld his previous order of the 20th May, 1924. The point taken by the learned Vakil for the petitioner against this order is that it contravenes the provision of section 144 inasmuch as it does not state the material facts of the case. Secondly it is argued that the order is vague and indefinite. From the order as it stands it is difficult to make out what the material facts were which led the District Magistrate to pass his order of the 20th May, 1924. The order, as it stands, no doubt, complies with the provision contained in paragraph 1 of sub-section (1) of section 144. It shows that in the opinion of the District Magistrate there was sufficient ground for proceeding under this section and immediate prevention or speedy remedy was desirable. But under section 144 something more is necessary to be done than a mere recital of the fact that in the opinion of the District Magistrate there was sufficient ground for proceeding under section 144. The second paragraph of sub-section (1) of section 144 provides that when a Magistrate is of opinion that there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may, by a written order stating the material facts of the case and served in manner provided by section 134, direct any person to abstain from a certain act.

The order, as it stands, does not state any facts relating to the case in order to show that there was any justification for making the order under section 144. From the order, as it stands, all that can be gathered is that there is danger to the petitioner himself and that there is an imminent likelihood of a disturbance of the public peace if the petitioner proceeds back to Mahal Maheshri or Charkapathar; but what the material facts were do not appear from the order. It, however, appears on a reference to the petition filed in this Court that the petitioner is the Manager of Mr. Chrestien, Mica merchant and *zemindar* of Taluka Maheshri, whose Head Office is at Charkapathar. Some time ago the petitioner was charged with having shot down a certain person named Chedi Singh of Maheshri, and that he and 21 other officers of Mr. Charestien were charged under various other sections of the Indian Penal Code, that the petitioner along with those officers was committed to the Sesssions, and the trial was held with the aid of four Assessors, and

after a trial extending over two months, the Assessors gave their unanimous opinion that none of the accused was guilty and that the learned Sessions Judge accepting the opinion of the Assessors acquitted the petitioner and other accused persons. From papers on the record it appears that certain arms and ammunition, belonging to the petitioner, were taken possession of and were in deposit in Court, that after the disposal of the Sessions case the petitioner wanted to take his arms and ammunition whereupon the Superintendent of Police represented to the District Magistrate that if the petitioner goes back to Maheshri with his arms and ammunition, there was likelihood of a breach of the peace and that the life of the petitioner was in danger. It is nowhere suggested that the breach of the peace, which was likely to take place if the petitioner returned to Maheshri or Charkapathar, would be occasioned by him. On the other hand, it appears from the order of the 20th May, 1924, that the breach of the peace was likely to be created by the other proprietors of Mahal Maheshri with whom Mr. Chrestien is in dispute and that it was in order to avert any danger to the safety of the petitioner himself that the order of the 20th May, 1924, was passed.

To my mind section 144, Criminal Procedure Code, is not intended to restrict the liberty of an individual if there is no apprehension of a breach of the peace on account of any act to be done by him. The object of section 144 is to enable a Magistrate in cases of emergency to make an immediate order for the purpose of preventing an imminent breach of the peace; but it is not intended to relieve him of the duty of making a proper enquiry into the circumstances which make it likely that such breach of the peace will occur. If it is found that a man is doing that which he is legally entitled to do and that his neighbour chooses to take offence thereat and to create a disturbance in consequence, it is clear that the duty of the Magistrate is, not to continue to deprive the first of the exercise of his legal right but to restrain the second from illegally interfering with that exercise of legal rights. *Vide* in the matter of *Abdool* v. *Lakhi Narain Mandal* (1).

If I am right in the interpretation of the order of the learned District Magistrate and if the only reason for making the order under section 144 was to save the life of Mr. Blong the petitioner and if on account of his return to Maheshri or Charkapathar there was a likelihood of a breach of the peace to be occasioned by the persons who are in dispute with him, the clear duty of the Magistrate was to take preventive action to bind those persons who were likely to cause a breach of the peace and not to restrict the petitioner from exercising his lawful rights.

In the second place the order restricts the petitioner from going back to Mahal Maheshri or Charkapathar. Now in so far as the order directs him not to go to Mahal Maheshri or Charkapathar the order is vague and indefinite. Mahal Maheshri, I am told, is a very big estate consisting of about 155 villages and extending over about 100 miles and Charkapathar is a village in Mahal Maheshri where the petitioner has got his head quarters. To restrict the petitioner from going anywhere in his *zeimindari*, and I am told that Mahal Maheshri is the only *zemindari* of which the petitioner is the manager in the District of Monghyr, I am clearly of opinion that the order is vague and is not justified by the circumstances as disclosed in the petition filed in this Court. It is indefinite inasmuch as it does not name any specific place in Mahal Maheshri where he is prevented from going.

Then if the order prohibits him from going to Mahal Maheshri, I see no reason to make the further order restraining him from going to Charkapathar which is in Mahal Maheshri. The order is, therefore, vague and indefinite. For these reasons I am of opinion that the order of the 20th May, 1924, cannot be supported. This order is set aside.

K. S. D. *Order set aside.*

(1) 5 C. 132; 2 Ind. Dec. (N. S.) 695.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 93 OF 1924.
July 18, 1924.
Present:—Mr. Hallifax, A. J. C.
Shekh GHASSU—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 34, 114, 397, 398—Dacoity - Dangerous weapons used—Offence —Sticks, whether "dangerous weapons"—Ss. 34, 114, operation of.

Section 397 and not section 398, Indian Penal Code, applies to a case in which a dacoity has been committed, not merely attempted, and weapons were not merely carried by the dacoits but were actually used by them, if only by being shown or brandished, even without verbal threats of using them. [p. 48, col. 1.]

The words of section 397 of the Penal Code do not exclude the operation of the provisions of sections 114 and 34 of the Code. [*ibid.*]

Emperor v. *Bhura Ahir*, 16 C. P. L. R. 97, not approved.

Obiter.—Sticks are deadly weapons within the meaning of section 397, Penal Code, in a country where many, if not most, murders are committed with sticks. [*ibid.*]

Appeal against the judgment of the Additional Sessions Judge, Bilaspur, dated the 15th April 1924, in Sessions Trial No. 624 of 1924.

Mr. *P. Lobo*, for the Crown.

JUDGMENT.—The appellant Shekh Ghassu and two other Musalmans, Rajab Khan and Qadir Khan, and two Chamars, Phulsai and Bhelsu, have been convicted of dacoity and each of them has been sentenced to rigorous imprisonment for three years. The appeals of the four other than Shekh Ghassu bear the numbers from 94 to 97, and all five will be considered together. The judgment of the Sessions Court would have made the case plainer if it had been accompanied by a map or had contained a statement of the relative positions of the places mentioned. The map filed as Exhibit P 20 is of little assistance as it is not drawn to any scale nor is it possible to say with any certainty to what two places each of the distances noted on it relates.

But from that map and statements appearing in the depositions and the ordinary map of the district, together with the information supplied by an Inspector of Police who was present in Court at the hearing of the appeals, the positions and distances appear to be approximately these. The village of Nirtu, one of the places mentioned, is four and a half or five miles due north of Bilaspur, where the Musalman accused live. Going north from Nirtu we come to Sendri, something less than a mile away, and then two miles further on, to Semartal, where the Chamar accused and the approver Baiju Chamar live. About half way between Sendri and Semartal is what is called the Koshta tank. Seven miles a little to the north of north-east from Semartal is the Kadesar tank in the village of Newsa, and between a mile and a half and two miles further on in the same direction is Beltara where the dacoity was committed.

The commission and the circumstances of the dacoity itself are beyond all doubt, and the fact that the approver Baiju and the two Chamar accused who confessed have separately stated most of those details correctly put is equally beyond doubt that those three took part in it, and that the story they tell is to that extent at least true. From the number of the details stated by them of the inception of the raid and the journey to and from Beltara which have been proved to be true by outside evidence, it is also clear that they have given us a true version of at least all the facts.

In this connection it must be mentioned that some confusion has been imported into the case by the idea that the witnesses were talking of a gun when they spoke of a *banduq*. Its length as stated by them, the finding of two discharged automatic pistol cartridges outside the house of Rambharos after the dacoity, and the failure of all the people who met the gang on its way to the village to notice anything like a real gun, which would be difficult to conceal, all prove that the weapon used was an automatic pistol.

GHASSU *v.* EMPEROR.

It remains only to examine the truth of the approver's story as to the identity of the persons concerned with him in the crime, the detail on which an approver is most apt to go wrong intentionally even when he sticks to the truth in every other. The proof of the complicity of the two Chamars, Phulsai and Dhelau, is complete. Both of them made confessions, stating details otherwise proved to be true which they could not possibly have known without being present, and could not even have learnt if they had been "tutored" as they assert. Both of them were also in possession when the matter was investigated of certain articles taken at the dacoity. Their guilt is established without the assistance of the depositions of Baiju and of several other witnesses who saw them with others in the gang that certainly committed the dacoity.

Before discussing the case against the three Musalmans it is necessary to examine the evidence of five witnesses which the learned Additional Sessions Judge has rejected as unreliable though quite possibly true. The first is Rambharos Kalar (P. W. No. 2), the man who was robbed. In his deposition he stated that among the men who entered his house he could swear to one only, Qadir Khan, who had a lamp in his hand and carried a pistol also. The learned Judge says: "He had expressly stated before in the Court of the Committing Magistrate that he could not identify any of the dacoits. This improvement in his memory is most suspicious and I cannot trust him in this matter." Qadir Khan was not among the accused when that statement was made to the Committing Magistrate, as he was arrested later, and the witness, as he explained, had from the beginning told the Police that he could identify one of the dacoits if he saw him. His statement to the Magistrate was obviously that he could not identify any of the accused then before him as among the dacoits, which was perfectly true.

The value of the testimony of Piyare Bhat (P. W. No. 28) is considered by the learned Judge to be reduced by the fact that he said in Court that he recognised Ghassu, Rajab, Phulsai and Dhelau among the eight men whom he saw in Newsa just before the dacoity was committed, but at an "identification parade" held in the Jail he picked out only Ghassu and Rajab. But he was well acquainted with Phulsai and Dhelau who live in his village and had already said they were there. The statement of Suleman (P. W. No. 5) that he saw Ghassu and Qadir Khan between the Koshta tank and Sendri on the day of the dacoity is accepted as reliable which it certainly is.

Of Lalji Brahmin (P. W. No. 23), who saw Dhelau, Ghassu, Phlusai and three others together about 8 o'clock the next morning at Semratal going towards Bilaspur, the learned Judge says his "evidence is extremely vague on this point and he seems to have been awakened to recollection by after-events." I am unable to find any vagueness in Lalji's deposition which is particularly definite in every detail, including the date, and also very convincing. As for his not having connected the men he saw with the dacoity till some time later, the same may be said of all the witnesses who speak of seeing the gang on its way to or from Beltara. None of them connected the men they saw with the dacoity for a long time after, but when their recollection was awakened by later information they were able to say with certainty that on a certain day of the week just about that time they saw these people together.

Dilesar Koshta (P. W. No. 25) speaks of the same incident as Lalji, and he says it was on a Friday in the second half of *Asarh*. His evidence is rejected because he may have been speaking of either the 20th or 27th of July. But Lalji's evidence puts it beyond doubt that he is speaking of the 20th; Phulsai and Dhelau and Baiju were not seen in company with Musalmans on a Friday on the road between Bilaspur and Beltara more than once during the month of *Asarh* or probably during the year 1923. Of the witness Marjat Chamar (P. W. No. 26) the learned

Judge holds that his "testimony is of no avail for he states he denied all knowledge of this when he was first questioned but that when G. I. stated to him about accused Dhelau's admission of having met the witness, he also nodded assent to it." Marjat is another witness who, when he was first questioned naturally did not connect his casual meeting some time before with Dhelau in the company of a number of strangers with the dacoity. But when the connection was pointed out to him he would naturally be "awakened to recollection" and the recollection would be quite honest and correct. As, however, Marjat says that he recognised none of the gang but Dhelau who told him Phulsai was with them and had just gone to the village, his deposition is of little consequence except as corroboration of the general story of the journey to and from Bilaspur.

Ghassu's participation in the crime is proved then by the evidence of Suleman (P. W. No. 5), Lalji Brahmin (P. W. No. 23), Dilesar Koshta (P. W. No. 25) and Piyare Bhat (P. W. No. 28), in addition to that of the approver Baiju and the confessions of the two Chamar co-accused. There the deposition of Raghunath Sahai (P. W. No. 15) to whom he paid an old debt of thirty rupees all in small change a few days after the dacoity. It also appears from the statement of Jawahir Lal Sonar (P. W. No. 40) that Ghassu was at that time in possession of more gold than he might be expected to have, but that fact cannot be regarded as more than general corroboration of the more direct evidence of his guilt. It is, however, proved by the evidence of Nabidad Khan (P. W. No. 31), Jhadu Mehra (P. W. No. 33), Abdul Rahman (P. W. No. 32), and Azim Ali (P. W. No. 34) that between the dacoity and his arrest Ghassu was in possession of much more opium than is permissible and was selling it. In the circumstances opium is as certainly a part of the stolen property as any of the personal ornaments that have been identified.

There is also corroboration of the allegation of Ghassu's connection with the crime in the statement of Sher Ali (P. W. No. 44), which proves that Ghassu sent his son and the witness to summon Phulsai from Semartal for a conference of some sort; Phulsai was undoubtedly one of the dacoits, and he and Ghassu have nothing else in common. The evidence of Sukru Panka (P. W. No. 24), further proves that shortly before the dacoity there were people in Ghassu's house with at least one "gun" of the sort that is proved to have been used at the dacoity by the two discharged cartridges picked up afterwards.

Against Rajab there is the evidence of the approver Baiju and the confessions of the two co-accused Phulsai and Dhelau, and the depositions of Suleman (P. W. No. 5), Dilesar Koshta (P. W. No. 25), Piyare Bhat (P. W. No. 28) and Khasru Teli (P. W. No. 29). Malen Mehra (P. W. No. ?) also proves that Qadir Khan was at Rajab's house a day or two before the dacoity; Qadir Khan is proved, as will be shown later, to have been one of the dacoits and that fact is, therefore, also evidence against Rajab.

As against Qadir Khan the deposition of the approver Baiju cannot be used, as it was not recorded in his presence. But in addition to the confessions of Phulsai and Dhelau, who were tried jointly with him, there is quite enough evidence to establish his guilt. Property clearly proved to be part of the property stolen in the dacoity was found in his possession when he was arrested at Cawnpur. He first of all declared that this was his own, but he has now fallen back on a futile denial of its having been found in his house at all. There is also the statement of Rambharos Kalar (P. W. No. 2) the complainant, which has already been shown to be quite reliable, and that of Suleman (P. W. No. 5) which was accepted as true in the Sessions Court, as it undoubtedly is. It is beyond question that the guilt of all the five accused who have been convicted is established, and all their appeals will be dismissed.

The Local Government has applied for an enhancement of the sentence passed on each accused, and it is convenient to discuss the matter in this

judgment. The facts are these. A gang of eight dacoits raided the house and removed property worth less than three rupees short of Rs. 5,000. One of them carried a pistol, with which he fired two shoots to frighten the people of the house; he also threatened to shoot with it, holding it in his hand. All the others knew he had the pistol and joined in the threats, and those others were also all armed with sticks, some of which were used on the people of the house. Each of them was charged in addition in the Sessions Court with being armed with a deadly weapon while attempting to commit dacoity (section 398, Indian Penal Code).

Section 398 has certainly no application to the case; the dacoity was committed, not merely attempted, and any weapon in the hands of any of the dacoits was used, not merely carried, if only by being shown or brandished even without verbal threats of using it. It is proved that all the dacoits had sticks and in a country where many, if not most, murders are committed with such sticks it can hardly be suggested that they are not "deadly weapons." Every one of the dacoits was, therefore, guilty of an offence punishable under section 397 with imprisonment for not less than seven years, whether he used a pistol or merely a stick.

They must be held all equally punishable under that section from another point of view. With all respect, I am unable to accept the implied though unexpressed view taken by Drake-Brockman, J. C., in *Emperor* v. *Bhura Ahir* (1) that the words of section 397 of the Penal Code exclude the operation of the provisions of section 114 of the same Code, or even of section 34. The matter is, however, of academic interest only, as it is shown by the result to have been in the case mentioned. If a man takes an active part in a dacoity in which another uses a deadly weapon as a part of the common plan of operations, he certainly ought not to get any less punishment than the man who actually uses the weapon whether he can legally get it or not.

(1) 16 C. P. L. R. 97.

The circumstances of this crime also make the sentences most inadequate. The Musalmans met in Bilaspur for the purpose of committing a dacoity somewhere and after enquiry ascertained that the house of Rambharos in Beltara was suitable for the purpose. The whole affair was planned with care and carried out with almost impudent daring, in that spirit of lawlessness and contempt for authority of which the prevalence demands a deterrent sentence. The property recovered was less than a tenth of that stolen, and the dacoits are still in possession of as much as is worth more than Rs. 4,500. The learned Judge's only stated reason for imposing the light sentences he did was that "no serious act of violence" was committed. The whole affair was a series of the most serious possible acts of violence, and the learned Judge was probably referring to the fact that no serious hurt was inflicted on any body. That was due to the absence of resistance, and cannot be counted for righteousness to the dacoits, who went there fully prepared to commit murder if necessary and threatend to commit it.

The two Chamar accused were merely tools in the hands of the Musalmans. They were ill paid and have given up practically all of the very small share in the booty that was given to them. For these reasons I consider that the sentence of three years' rigorous imprisonment passed on each of them, though insufficient, is not inadequate to such a degree as would justify enhancement. The case of the Musalmans is, however, very different. A very small amount of property was recovered from Qadir Khan, but it is clear that each of them has still just about fifteen hundred rupees' worth of the stolen property hidden away somewhere. The least punishment that could have been inflicted on them under section 397, under which they ought to have been convicted.

For these reasons the sentence I consider the least that is adequate for each of three Musalman accused is one of rigorous imprisonment for eight years, which will include solitary confinement

for three months, and a fine of fifteen hundred rupees, with further rigorous imprisonment for two years in default of payment of the fine. The sentences of *Shekh* Ghassu, Rajab Khan and Qadir Khan will be enhanced accordingly, and it will also be ordered that so much of the fine as is recovered will be paid as compensation to Rambharos Kalar.

G. R. D. *Sentences enhanced.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 959 OF 1923.
(CASE REFERRED No. 130 OF 1923).
March 4, 1924.

Present:—Mr. Justice Venkatasubba Rao.

S. B. VARADARAJALU—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Whipping Act (IV of 1909), s. 3—"Punishment," meaning of—Sentence of imprisonment or fine, if can be added to whipping.

The word "punishment" in section 3 of the Whipping Act means "the total of punishments awardable." In lieu of punishing an offender with imprisonment and fine, the Court may punish him with whipping but it cannot sentence him to whipping and also impose a fine.

Queen-Empress v. *Dagadu*, 16 B. 357; 8 Ind. Dec. (N. S.) 716, followed.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the Sessions Judge, North Arcot, in his letter, dated the 14th December 1923.

Mr. *P. G. Krishna Aiyar*, for the Accused.

The Public Prosecutor, for the Crown.

ORDER.—The word "punishment" in section 3 of the Whipping Act, has been interpreted as the "total of punishments awardable" by the learned Judges who decided *Queen-Empress* v. *Dagadu* (1). In lieu of punishing the offender by sentencing him to imprisonment and imposing on him a fine, the Court may punish him with whipping. The portion of the sentence, imposing the fine, must, therefore, be set aside. I accordingly do so and direct that the fine be refunded.

V. N. V. *Sentence partly set aside.*

(1) 16 B. 357; 8 Ind. Dec. (N. S.) 716.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 365 OF 1924.
August 16, 1924.

Present:—Mr. Wazir Hasan, A. J. C.

MR. ABDUL AZIZ—COMPLAINANT—APPLICANT

versus

GANESH PRASAD AND ANOTHER—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer—Magistrate, cross-examining witnesses and disallowing questions of complainant—Reasonable apprehension of not receiving justice.

A Magistrate should not cross-examine frequently the prosecution witnesses, nor should he disallow as irrelevant the questions which the complainant may wish to put to defence witnesses with a view to show their partiality. However, even if he acts in such a manner, it cannot be held that his conduct gives rise to a reasonable apprehension in the mind of the complainant that his case will not receive a fair trial at the hands of the Magistrate.

Application under section 526, Criminal Procedure Code for transfer of a case under sections 435 and 457, Indian Penal Code, from the District of Sultanpur to some other district.

Mr. *Hyder Husain*, for the Applicant.

Mr. *S. N. Roy*, for the Opposite Party.

The Government Pleader, for the Crown.

ORDER.—This is an application for transfer of a case pending in the Court of a First Class Magistrate at Sultanpur under section 526 of the Code of Criminal Procedure. I have heard arguments at great length with respect to every ground of the application and have also read the exhaustive explanation furnished by the District Magistrate of Sultanpur. There is no doubt that proceedings reveal some lapses of procedure on the part of learned Deputy Magistrate. I am unhesitatingly of opinion that the learned Magistrate should not have taken upon himself the task of frequently cross-examining the prosecution witnesses nor was he right in disallowing certain questions on the ground that they were irrelevant, which the complainant wanted to put to the defence witness, Babu Ganpat Sahai. I purposely refrain from incorporating the nature of those questions in my order but this much I can

say that the tendency of the questions which the applicant wanted to put to that witness was to show that the witness was not impartial. On the whole, however, I am not prepared to hold that the learned Magistrate acted in such a manner as to give rise to a reasonable apprehension in the mind of the applicant that his case will not receive a fair trial at the hands of the Magistrate, in whose Court it is pending. I feel convinced that the learned Magistrate is quite capable of doing complete justice and that he has not in any manner developed any bias against the complainant. The application is, therefore, dismissed.

S. D. *Application dismissed.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 131 OF 1924.

March 24, 1924.

Present:—Mr. Justice Adami and Justice Sir John Bucknill, KT.

BHOLA SINGH—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 423—Appellate Court, powers of—Alteration of sentence amounting to enhancement.

The Trial Court sentenced the accused to rigorous imprisonment for two months and a fine of Rs. 50 or in default one month's rigorous imprisonment. On appeal the District Magistrate changed the sentence to one of one month's rigorous imprisonment and a fine of Rs. 200 or in default to two months' rigorous imprisonment. On an application for revision:

Held, that the sentence awarded by the District Magistrate amounted to an enhancement of the sentence passed by the Trial Court and could not be allowed to stand.

King-Emperor v. *Sagwa*, 23 A. 497; A. W. N. (1901) 176, followed.

Criminal revision from a decision of the District Magistrate, Shahabad, dated the 12th February 1924.

Messrs. *Tribhuan Nath Sahay* and *Janak Kishore*, for the Petitioner.

JUDGMENT.—The only point urged before us in this application is that the change made in the sentence by the learned District Magistrate is not in

accordance with law. The petitioner was convicted under section 429, Penal Code, by the Deputy Magistrate of Sasaram and sentenced to rigorous imprisonment for two months and to a fine of Rs. 50 or in default one month's rigorous imprisonment. On appeal the learned District Magistrate has changed the sentence to one of one month's rigorous imprisonment and a fine of Rs. 200 or in default to two months' rigorous imprisonment. On the authority of the case of *King-Emperor* v. *Sagwa* (1) this latter sentence amounts to an enhancement of the sentence passed by the Trial Court, for supposing the fine is not paid the petitioner would have to undergo three months' rigorous imprisonment and still be liable to the fine. To regularise this sentence the imprisonment in default of payment of fine of Rs. 200 will be reduced to rigorous imprisonment for one month in default.

K. S. D. *Sentence reduced.*

(1) 23 A. 497; A. W. N. (1901) 176.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE No. 983 OF 1923.

April 3, 1924.

Present:—Mr. Justice Greaves and Mr. Justice Duval.

BALARAM KUNDU—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 457—House trespass with intent to commit adultery—Husband's consent or connivance, proof of—Charge, frame of—Defect in form—Prejudice to accused—Defect, whether cured—Criminal Procedure Code (Act V of 1898), s. 537.

The Court has got to be satisfied before convicting a person of an offence under section 457 of the Penal Code, when the offence charged is of house trespass with intent to commit adultery, that there was no consent or connivance by the husband.

A charge stating that the accused did a particular act in order to commit a certain offence "or any other offence punishable with imprisonment" is improper as the accused should know the specific offence with which he is charged.

BALARAM KUNDU *v.* EMPEROR.

When however the accused does not suffer any prejudice the defect in the form of the charge is curable by the provisions of section 537 of the Criminal Procedure Code.

Mr. *Gregory* and Babu *Pannalal Chatterjee*, for the Petitioner.

Mr. *Khandkar*, for the Crown.

JUDGMENT.—This is an open Rule which was granted at the instance of the accused who had been convicted of an offence under section 457 of the Indian Penal Code. Two points were urged before us on behalf of the petitioner. First, it is said that the conviction cannot stand having regard to the frame of the charge. The charge was in this form. That the accused on a certain date "committed house breaking by night by entering into the hut of Purna Pal through a window and quitting the same through the eastern door between the hours of sunset and sun-rise in order to the committing of adultery with Purna Pal's wife or any other offence punishable with imprisonment".....and it is stated that having regard to these words "or any other offence punishable with imprisonment" the charge is vague and bad and that the accused has been prejudiced thereby. There is no doubt that the charge in this form "or any other offence punishable with imprisonment" is an improper form in which to frame a charge for it is elementary that the accused should know the specific offence with which he is charged. But he was charged with a specific offence of house breaking by night in order to commit adultery with Purna Pal's wife and no other evidence was laid by the prosecution except with regard to this charge. Under the circumstances, therefore, we think that the defect in the charge is cured by the provisions of section 537 of the Code of Criminal Procedure. The first point, therefore, fails.

Secondly, it is urged that the conviction cannot stand because there is no evidence that the lady's husband did not consent to or connive at the act and it is said that having regard to the provisions of section 497 of the Indian Penal Code, no conviction under section 457 can follow unless there is evidence that the husband did not consent or connive if the charge under section 457 is one of house trespass with intent to commit adultery. As against this it is urged that the real offence under section 457 is the committing of lurking house trespass but having regard to the provisions of section 441 of the Indian Penal Code we think this is not so. Accordingly, it seems to us, that the Court has got to be satisfied before convicting a person of an offence under section 457 when the offence charged is of house trespass with intent to commit adultery that there is no consent or connivance by the husband. The husband was not in this case the complainant as he was absent at the time of the commission of the alleged offence and the actual complaint was lodged by a constable to whom the complaint had been made. The husband, however, was examined in the course of the trial as a Court witness and he answered one question put to him by the Court in these terms: "I want redress for the wrong done to me and to my wife:" Moreover, it does appear that the entry of the accused into the house was a forcible entry and not through a open door or window as was suggested by the defence. In the circumstances, we think that there is evidence on the record that the husband did not consent or connive at the attempt of the accused to commit adultery on his wife. We do not think that it is necessary that the husband should have been specifically asked whether he actually consented or connived at the accused's attempt to commit adultery if there is otherwise evidence on the record that there is no such consent or connivance.

In the circumstances, the Rule is discharged.

The petitioner must surrender to his bail-bond and serve out the rest of the sentence.

K. S. D. *Rule discharged.*

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 286 OF 1923.
January 23, 1924.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Justice Sir Lallubhai Shah, Kt.

TYABALLI MULLA LUKMANJI—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Bombay District Municipal Act (III of 1901), ss. 3 (12), 96—Bye-laws of Kurla Municipality—Bye-law 132, meaning of—Street, definition of—Open space between buildings, whether street.

While the owner of a large area of building land is erecting buildings thereon, the open spaces between the buildings cannot be considered as streets within the meaning of section 3 (12) of the Bombay District Municipal Act, until the buildings are finished, as the owner has a right to prevent all other persons from using his private land.

Bye-law 132 of the Bye-laws of the Kurla Municipality means that no point of a building must be at a greater height from the ground than the distance from the farther edge of the street on which the building abuts, to the end of the vertical line drawn from that point at the top of the building.

Criminal appeal against the conviction by the City Magistrate, Bandra.

Mr. *G. N. Thakur*, for the Appellant.

Mr. *R. W. Desai*, for the Crown.

JUDGMENT.—We think this Rule must be made absolute. The accused was sentenced to pay a fine of Rs. 50 for contravening the Bye-law No. 132 of the Kurla Municipality, read with section 96 of the Bombay District Municipal Act. It was for the prosecution to prove that the building contravened the bye-law. The accused had given notice of what he intended to build, and the Municipality did not answer the request within a month, so the accused was entitled to build, provided he did not contravene the provisions of the Act or any bye-law then in force. The complainant contended that Bye-law No. 132 had not been complied with, and if the open space between block A, on the plan, and the block opposite it, is a street, then it must be admitted that the bye-law had been contravened. But it was for the prosecution to show that that space was a street. The Magistrate says "the defence has not shown that the occupier of the building has a right at all hours to prevent all other persons from using it or part of it as aforesaid."

We must assume that the buildings had not been completed at the time that the charge was laid, and so the owner of the premises would still be considered as the occupier of the building which was being erected, and it would be in his power to prevent all persons from using the space between the buildings until they were let out to tenants. The result must be that while the owner of a large area of building land is erecting buildings thereon, the open spaces between the buildings cannot possibly be considered as streets until the buildings are finished, as clearly the owner has a right to prevent all other persons from using his private land. It was, therefore, open for the Municipality to refuse permission under section 96 of the Act within the time allowed. Otherwise the owner was entitled to go on with the building and it cannot be said that any of the open spaces on his private property which were not built upon were streets within the meaning of the definition of street in section 3 (12) of the Bombay District Municipal Act. That being the state of the evidence in this case, it seems there is no evidence that this vacant space was a street, and, therefore, no bye-law has been contravened.

We may also mention that we do not think that the construction placed by the Magistrate on Bye-law No. 132 is correct. It clearly means that no point of the building must be at a greater height from the ground than the distance from the farther edge of the street, on which the building abuts, to the end of the vertical line drawn from that point at the top of the building. The Rule is made absolute, the conviction and sentence set aside and the fine, if paid, to be refunded.

Z. K. *Rule made absolute.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 94 OF 1924.
July 21, 1924.
Present:—Mr. Pullan, A. J. C.
CHHEDA KHAN—ACCUSED—APPLICANT
versus
EMPEROR THROUGH HARIHAR DAT—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 209, 253, 436—Inquiry preliminary to commitment—Accused, when to be committed—Magistrate, duty of—Order discharging accused, reasons for—Sessions Judge, powers of.

A Magistrate is not compelled to commit to Sessions any case in which he considers that conviction is impossible. [p. 53, col. 2.]

Dharam Singh v. *Joti Prasad*, 28 Ind. Cas. 1005; 37 A. 355; 13 A. L. J. 497; 16 Cr. L. J. 429, *Fattu* v. *Fattu*, 26 A. 564; A. W. N. (1904) 125; 1 A. L. J. 292; 1 Cr. L. J. 510, *Lachman* v. *Juala*, 5 A. 161; A. W. N. (1882) 223; 3 Ind. Dec. (N. S.) 169, *In re Bai Parvati*, 8 Ind. Cas. 631; 35 B. 163; 12 Bom. L. R. 923; 11 Cr. L. J. 692, referred to.

A Magistrate must however exercise a proper discretion in ordering the discharge of any person charged with an offence triable only by a Court of Session. It is not enough for the Magistrate merely to doubt some portions of the prosecution evidence. He must be satisfied that the prosecution will fail and rightly fail in the Sessions Court. [p. 54, col. 1.]

The report made to the Police of a dacoity mentioned, among others, one *C* but the senior investigating officer dropped proceedings against *C*, and certain other persons were committed to Sessions and convicted. On appeal the Judicial Commissioner passed an order directing that the charge against *C* be enquired into and dealt with according to law. The Magistrate who held the enquiry, after recording the prosecution evidence, discharged *C*, but the Sessions Judge set aside the order of discharge and committed *C* to Sessions. *C* filed a petition of revision:

Held, that in the face of the Judicial Commissioner's order directing that the accused should be put on his trial, the Magistrate was ill-advised in refusing to commit the accused to Sessions, and that it was a case in which a definite pronouncement should be given by the Court empowered to try the offence with which the accused was charged. [p. 54, cols. 1 & 2.]

Revision application under sections 435 and 439, Criminal Procedure Code, against an order of the Additional Sessions Judge, Bahraich, dated the 27th June 1924, committing the applicant to the Sessions in reversal of an order of the Magistrate, First Class, Bahraich, dated the 4th March 1924.

Mr. *Muhammad Hafiz*, for the Applicant.

ORDER.—This is an application in revision of an order passed by the Additional Sessions Judge of Gonda setting aside the order of a Magistrate of the First Class discharging Chheda Khan applicant, and committing the said Chheda Khan to Sessions on a charge under section 395, Indian Penal Code. There is no question that the learned Additional Sessions Judge was acting within his powers in ordering the commitment of the applicant and there is no illegality in his order. The case presents some peculiar features which it is advisable to narrate in detail. A dacoity was committed in the house of Harihar Dat in January 1924 in the absence of the owner. A report was made at the Police station naming among others Chheda Khan. The Police Officers who investigated the case held different opinions as to the offence committed and the persons who should be charged. As the result of the orders of the Circle Inspector who was the senior investigating officer, proceedings against Chheda Khan were dropped. Ultimately, however, certain other persons were committed to Sessions on a charge of dacoity and four were convicted. Both the Sessions Judge and the learned Judicial Commissioner on appeal criticized the Police investigation and the Judicial Commissioner passed an order to the following effect :—

"In view of the evidence adduced in this case it is desirable that the prosecution of Chheda should have been proceeded with and his guilt or otherwise determined by a competent Court. The charge against Chheda will be be inquired into.....and dealt with according to law."

The Magistrate, to whom the inquiry was entrusted, recorded the prosecution evidence and also that of the Circle Inspector and discharged the accused. It is well-established that a Magistrate is not compelled to commit to Sessions any case in which he considers that a conviction is impossible. I need only refer to the case reported in *Dharam Singh*

v. *Joti Prasad* (1). In that case, however, the Magistrate not only disbelieved the evidence for the prosecution but he also recorded evidence for the defence which, in his opinion, rendered a commitment to Sessions improper. The judgment in that case followed an earlier ruling in *Fattu* v. *Fattu* (2) and is on all fours with the still earlier ruling reported as *Lachman* v. *Juala* (3) and with that of the Bombay High Court reported as *In re Bai Parvati* (4). A Magistrate, however, must exercise a proper discretion in ordering the discharge of any person charged with an offence triable only by a Court of Session. It is not enough for the Magistrate merely to doubt some portions of the prosecution evidence. He must be satisfied that the prosecution will fail and rightly fail in the Sessions Court. In the present case a perusal of the Magistrate's order does not show that he had any convincing reasons for discharging the accused. He did not hear the defence evidence and the discrepancies which he noticed in the statements of the prosecution witnesses are not such as to render a conviction impossible or even unlikely. The mere fact that the complainant is a personal enemy of the accused is a very doubtful argument. The complainant himself admits the fact and argues that on account of this enmity the accused organised a dacoity at his house. It is apparent from the last page of the Magistrate's order that he has not fully appreciated the case-law to which he refers. In the present case also in addition to the fact that the Magistrate's reasons for discharging the accused are not convincing there is an order by the highest judicial authority in Oudh that the accused should be put on his trial. In face of that order the Magistrate was ill-advised in refusing to commit the accused to Sessions. This is obviously a case in which a definite pronouncement should be given by the Court empowered to try the offence with which the accused is charged. I, therefore, decline to interfere with the order passed by the learned Sessions Judge and dismiss the application.

K. S. D. *Application dismissed.*

(1) 28 Ind. Cas. 1005; 37 A. 355; 13 A. L. J. 197; 16 Cr. L. J. 429.
(2) 26 A. 564; A. W. N. (1904) 125; 1 A. L. J. 292; 1 Cr. L. J. 510.
(3) 5 A. 161; A. W. N. (1882) 223; 3 Ind. Dec. (N. S.) 169.
(4) 8 Ind. Cas. 631; 35 B. 163; 12 Bom. L. R. 923; 11 Cr. L. J. 692.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 375 OF 1924.
June 25, 1924.

Present :—Mr. Cecil Henry Walsh, Actg. Chief Justice, and Mr. Justice Ryves.

KHANJAN AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 304, 436—Fire to building—Conviction under s. 436—Proof, nature of—"Ordinarily used," meaning of—Attack on village Chamars—*Child deserted by* Chamars *in* chaupal—*Accused setting fire to* chaupal—*Death of child.*

It is absolutely necessary, in order to convict under section 436 of the Penal Code, to prove that the building which the accused destroyed came within one of the three classes mentioned in the section, and the words "ordinarily used" do not mean that other buildings are from time to time used for purposes such as those stated in the section but they mean that that particular building is itself used. [p. 55, col. 2.]

Certain villagers were convicted under sections 304 and 436, Penal Code, for having made an attack on the *Chamars* of the village, resulting in the destruction by fire of their *chaupal*, and the death of a child therein. It appeared that on being attacked, the *Chamars* fled from the spot and left the child inside the *chaupal*. There was no evidence that the *chaupal* was ordinarily used as a human dwelling or for one of the other purposes specified in section 436. Nor did the accused know that the child was inside when they set fire to it :

Held, that under the circumstances no offence under section 304 or section 436, Penal Code, had been established. [p. 56, col. 1.]

Criminal appeal from an order of the Sessions Judge, Budaun, dated the 11th April 1924.

Mr. *G. W. Dillon*, for the Appellants.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

Walsh, Actg. C. J.—This is an appeal against a conviction of eight people for a variety of offences which may be compendiously described as an unjustifiable and lawless attack enforced upon some low caste inhabitants of the village over a grievance, or a fancied grievance, resulting in serious injury, including the fracture of an arm to two men, the unfortunate death of a little child who was deserted by the *Chamars* who fled from the spot, the destruction of a *chaupal* of small value, but which no doubt cost money to these *Chamars*, and a general riot. It is probably idle to protest against the multiplication of the sections which the lower Courts persist in making in order to cover every conceivable offence that the facts may possibly establish in the course of a trial. It is not as a rule a convenient practice and this is a good example of the serious consequences which may arise from surplusage. With all respect to the learned Judge who tried this case, he has overlooked certain legal difficulties. How this child got into the *chaupal* no one knows precisely. It is not alleged that the accused knew that the child was inside; it would be difficult, and even wrong, to assume against them that they knew, or ought to have known, that it was likely to get inside. The natural conduct of a father, or anyone else at a disturbance of this kind, with a child in his arms, is not to leave it behind, and the natural conduct of a child is not to slip from a comfortable seat in the arms of a man on to the ground, and it is impossible to resist the conclusion that this child was deliberately left behind when its life might have been saved by the man who had the charge of it. But none of this speculation can be fairly brought within a measurable distance of the inference that the accused persons were likely to know that the child was within the zone of danger. If on the other hand, as my brother pointed out in argument, it were proved against them that they knew that the child was there at the time they set fire to this inflammable erection, it is not a case under section 304; it would be a case under section 302, and the only fair inference to draw as regards the conviction under section 304 is, that the Judge did not have the case presented to him in such a way as to give him an opportunity of working it out. It is unreasonable to drag in section 304, which has no application, and in that respect the appeal must be allowed and the convictions quashed. Much the same must be said about 436. Here again the mistake the Judge has made is probably due to the multiplicity of offences and to his failure really to study the section in the light of the facts with which he had to deal. Whatever the reason of the Legislature may have been the fact remains that the section is narrowly confined to the destruction of any building; (the word "any" in that sense meaning, a certain building, or a particular building) which is ordinarily used as a place of worship, as a human dwelling, or as a place for the custody of property. It is absolutely necessary, in order to convict an accused under this section, to prove that the building which he destroyed came within one of those classes, and the words "ordinarily used" do not mean that other buildings are from time to time used for such purposes, but they mean that that particular building is itself used. Of course, if there were evidence that this *chaupal* had been used as a human dwelling, it would be brought within the section, but in the absence of evidence of that kind, no offence under section 436 is established, and it is really a startling thing to find two people sentenced to ten years' imprisonment under a section which has no application whatever to the offence charged. Looking through the sections which are germane to this matter, we come to the conclusion really that section 426, the mere commission of mischief, happens to be the only one which is applicable. It does not really matter, as the learned Judge has said that the worst part of this case is the lawlessness the rioting and the injury done to the person, and in our opinion even if this *chaupal* had been ordinarily used so as to come within section 436, a sentence of ten years' imprisonment is

wholly disproportionate to any possible aspect of the crime from a moral point of view, provided that that part of their misconduct, namely the setting of fire, is reasonably included in, and taken to aggravate, the general lawless conduct of which they have been convicted under sections 147 and 325. We think, we ought to differentiate between the degrees of guilt in this case. It is obvious that Mul Chand and Khanjan were the ring-leaders. Indeed they were the persons interested in the complaint against these *Chamars*. We think the punishment ought to be severe on the ground stated by the learned Judge, namely, the necessity for a deterrent punishment with a view to putting a stop to this type of lawlessness. It need hardly be said that none of our observations on the legal aspects of the case ought to be taken as in the least discounting the very serious risk of setting fire to any thatch or any building or erection in an Indian village where the climate is excessively dry. In a high wind terrible devastation and possible loss of life may follow. The result is that we agree with the learned Judge in taking the serious view which he did of the offence. We allow the appeal and quash the convictions under sections 304 and 436. We confirm the convictions under sections 147 and 325 and vary the sentences by sentencing Khanjan and Mul Chand to five years' rigorous imprisonment each in the aggregate. It may be distributed in any way they like between the two sections. Probably the lawful would be two years under section 147, and three years under section 325 to run consecutively; but that is of no consequence, they get five years each in the aggregate, and the rest of them three years each in the aggregate.

Ryves, J.—I agree in the proposed order. It seems to me that the charge under section 304 on the facts of the case is quite impossible. To bring a case under section 304 it is necessary to apply section 299: "Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide". The offence of culpable homicide may be murder or culpable homicide not amounting to murder. In this case the charge is not of murder, that is to say, the accused are not charged with having intended to cause the death of the child. Therefore, the case against them must come under the second clause of that section, or the third clause. Did they when they set fire to the *chaupal* intend causing such bodily injury as was likely to cause death? The answer on the finding must be, no, because they did not know that the child was there and, therefore, they could not have intended to cause any bodily injury to it. Lastly, they must have known that they were likely by such act to cause death, namely, that by setting fire to this *chaupal* they were likely to cause the death of the child or of some other person. On the finding again, it seems impossible to hold that there was any likelihood in their minds that setting fire to this *chaupal* would do anything more than consume the materials with which it was built. A *chaupal* is not ordinarily a place of dwelling, it may be used as such no doubt, but there is no evidence in this case that it was so used. When the *Chamars* ran out of the *chaupal* these accused could not possibly have any reason whatever to think that they had left behind a child inside. It seems to me that the death of this unfortunate child was a pure accident, and the person really responsible for it was the father who left it behind when he ran away. I agree also that section 436, on the evidence in this case, is not applicable.

N. H. *Appeal partly allowed.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 693 OF 1923.
(CRIMINAL REVISION PETITION No. 552 OF 1923.)
February 28, 1924.

Present:—Mr. Justice Venkatasubba Rao.

SETTI RANGAYYA—ACCUSED—PETITIONER

versus

SOMAPPA—COMPLAINANT—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 417, 420, distinction between—Jurisdiction, absence of—Objection by accused—Trial, whether vitiated—Second Class Magistrate, jurisdiction of.

No Tribunal can properly clutch jurisdiction by intentionally ignoring facts of aggravation which make the offence really cognizable only by a higher Tribunal; and where the accused himself has objected to the jurisdiction, in the lower Courts, the High Court will interfere in revision and set aside the conviction.

High Court Proceedings, 26th October 1885, No. 517, 2 Weir 21, followed.

Section 417, Penal Code, deals with cheating generally; but section 420 deals with that aggravated species of cheating which involves delivery of property or destruction of valuable security.

A Second Class Magistrate has no jurisdiction to try an offence under section 420, Penal Code, though one under section 417 is triable by him.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment, dated the 24th of July 1923, of the Court of the Sub-Divisional, First Class Magistrate, Gooty, in Criminal Appeal No. 31 of 1923, preferred against the judgment of the Court of the Stationary Sub-Magistrate, Tadpatri, in C. C. No. 122 of 1923.

Dr. S. *Swaminadan*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—The facts as set forth in the charge do undoubtedly constitute an offence under section 420, Indian Penal Code. Objection to jurisdiction was taken by the accused on the ground that the offence was not cognisable by a Second Class Magistrate and the objection was again pressed in appeal. It was overruled, the reason given being that there is no distinction between sections 417 and 420. This is of course clearly wrong. Section 415 defines cheating. It consists of two parts (1) fraudulently or dishonestly inducing the person deceived to deliver any property or to consent that any property shall be retained (2) intentionally inducing the person deceived to do or omit to do anything which he would not do or omit if he were not so deceived, if the act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

Section 417 deals with cheating generally; but section 420 deals with that species of cheating which involves delivery of property or destruction of valuable security. Section 417 prescribes punishment for simple cheating and section 420 lays down the sentence for the aggravated form of the offence. An offence under section 417 is triable by a Magistrate of the Second Class whereas that under section 420 is not so triable. The distinction was ignored by the lower Courts. In *High Court Proceedings, 26th October 1885, No. 517* (1) the learned Judges observe thus: "But the doctrine that no Tribunal can properly clutch jurisdiction by intentionally ignoring facts of aggravation which make the offence really cognizable only by a higher Tribunal still holds good, and where the accused has himself objected to the jurisdiction, it is possible that the High Court would feel itself bound to interfere; that it is not then a mere matter of discretion even with the High Court whether the conviction should be allowed to stand."

With respect I follow the decision and hold that the Second Class Magistrate had no jurisdiction to deal with the case.

Apart from this, I must say that the accused has been unnecessarily harassed. If technically he was guilty of cheating, the punishment inflicted is out of all proportion to the offence. I cannot help remarking that the conduct of the complainant, the Reddy, is open to grave reproach. He dealt with public monies as if they were his own, kept back the complainant's brass vessel and indulged in vile abuse.

The sentence and conviction are set aside and the order of compensation is also reversed.

V. N V. *Conviction set aside.*

(1) 2 Weir 21.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 82 OF 1924.
August 4, 1924.
Present:—Mr. Pullan, A. J. C.
MAKHDUM—ACCUSED—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 342 (2)—Accused making false charge against Police Officer to Magistrate not trying his case, whether protected.

Section 342 of the Criminal Procedure Code protects an accused person from punishment for giving false answers to Court, but does not protect him when he goes out of his way to a Court which is not trying him and makes a false charge against other persons.

Application for revision under sections 435/439, Criminal Procedure Code, against an order of the Sessions Judge, Gonda, upholding an order of the District Magistrate, Gonda, dated the 30th November 1923.

Mr. *Moti Lal Saksena*, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—This is an application in revision of an order of the Sessions Judge of Gonda declining to interfere with an order of the District Magistrate of the same district ordering the applicant to be prosecuted under section 182, Indian Penal Code. The applicant is one of the persons accused of taking part in the *Muharram* riots at Gonda in 1923. When that case was still before the Magistrate, this man went to the District Magistrate and made a report against the Circle Inspector of Police. It appears that the District Magistrate thought that this report was false and known to be false by the applicant. He accordingly ordered his prosecution under section 182, Indian Penal Code. The Sessions Judge refused to interfere with the order pointing out that it had been delayed for over six months and it was purely an attempt to take advantage of the fact that the Judge himself had only recently taken over charge of the District. The main ground of revision is that the applicant being an accused person is protected by section 342, Criminal Procedure Code. But this section only protects an accused person in Court. It does not protect him when he goes out of his way to a Court which is not trying him and makes a false charge against other persons. It does not appear that the District Magistrate acted illegally or failed to show a proper discretion in this matter. There is no ground for interference in revision and the application is rejected.

S. D. *Application rejected.*

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 252 OF 1923.
October 18, 1923.
Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Crump.
In re P. D. SHAMDASANI—APPLICANT.

Companies Act (VII of 1913), s. 136 (1)—Banking Company—Duty to publish statements on specified dates—Omission in good faith, whether justified.

The omission of a limited Banking Company to publish the statements specified in section 136 (1) of the Companies Act on the dates indicated in the section, cannot be justified by the fact that the omission was due to a change in the closing date of the financial year of the Company and that the officers of the Company imagined in good faith that this justified a change in the dates on which the statements were required to be published. The officers of the Company are in such a case liable to be dealt with under sub-section (4) of section 136.

Application in revision against an order passed by the Acting Third Presidency Magistrate, Bombay.

Mr. *Kanga*, Advocate General (with him Messrs. *Kemp* and *B. J. Desai*) instructed by Messrs. *Captain* and *Vaidya*, for the Bank.

Mr. *S. S. Patkar*, Government Pleader (with him Mr. *A. Kirke Smith*), Acting Public Prosecutor, for the Crown.

JUDGMENT.—This application arises out of the information filed by the present petitioner in the Court of the Third Presidency Magistrate in respect of a default said to have been committed by the Union Bank of India, Limited, and by their Managing Director and Agent

under section 136 of the Indian Companies Act. The default alleged was that in accordance with the requirements of section 136, sub-section (1), this limited Banking Company failed to publish a statement on the first Monday in February 1922, on the first Monday in August 1922, and on the first Monday in February 1923. The learned Presidency Magistrate after hearing the parties made this order:—"There is no case for process. Complaint dismissed under section 203, Criminal Procedure Code."

The present application is made by the original complainant for a revision of this order praying for a further inquiry. We have heard the parties in connection with the point arising in this application. The learned Government Pleader for the Crown contends that the order of the Magistrate is wrong, but he informs the Court that under the circumstances he is instructed not to press for any further inquiry into this matter. The learned Counsel for the opponents, the Company and its officers is unable to satisfy us that the provisions of section 136 have been complied with. The explanation offered is that as there was a change in their financial year, in the sense that in 1922 the financial year ended on March 31, 1922, they put up a statement as required by section 136 on the first Monday in May 1922, on the first Monday in November 1922, and then lastly, on June 5, 1923. It is conceded, however, by the Counsel on behalf of his clients, and quite properly conceded, that it is not possible to justify this kind of departure from the provisions of section 136, whatever be the good faith of the officers of the Company in acting upon the view that a change in their financial year as indicated above would justify their action. The words of section 136 are clear, and the only complaint in the present case is that at the proper dates indicated in that section these statements had not been put up. There is no complaint that the statements as put up do not otherwise satisfy the requirements of that section. We are wholly unable to appreciate the reasons which led the Magistrate to make the order. In fact there is no defence to this information, and we cannot understand how this complaint could have been dismissed under section 203, Criminal Procedure Code, or how it could be said that there was no case for process. It is quite clear that the Company and their officers have rendered themselves liable to the penalty provided in sub-section (4) of section 136 of the Act. This is the first case of its kind brought to our notice; and having regard to the facts stated on behalf of the Company, to the fair attitude taken up on behalf of the Company and its officers and to the fact that the Crown has not pressed for any further orders, we think that it will be sufficient, under the circumstances of this case, to note that the Company and its officers have been guilty of a default under section 136 of the Indian Companies Act and have rendered themselves liable to be dealt with under section 136, sub-section (4). Beyond this we do not consider it essential, under the special circumstances of this case, to make any further order.

Z. K. *Order accordingly.*

SIND JUDICIAL COMMISSIONER'S COURT.

APPLICATION No. 138 OF 1921.
September 18, 1922.
Present:—Mr. Kennedy, J. C., and Mr. Raymond, A. J. C.
SALEH SHAH—APPLICANT
versus
EMPEROR—OPPONENT.

Criminal Procedure Code (Act V of 1898), ss. 195, 236—Penal Code (Act XLV of 1860), s. 193—Perjury—Contradictory statements in civil and criminal proceedings—Alternative charge—Series of acts—Sanction to prosecute—Application to both Courts, whether necessary.

It is only when the contradictory statements in respect of which a prosecution for perjury is instituted, constitute a "series of acts" that an alternative charge can be framed under section 236 of the Criminal Procedure Code. [p. 61, col. 2.]

The series of acts referred to in section 236 of the Criminal Procedure Code implies two or

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more acts connected by some more intimate relation than that of mere consecutiveness of time. [p. 62, col. 2.]

Two contradictory statements recorded in two utterly unconnected cases, the accused being, at the time when he gave one deposition, an approver in the Sessions Court, and when he gave the second, a defendant in a civil suit, cannot form the basis of an alternative charge of perjury under section 236 of the Criminal Procedure Code. [p. 63, col. 1.]

Emperor v. *Sailendra Kumar Das*, 6 Ind. Cas. 476; 37 C. 618; 14 C. W. N. 767; 11 Cr. L. J. 360, referred to.

Semble.—Where an alternative charge of giving false evidence is based on contradictory statements made before different Courts, it is necessary that sanction of each of those Courts must be obtained under section 195, Criminal Procedure Code, before a Court can take cognizance of the charge. [p. 61, col. 1.]

Purshottam Ishvar v. *Emperor*, 60 Ind. Cas. 593; 45 B. 834; 23 Bom. L. R. 1; 22 Cr. L. J. 241, relied on.

Application against an order of the Sub-Judge, Larkana.

Mr. *Bhojsing Gurdinomal*, for the Applicant.

Mr. *T. G. Elphinston*, for the Crown.

JUDGMENT.

Raymond, A. J. C.—This is an application under section 195 (6), Criminal Procedure Code, for the revocation of the sanction granted by the F. C. Sub-Judge, Larkana, for the prosecution of the applicant Saleh Shah under section 193, Indian Penal Code, in respect of contradictory statements made by him in two judicial proceedings. The circumstances under which these statements were made may be briefly described. One Gul Mahomed Shah, the father of the applicant, was murdered whilst asleep in his *kote* at about 4 A. M. on the 6th September 1918 and the applicant was suspected of being concerned, in the crime. About a fortnight after the offence, whilst the Police were still engaged in the investigation the applicant promised to make a full and true disclosure of the facts connected with the murder provided he was granted a pardon. This was done and after the applicant's statement was recorded by the District Magistrate, Larkana, four persons were placed on their trial on a charge of murder of Gul Mahomed Shah in Sessions Court, Larkana, after the usual preliminary magisterial proceedings. In the Sessions Court, Saleh Shah narrated with great wealth of detail the circumstances under which the unfortunate Gul Mahomed Shah was done to death, mentioning the names of the accused before the Court as the persons concerned in the foul deed, and explained his own complicity in the murder and the motives that inspired him to have his own father assassinated. Two of the four accused were found guilty by the Sessions Court of the murder of Gul Mahomed Shah and sentenced to transportation for life and their appeals to this Court were dismissed.

Now early in 1919 after the completion of the aforesaid proceedings one Ali Gohar Shah who described himself as a cousin and maternal uncle of Gul Mahomed Shah deceased, filed a suit in the Court of the F. C. Sub-Judge, Larkana, against Saleh Shah and his mother for a declaration that he was entitled to property moveable and immoveable of Gul Mahomed Shah and for possession thereof, as the defendants became disqualified from inheriting the property owing to their being concerned in the murder of Gul Mahomed Shah whose death had been encompassed by their intrigues and at their instigation. In this case Saleh Shah was examined as a witness and in his evidence he wholly resiled from the evidence given by him in the Sessions Court and denied all knowledge of the offence at the time of its commission and emphatically declared that his evidence in the Sessions Court was the result of Police pressure and that it was not true. The learned Sub-Judge who was then Mr. Banasing after an exhaustive inquiry came to the definite conclusion that Saleh Shah was not concerned in the murder of his father and that his evidence in the Subordinate Court was true and he dismissed the suit of Ali Gohar. An appeal was filed against his judgment to this Court, but as will appear from the decree the parties arrived at a settlement in consideration of Saleh Shah making a payment of about Rs. 20,000 to Ali Gohar and the appeal was withdrawn. The next step was the presentation of an application by the Public Prosecutor for Larkana, under instruc-

tions from the District Magistrate to the same Sub-Court of Larkana, then presided over by Mr. Thawardas for sanction to prosecute the applicant in respect of the contradictory statements made by him in Sessions Court and in the Subordinate Court and sanction has been accorded by the Sub-Judge, authorising the institution of criminal proceedings against Saleh Shah under section 193, Indian Penal Code, in respect of four statements set out in his order on the ground that one or the other of them is false or the applicant had reason to believe to be false.

The necessity for the application for sanction to the Subordinate Judge, Larkana, is demonstrated by the judgment in the case of *Purshottam Ishvar* v. *Emperor* (1) where it was held that where an alternative charge of giving false evidence is based on contradictory statements made before different Courts, it is necessary that sanction of each of these Courts must be obtained under section 195, Criminal Procedure Code, before a Court can take cognizance of the charge. We are informed though there is no indication of it in the paper-book that a similar application for sanction was made contemporaneously to the Sessions Court, Larkana, which has also granted it, after the disposal of the application by the Subordinate Court.

Now the sanction granted by the Subordinate Judge is, as I have remarked, in respect of two contradictory statements made by the applicant in his Court and that of the Sessions Judge. Both of them were undoubtedly made in a judicial proceeding. The prosecution theory is that as it is difficult to establish which of the two statements is false the charge against the applicant must be one under section 236, Criminal Procedure Code, and this is the only section under which an alternative charge can be framed. To attract the applicability of this section in this case and justify a charge in the alternative it is essential to remember that it is only when the statements constitute a "series of acts" that an alternative charge can be framed under section 236, Criminal Procedure Code.

The interpretation to be attached to the words "series of acts" used in section 236, Criminal Procedure Code, has been laid down in the Full Bench case of *Purshottam Ishvar* v. *Emperor* (1). It was held in the case that although a statement recorded under section 164, Criminal Procedure Code, is not evidence in a stage of judicial proceedings, but comes within the meaning of the words "evidence in any other case" used in section 193, Indian Penal Code, it can be linked with a statement which is evidence in a stage of a judicial proceeding following on the investigation so that the two can be said to be a "series of acts" on which an alternative charge can be framed under section 236, Criminal Procedure Code, of intentionally giving false evidence under section 193, Indian Penal Code. In the present case the stages wherein the two apparently irreconcilable statements were made, are entirely disconnected, the criminal trial wherein the point at issue was as to the persons that had committed the murder of Gul Mahomed Shah was distinct from the civil suit filed by Ali Gohar Shah. Had the suit not been instituted there would have been no occasion for the applicant to make any statement in Court and the fact that he disowns all knowledge of the murder in his evidence in the Civil Court cannot, in my opinion, by any stretch of language be deemed to fall under the category of a "series of acts" because it contradicts his previous statement in the Sessions Court. In the case referred to above the question arose whether the statement made by a witness on oath under section 164, Criminial Procedure Code, during the course of a Police investigation and a statement made by the same witness at the trial contradictory of the previous one constitute a "series of acts" within the meaning of section 236, Criminal Procedure Code, so that an alternative charge could under that section be framed in respect of the statements and it was held that it could as there was a common relation between a Police investiga-

(1) 60 Ind. Cas. 593; 45 B. 834; 23 Bom. L. R. 1; 22 Cr. L. J. 241.

tion, as enquiry by the Magistrate preliminary to commitment and a final trial in the Sessions Court and to the statements made at these different stages the words "series of acts" would be applicable. Further as remarked by Macleod, C. J. "A series of acts means two or more acts connected together by some common relation. Clearly a statement on oath before a Committing Magistrate and a statement on oath at the trial of the same accused on the same charge would constitute a series of acts". I am prepared to concede that the statements of the applicant in the Sessions Court and in the Sub-Court are diametrically opposed to each other but I cannot conceive a common relation between the two statements or anything approaching the relationship existing, say, between a statement in the Committing Magistrate's Court that A has committed the murder and a statement in the Sessions Court that A has not committed the murder. The crux of the enquiry in the Sessions Court was whether the accused named by the applicant were guilty of the murder of Gul Mahomed Shah, the question before the civil Court was whether the applicant himself was also implicated in the murder, and though no doubt in both the inquiries the circumstances leading to the murder of Gul Mahomed Shah formed the subject of investigation, the two statements could not be described as "series of acts". As, therefore, sections 236, Criminal Procedure Code, is the only section that provides for the framing of a charge in the alternative and as, in my opinion, an alternative charge would not be justified in the present case as the statements made by the applicants in the Sessions Court and in the Civil Court do not fall under the category of a "series of acts", I would revoke the sanction granted for the prosecution of the applicant.

Kennedy, J. C.—I must confess that I am in much doubt as to this matter, but on the whole I do not think I ought to differ from the opinion of my colleague.

The difficulty arises from the fact that the power of the Court to charge and convict an accused person who has made two contradictory statements, without ascertaining which of the contradictory statements is false, is put beyond doubt only by the Illustration to section 236 of the Criminal Procedure Code and the form in the Schedule. In such a state of affairs it is not to be wondered at if the powers of the Court are ill-defined.

If the powers of the Court are as the prosecution wish us to assert, then the result of the assertion is to create a new substantive offence which does not occur in the Penal Code, namely "tergiversation". In any case where the same man has advisedly made on oath two contradictory statements he is punishable. To hold this would be to lay down that in no case was a perjurer to change his mind and to tell the truth. The law would, therefore, compel the sinner to abide by his sin and would offer him no opportunity for penitence. In the absence of clear authority that this is the law I should hesitate to pronounce it such.

It is true that the dictum of Pratt, J., in *Purshottam Ishvar Amin* v. *Emperor*, (2) tends to support that view. But that dictum was not necessary for the decision of the case before him, and it does not appear that anything in the judgments of the other Judges supports it.

No doubt any two acts may form a series if you choose to regard them as such. And it is arguable that two acts of testimony by the same man constitute a series without more. So do two acts of homicide at the interval of a year. Would it be permissible to charge the accused in the alternative in such a case?

I think there is much to be said for the view that the series of acts referred to in section 236 implies two or more acts connected by some more intimate relation than that of consecutiveness in time. This view is also supported by the example. The two acts of swearing referred to therein occur one before the Committing Magistrate and one in the Sessions Court so there is this connection between them that they occur in the preliminary and final stages of the same trial. Here there is a clear connection other than temporal and I think there could be no doubt that two

(2) 60 Ind. Cas. 593; 23 Bom. L. R. 1 at p. 21; 22 Cr. L. J. 211 (F. B.).

such acts of swearing would form a series. Similarly in the Bombay case quoted above the two acts occur one in the Police investigation and one at the trial of the same offence.

I cannot find in the books any case in which two contradictory statements formed the basis of a charge when those contradictory statements were recorded in two utterly unconnected cases as here, where the accused was at the time when he gave one deposition an approver in the Sessions Court and when he gave the second, a defendant in a civil suit.

The present case is of course a bad case. If applicant's deposition in the Sessions Court was false he assisted by false evidence in getteing two persons sentenced to transportation for life. If his statement in the Civil Court was false he succeeded in retaining by such false evidence an estate worth several lacs, on the other hand even in this case much inconvenience is likely to be caused by proceeding in the alternative. Suppose the learned Judges who decided *Emperor* v. *Sailendra Kumar Das*, (3) laid down what it is argued they laid down. They are Bench of which no one can speak otherwise than with deep respect. If it is essential (as I do not think it is essential) for the sanctioning Court to come to the conclusion whether the statement made before it, is true or false, then in this case you would have the Subordinate Court compelled to express its view on the correctness of the finding of his predecessor in the civil suit and the correctness of the findings of the Sessions Court and of this Court in the criminal matter. Contrariwise the Sessions Court would have to ascertain whether the judgment in the Civil Court (which might have been that of this Court) was correct. This would be unseemly.

As I have said I do not myself think that any such duty lies on the sanctioning Court. I should say that all that was necessary for such a Court was to see whether the two statements were irreconcilable and whether the other elements existed which rendered a trial for perjury in the alternative necessary.

But as I have said there is the best authority the other way. I think, therefore, there is much to be said for the view that the two acts of swearing must be closely connected. I do not say that the example is exhaustive. I think it quite probable that a charge would lie in respect of two contradictory statements made by a witness in the course of two succesive Session trials of different batches of accused for the same or closely allied offences. But I am not fully prepared to hold in the present case that the act of swearing in the Sessions Court and the act of swearing in the Civil Court form a series. I, therefore, agree with the proposed order, with the understanding that this order is no bar to the prosecution obtaining sanction and prosecuting on either of the alleged statements. My colleague agrees with this last part.

Z. K. *Sanction revoked.*

(3) 6 Ind. Cas. 476; 37 C. 618; 14 C. W. N. 767; 11 Cr. L. J. 360.

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1716 OF 1922.
March 10, 1923.
Present:—Mr. Justice Moti Sagar.
SHEO RAM AND ANOTHER—CONVICTS—PETITIONERS
versus
EMPEROR—RESPONDENT.

Northern India Canal and Drainage Act (VIII of 1873), s. 70 (12)—Opening closed outlet, proof of—Irrigation of fields, whether sufficient.

A person cannot be convicted under section 70 (12) of Northern India Canal and Drainage Act, for opening an outlet closed under the orders of the Canal Authorities, when the only fact against him is that he irrigated his fields with the canal water.

Criminal revision from an order of the District Magistrate, Rohtak, dated the 9th November 1922.

Mr. *Shamair Chand*, for the Petitioners.

JUDGMENT.—Criminal Revisions Nos. 1716 and 1717 of 1922 are connected and shall be disposed of by one judg-

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ment. The petitioners in both these cases were charged with opening an outlet of water which had been closed under the orders of the Canal Authorities, and, on conviction under section 70 (12) of Act VIII of 1873, were sentenced by the Trial Magistrate to pay a fine of Rs. 50 each in Criminal Revision No. 1716 and a fine of Rs. 40 each in the other case. On appeal the learned District Magistrate upheld the convictions and the sentences.

The petitioners have now come up in revision to this Court, and three points have been urged by the learned Counsel appearing on their behalf, *viz.*, (1) that there is no direct evidence in proof of the charge under which they have been convicted; (2) that the trial was bad for misjoinder, and (3) that after the witnesses for the prosecution were examined the accused were not asked to explain the evidence against them as required by section 342 of the Code of Criminal Procedure. I do not think it necessary to discuss all these points in detail in this judgment as I am clearly of opinion that the petitions must succeed on the first point alone. I have carefully gone through the record and do not find any evidence in support of the fact that the petitioners were guilty of opening the outlet. The mere fact that the fields were irrigated by the accused is not sufficient to show that they had also a hand in opening the outlet in question. In fact the learned District Magistrate himself observes in his judgment that it is difficult to obtain evidence in such cases and remarks further that if the agents of the petitioners broke the rule the principals are undoubtedly guilty. I do not think there is any warrant for such a proposition, and in the absence of any evidence to the contrary I must hold that the accused are not guilty of the offence of which they have been charged.

I accept the revisions and acquit the accused. The fines, if paid, shall be refunded.

N. H. *Petitions allowed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 767 OF 1922.

November 24, 1922.

Present:—Mr. Justice Le-Rossignol.

AMIR-UD-DIN—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 376—Rape, proof of—Probabilities of case.

Accused was charged with rape of a girl of seventeen in a place where the girl could not easily have been forced to go against her will. There was no physical proof of the rape, and the inference from the medical evidence was that at the time of the alleged offence the girl was not a virgin:

Held, that the offence had not been established against the accused.

Appeal.

Mr. *Sagar Chand*, for the Appellant.

The Public Prosecutor, for the Respondent.

JUDGMENT.—The appellant has been convicted of rape of a girl of 17. The learned Magistrate has described the scene of the alleged rape, has shown how inaccessible it was, but has swallowed with ease all the great improbabilities of the story.

There is no physical proof of the rape; indeed the inference from the medical evidence is that at the time of the alleged offence, the girl was not a virgin. No trace of semen was found on her clothes and there is no evidence that the appellant was injured, as he should have been, if the evidenee of P. W. No. 2 is truthful.

I do not believe that the girl was forced into the *maqbara*; she must have gone there willingly. It would take considerable effort to force a girl of 17 through a low arch only 3 feet high, if she were a resisting party.

In addition, there is a discrepancy regarding the stick used by the witness Nura and the whole case strikes me as false.

I accept the appeal and acquit the appellant.

Z. K. *Appeal accepted.*

SANTI LAL *v.* RAJ NARAIN.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 255 OF 1923.

May 23, 1924.

Present:—Mr. Justice Mukerjee and Mr. Justice Dalal.

Lala SANTI LAL AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

RAJ NARAIN AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 153, O. VI, r. 17, O. XXXIV, r. 6—Amendment of pleadings, object of—Pending suit—Fresh defence, whether can be taken—Court, discretion of—Recovery of balance due on mortgage—Application for personal decree against mortgagor, form of.

When a suit is pending, a defendant, with the permission of the Court, may be allowed to take a fresh defence to the suit. [p. 66, col. 1.]

The object of amendment of pleadings is to determine the real question in controversy between the parties. [*ibid.*]

The matter of allowing amendment of pleadings is entirely within the discretion of the Court. [*ibid.*]

There is nothing in O. XXXIV, r. 6 of the Civil Procedure Code which requires that an application for a personal decree against the mortgagor should be in writing, much less is there anything to show that the application should be signed by anybody. [*ibid.*]

Even assuming that a written application is necessary, such application may be allowed to be signed at any stage of the proceedings under section 153 of the Code. [p. 66, col. 2]

Execution first appeal from a decree of the Subordinate Judge, Agra, dated the 7th April, 1923.

Dr. *M. L. Agarwala* and Mr. *M. L. Sandal*, for the Appellants.

Mr. *N. P. Asthana*, for the Respondents.

JUDGMENT.—The facts which have given rise to this appeal are briefly as follows:—The decree-holders, who are the respondents in this appeal, brought a suit of mortgage and obtained a decree. In execution of the decree the mortgaged property was sold and on 29th March, 1921, an application was made to the Court under O. XXXIV, r. 6, Schedule 1 of the Civil Procedure Code, for the passing of a money-decree against the mortgagors. The judgmeut-debtors, who are the appellants in this Court, filed objections to the granting of the application, once on 30th April, 1921, and then on 7th May, 1921. In fact, the objections were that the application was barred by time and the decree-holder had prepared the account without giving credit for all the sums realised and without calculating the interest by the proper method. The lower Court decided the question of limitation alone and held that the application was time-barred. An appeal was preferred to this Court, and by a judgment, which will be found printed at page 37 of A. L. J., Vol. 21, *Raj Narain Mal* v. *Santi Lal* (1) this Court allowed the appeal, holding that the application was within time. Thereafter the judgment-debtors, who were dissatisfied with the judgment of this Court, presented an application for permission to appeal to His Majesty in Council. That application was granted and the order of this Court will be found printed at page 686 of the same volume of A. L. J., *Santi Lal* v. *Raj Narain* (2). When the case went back to the Court below to find out what was the amount really due to the decree-holders and thereupon to frame a decree, the judgment-debtors came forward with a fresh objection on 20th March, 1923. The objection taken was that the application for a personal decree was not properly signed. It appears that it was not signed by any of the plaintiffs and the legal practitioner, Babu Kanhaiya Lal, who signed it, held no *vakalatnama* on behalf of the plaintiffs. The Court below held that this objection could not be heard as it was barred on the principle of *res-judicata*. The judgment-debtors have oome to this Court again and the contention is that there can be no *res judicata* by implication in an execution proceeding.

On behalf of the decree-holders the order of the Court below has been sought to be supported both on the ground on which it proceeded in the Court below and also on the ground that the application, dated 29th March, 1921, was not required by law to be signed and at any rate the objection to this effect had been waived.

The first question to be decided is whether the plea of *res judicata* is sound.

(1) 79 Ind. Cas. 85; 21 A. L. J. 37; (1923) A. I. R. (A.) 203.

(2) 79 Ind. Cas. 87; 21 A. L. J. 686; 9 O. & A. L. R. 832; 45 A. 741; (1924) A. I. R. (A.) 119.

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We think it is not. The application, which was pending in the Court below, was the same application with respect to which the objection of 1921 had been taken. When it went back before the Court again, to dispose of the remaining objections of the judgment-debtors, fresh objections were taken. To argue by way of analogy, when suit is pending (the application is in the course of a suit), a defendant, with the permission of the Court, may be allowed to take a fresh defence to the suit. The matter, however, would be entirely in the discretion of a Court, *viz.*, whether to allow an amendment to the written statement or not. The law on the point is laid down in O. VI, 6 r. 17 of the Code of Civil Procedure and the matter is entirely within the discretion of the Court. The object of an amendment is to determine the real question in controversy between the parties. We, therefore, are of opinion that the plea of *res judicata* taken on behalf of the decree-holders, plaintiffs cannot be sustained.

Coming, however, to the question now raised in this appeal, we are of opinion that the application of the decree-holders should not be thrown out on the ground taken by the judgment-debtors.

The application was, as already stated, one under O. XXXIII, XXXIV, r. 6 of the Code of Civil Procedure. There is nothing in that rule which requires that an application to the Court should be in writing, much less is there anything to show that the application should be signed by any body. All that the rule lays down is that the Court is authorised to pass a decree, where the judgment-debtor is personally bound to pay the balance. Under the circumstances, the fact, that the application was not signed by the decree-holders, will not affect the case.

From the facts of the case, already stated, it will be seen that it is not the case that the decree-holders repudiated the action of Babu Kanhaiya Lal, who purported to sign the application on their behalf. On the other hand they entirely adopted the application made on their behalf. They resisted the objection preferred by the judgment-debtors in the Court of first instance and filed an appeal in this Court. When the case went back they were prepared to proceed on the very application which had been filed on 29th March, 1921.

Assuming, however, that a written application would be necessary on behalf of the decree-holders, such application may certainly be allowed to be signed at any stage of the proceedings. Under section 153 of the Code of Civil Procedure the Court is authorised to amend any defect or error in any proceeding in a suit. If the application is offered to be signed by the decree-holders or any body on their behalf, authorised to do so, we see no reason why the application should not be allowed to be signed by them, by way of amendment.

It appears that Babu Kanhaiya Lal, Vakil, who signed the application for the decree-holders, appeared at a certain stage of the execution proceedings for the judgment-debtors. His *vakalatnama*, on their behalf, is dated 21st June 1917. We have heard it. We find that he was engaged for a particular purpose, *viz.*, to file an application objecting to the execution of the decree under section 47 of the Code of Civil Procedure. That application was struck off for default of prosecution and he made another application for the restoration of it. The application was finally disposed of on 22nd December, 1917, and the purpose for which Babu Kanhaiya Lal had been engaged came to an end. There was, therefore, nothing to prevent Babu Kanhaiya Lal from being engaged on behalf of the decree-holders for making the application under O. XXXIV, r. 6 of the Code of Civil Procedure.

We are satisfied that, although the decision of the Court below on the question of *res judicata* was not right, the Court was fully justified in brushing aside the objection of the judgment-debtors.

We dismiss the appeal with costs, which will include Counsel's fees in this Court on the higher scale. We hope the matter will now be expedited.

K. S. D. *Appeal dismissed.*

NARAYANASWAMY *v.* THANGAVELU.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 506 OF 1921.

January 22, 1924.

Present:—Mr. Justice Venkatasubba Rao.

NARAYANASWAMY DEVAROYAR —PLAINTIFF—APPELLANT

versus

THANGAVELU PADAYACHI— DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), s. 49—Unregistered deed of gift—Admissibility in evidence—Nature of donee's possession—Construction of deeds—Maintenance deeds—Gift "with absolute rights."

An unregistered deed of gift confers no title on the donee, but if he has been in possession longer than the prescriptive period, the deed may be admitted in evidence to ascertain the nature and character of donee's possession.

Varada Pillai v. *Jeevarathnammal*, 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 2 U. P. L. R. (P. C.) 164; 22 Bom. L. R. 444; 46 I. A. 285 (P. C.), and *Nadepena Appamma* v. *Saripelli Chinnavadu*, 79 Ind. Cas. 510; 45 M. L. J. 667; (1923) M. W. N. 825; 33 M. L. T. 146; 19 L. W. 37; (1924) A. I. R. (M.) 292; 47 M. 203, referred to.

There is no warrant for the proposition that in maintenance deeds the words "with absolute rights, etc.," ought to be construed in a manner different from the way in which they would be construed if they occurred in other documents.

Jageswar Narain Deo v. *Ram Chandra Dutt*, 23 C. 670; 23 I. A. 37; 7 Sar. P. C. J. 13; 6 M. L. J. 75; 12 Ind. Dec. (N. S.) 445 (P. C.) and *Muthu Venkatanarayanan Chetti* v. *Authipanduranga Naidu*, 51 Ind. Cas. 217; (1919) M. W. N. 103, followed.

Second appeal against the decree of the District Court, South Arcot, in Appeal Suit No. 48 of 1920, preferred against the decree of the District Munsif, Mannargudi, in Original Suit No. 87 of 1919.

Mr. *T. Narasimha Aiyangar*, for the Appellant.

Mr. *T. V. Muthukrishna Iyer*, for the Respondent.

JUDGMENT.—On the death of Kuppusami in the year 1885, there appear to have been some negotiations regarding a provision for suitable maintenance to his widow Alamelu. In 1890 Exhibit I was executed by which the surviving co-parceners gifted to Alamelu certain portions of family property in lieu of her right to maintenance. She was in enjoyment of the property from the date of the deed till her death. The defendant is now in occupation of it claiming under a Will executed by Alamelu. The lower Courts have found that the Will is genuine and that finding must be accepted.

The question to be decided is, did Alamelu have an absolute interest in the property? On behalf of the plaintiff it is argued that the deed of gift was unregistered and could consequently confer no title on Alamelu. This argument is perfectly correct. But Alamelu was in enjoyment of the property for over the statutory period, in fact, for about 28 years. Exhibit I is not operative as a deed of gift as it was not registered. But to ascertain the nature and character of Alamelu's possession, the deed may be looked at—[See *Varada Pillai* v. *Jeevarathnammal* (1) and *Nadepena Appamma* v. *Saripelli Chinnavadu* (2)]. In the deed, what do we find? The recital is, that these lands were given to Alamelu with absolute rights including the right to sell, make gifts and alienations. For ascertaining the nature of the right which she was setting up, the recitals in the deed may be referred to. The document was properly admitted in evidence for this purpose and the finding that she perfected her title by adverse possession is not open to question.

Then it is said that in maintenance deeds the words "with absolute rights, etc.," ought to be construed in a manner different from the way in which they would be construed if those words occurred in other documents. I do not think there is any warrant for this proposition. In fact, in *Jogeswar Narain Deo* v. *Ram Chandra Dutt* (3) and also in *Muthu Venkatanarayanan Chetty* v. *Authipanduranga Naidu* (4) similar contentions were overruled.

In the result, the appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

S. D.

(1) 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 2 U. P. L. R. (P. C.) 164; 22 Bom. L. R. 444; 46 I. A. 285 (P. C.).

(2) 79 Ind. Cas. 510; 45 M. L. J. 667; (1923) M. W. N. 825; 33 M. L. T. 146; 19 L. W. 37; (1924) A. I. R. (M.) 292; 47 M. 203.

(3) 23 C. 670; 23 I. A. 37; 7 Sar. P. C. J. 13; 6 M. L. J. 75; 12 Ind. Dec. (N. S.) 445 (P. C.).

(4) 51 Ind. Cas. 217; (1919) M. W. N. 103.

LAKHRAM SINGH *v.* SHEO PRASAD.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1216 OF 1920.
April 20, 1922.

Present :—Mr. Justice Gokul Prasad.

LAKHRAM SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHEO PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Sale by managing members—Legal necessity for portion of amount—Sale, validity of.

Where a portion only, for instance, about three-fourth, of the consideration for a sale, effected by the managing members of a joint Hindu family is found to be for legal necessity, the Courts will set aside the sale as regards the share of the property of the member contesting the sale, on his payment of a proportionate share of the amount found to be for necessity.

Gobind Singh v. *Baldeo Singh*, 25 A. 330 A. W. N. (1903) 57, and *Nathu Ram* v. *Kanhaiya Lal*, 80 Ind. Cas. 226, relied on.

Second appeal from a decree of the District Judge, Benares, dated the 26th May, 1920.

Mr. *P. L. N. Banerji*, for the Appellants.

Dr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—The plaintiffs brought a suit to set aside a sale-deed of their share executed by their mother and certain other members of their joint family for a total consideration of Rs. 3,800 and for possession thereof on the ground that the sale had been made without legal necessity. The defendants pleaded legal necessity.

The Trial Court found that only Rs. 491 were chargeable against the plaintiffs for legal necessity and that the remaining amount chargeable against their share was not so taken. It, however, passed a curious decree upholding the sale in case the defendants-vendees paid Rs. 146 to the plaintiffs and in case of their failure to do so, decreed the plaintiffs' claim conditional on their paying Rs. 491 to the defendants-vendees which had been advanced for legal necessity and thus avoiding the sale-deed. The plaintiffs went up in appeal and the defendants filed a cross-objection. The lower Appellate Court has found that the plaintiffs' share in the property sold amounts to 1 pie 6 *krant* and 2/3 *dant*. It has further found in agreement with the Court of first instance that out of the sale consideration the amount chargeable against the plaintiffs share to the extent of Rs. 491 was for legal necessity. It has accordingly decreed the plaintiffs' claim conditional upon their paying Rs. 491 aforesaid to the defendants-vendees. The defendants-vendees come here in second appeal. Their first contention is based on a misapprehension as I have already stated above. The learned Judge of the lower Appellate Court has found the extent of the plaintiffs' share. That ground of appeal therefore fails.

The second ground of appeal has no force because the property sold apparently included the *khatas* pertaining to the share sold.

Another point argued before me was that on the finding of the Court below as to the extent of the plaintiffs' share, the amount found to have been for legal necessity would have exceeded the value of that share. There is nothing on the record to warrant this assumption and this ground of appeal must therefore fails.

It has been argued before me that as the major part of the sale consideration was for valid necessity this sale should not be set aside. It is not easy to draw a line of demarcation in such cases nor has the learned Vakil for the appellants been able to show me any authority for such a proposition. Out of the total consideration chargeable against the plaintiffs' share Rs. 491 only was for legal necessity, whereas Rs. 146 were found to have been without any such necessity. The view of the learned Judge of the lower Appellate Court on this question of setting aside the sale finds support from the Division Bench ruling of this Court to be found in the case of *Gobind Singh* v. *Baldeo Singh* (1). See also, in this connection, the unreported case of *Nathu Ram* v. *Kanhaiya Lal** decided on the 3th May, 1921, by Lindsay and Kanhaiya Lal, JJ. Therefore, the decree of the lower Appellate Court seems to be correct. I

(1) 25 A. 330 A. W. N. (1903) 57.

*Since reported in 80 Ind. Cas. 226.—[*Ed.*]

dismiss the appeal with costs including in this Court, fees on the higher scale.

N. H. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL REVISION No. 19 OF 1922.
June 15, 1922.
Present :—Justice Sir Thomas William Richardson, KT., and Mr. Justice B. B. Ghose.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—PETITIONER
versus
RAJ KUMAR MUKHERJEE AND OTHERS —OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 60 (1) (k)—Provident Funds Act (IX of 1897), ss. 2 (4), 4 (1)—State Railway Open Line Code, Vol. II, App. I, rr. 22, 30—"Compulsory deposit", what is—Deposit, whether ceases to be compulsory on death or retirement—"Discharged" in r. 30, meaning of—Deposit, whether liable to attachment after retirement.

The State Railway Provident Institution is governed by the Rules contained in the State Railway Open Line Code, Volume II, Appendix I, and the General Fund Rules have no application to it. [p. 70, col. 1.]

The word "discharged" in rule 30 of the Rules contained in the State Railway Open Line Code, Volume II, Appendix I, does not necessarily mean "dismissed"; it is wide enough to include the case of a servant who has been permitted to retire or take his discharge. [*ibid.*]

A compulsory deposit is a deposit which goes into the fund as a compulsory deposit, within the meaning of section 4 (1) of the Provident Funds Act, and is at that date received and classified as such, and so long as such a deposit subsists in the fund it continues to be a compulsory deposit, irrespective of the fact that it is liable to withdrawal on the death or retirement of the depositor under rule 22 of the Rules contained in Appendix I, Volume II of the State Railway Open Line Code. [p. 71, col. 1]

Such deposits as the above are protected from attachment under section 60 (1) (*k*) of the Civil Procedure Code read with section 4 (1) of the Provident Funds Act. [p. 72, col. 2.]

A compulsory deposit includes the sums deposited by the depositor himself and the contributions in respect of those deposits made by the Railway and the interest or increment accrued on them. [p. 70, col. 2.]

Veerchand v. *B. B. & C. I. Ry. Co.*, 29 B. 259; 6 Bom. L. R. 921, *Miller* v. *B. B. & C. I. Ry. Co.*, 5 Bom. L. R. 454, *Seth Manna Lal* v. *Gainsford*, 35 C. 641; 12 C. W. N. 633 and *Hindley* v. *Joynarain Marwari*, 54 Ind. Cas. 439; 46 C. 962; 24 C. W. N. 288, discussed.

Per *Ghose, J.*—A deposit cannot be said to be payable on demand by reason of the fact that it becomes payable under the Rules on the death or retirement of the depositor. [p. 72, col. 2.]

Messrs. *Gibbons, Dwarka Nath Chakervarty* and *Surendra Nath Guha*, for the Petitioner.

Messrs. *Mohendra Nath Ray* and *Rupendra Kumar Mitter*, for the Opposite Party.

JUDGMENT.

Richardson, J.—By our order, dated 26th January, 1922, Rule No. 515 of 1921 *Raj Kumar Mookerjee* v. *W. J. Godfrey* (1), was made absolute on the footing that the amount standing to the credit of W. J. Godfrey in the State Railway Provident Institution was attachable at the instance of the then petitioner, Raj Kumar Mukherjee, in execution of a decree for money which he had obtained against Godfrey in the Sealdah Court of Small Causes. Inasmuch, however, as the rule was unopposed, there being no appearance for Godfrey and the Administrator of the Fund, to whom no notice of the Rule had been given, not being represented, liberty was expressly reserved to the latter to come in and move to have the order discharged. In pursuance of the liberty so reserved, the present Rule was obtained on behalf of the Secretary of State for India. At the hearing, the learned Advocate-General appeared for the present petitioner, the Secretary of State, and the learned Vakil, Mr. Mohendra Nath Roy, for the creditor.

There is no dispute that the amount standing in the Fund to Godfrey's credit was not attachable so long as he was employed as a servant of a State Railway. The question is whether the amount became attachable on his retirement from such service.

It now appears that the Rules regulating the General Provident Fund to which we were referred on the former occasion, do not apply to the State Railway Provident Institution,

(1) (1922) A. I. R. (C.) 196.

which is governed by the Rules contained in the State Railway Open Line Code, Volume II, App. I, rule 10 of the General Fund Rules is therefore out of the way. The corresponding rule 30 of the relevant Rules is otherwise framed and in the view we take gives rise to no difficulty. It is in these terms:—

"Neither compulsory deposits, nor bonuses, *i. e.*, money added by Government to compulsory deposits, nor the interest thereon standing at the credit of a depositor, whether in actual service, discharged or deceased, can be attached by a Court of Law, but voluntary deposits and the interest thereon standing at the credit of a depositor on any given date are free to attachment on that date."

It is conceded that the amount at Godfrey's credit consists entirely of deposits which, when they were made, were 'compulsory deposits' within the meaning of this rule and of the Provident Funds Act. There is no question of any voluntary deposits.

As to the word 'discharged' it does not necessarily mean 'dismissed.' It is wide enough to include the case of a servant who has been permitted to retire or take his discharge.

The question is whether rule 30 is in accordance with the law on the subject.

The Civil Procedure Code section 60 (1) (*k*) exempts from liability to attachment "all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1897, for the time being applies in so far as they are declared by the said Act not to be liable to attachment."

That leaves the matter to be controlled by the Provident Funds Act and rule 30 seems merely to express the draftsman's view of the result of sub-section (1) of section 4 of that Act Act IX of 1897 as amended by Act V of 1903). The question turns on that sub-section the meaning of which, apart from any difficulty as to the term 'compulsory deposits,' is clear enough. "Compulsory deposits," it says, "in any Government or Railway Provident Fund shall not be liable to any attachment under any decree or order of a Court of Justice in respect of any debt or liability incurred by a subscriber to, or depositor of, any such Fund and, neither the Official Assignee nor a Receiver appointed under Chapter XX of the Code of Civil Procedure shall be entitled to, or have any claim on any such compulsory deposit." The words are quite plain and general. No "compulsory deposits" are attachable.

But then it is argued that these deposits with which we are concerned, though they were compulsory deposits when they were made and so long as Godfrey continued in the Railway service, ceased to be compulsory deposits when he retired. The argument is based on the definition in section 2 (2) of the Act and on rule 22 of the Rules.

As defined in the Act "'compulsory deposit' means a subscription or deposit which is not repayable on the demand, or at the option of the subscriber or depositor, and includes any contribution which may have been credited in respect of, and any interest or increment which may have accrued on, such subscription or deposit under the Rules of the Fund."

Rule 22, so far as it is material, is as follows:—

"Save with the particular sanction of the Government of India no compulsory deposit or bonus shall be withdrawn excepting;

(*i*) on the decease of the depositor;

(*ii*) on his leaving the public service."

The contention is that if the Act and rule 22 be read together, Godfrey's deposits became repayable on his demand when he left the public service and thereupon were automatically removed from the category of compulsory deposits.

In my opinion that is a mistaken construction of the statutory definition. The definition speaks with reference to some Fund in which the deposit is made, and as it seems to me it crystallizes the nature of the deposit at the time at which it is

made. A compulsory deposit is a deposit which goes into the Fund as a compulsory deposit and is at that date received and classified as such. It is conceivable that the Rules of a Fund might subject the general right of withdrawal conferred by such a rule as rule 22 to restriction or condition so that the whole amount at a depositor's credit might never become freely payable or repayable on his demand. But quite apart from that, a depositor presumably continues to make compulsory deposits till he dies in service or retires and I can see no ground for a different classification of such deposits or a different description being applied to them after his death or retirement. In other words, as long as the deposits subsist in the Fund, so long, at any rate, both as matter of legal construction and in the common and ordinary way of speaking, they are properly and correctly described as compulsory deposits. If that be so, under section 4 of the Act, they are not liable to attachment.

Though there is no decision binding on us, the question is not free from authority and the view I have expressed is supported by the judgment of Sir Lawrence Jenkins, C. J., in *Veerchand* v. *B B. & C. I. Railway Co.* (2) the facts of which are on all fours with the facts of the present case. The case of *Miller* v. *B. B. & C. I. Railway Co.* (3), on which reliance has been placed for the creditor, was there cited but was not followed. I am content to adopt the brief statement of the learned Chief Justice. "The deposit," he said, "when it was made was not repayable on demand and therefore at that time was a 'compulsory deposit' and having once acquired that character with its attendant consequences, it continude (in my opinion) to retain it."

I have dealt with the case on the footing that no distinction exists between the deposits made by the depositor himself on the one hand and the contributions in respect of those deposits and the interest or increment accrued on them on the other. I have assumed that there is a sense in which these accretions to the original deposits can be said to be 'repayable' or 'not repayable' on the demand of the depositor. I do not forget, however, that Sir Lawrence Jenkins, C. J., founds an argument on the frame of the statutory definition. If the word be interpreted as meaning one thing and including another and a different thing the meaning of the word as first defined would seem to be enlarged so as to include the second thing. It is as if the Legislature had said the word shall mean and include (1) the first thing, and (2) the second thing. In the view suggested for the creditor, therefore, on the depositor's death or retirement a distinction might have to be drawn between the deposits made by the depositor himself then repayable on his demand and the additions to those deposits to which the limitation of not being repayable on his demand was never applicable or essential and which must, therefore, be understood as coming otherwise within the meaning of the term "compulsory deposit." The learned Chief Justice concluded:—"I do not suppose it was ever intended that the Fund should as to part be and as to part not be, a 'compulsory deposit.'

As to the cases in this Court, in *Seth Manna Lal* v. *Gainsford* (4), the main question decided was that the fund there in question, which had been established by the Corporation of Calcutta, was subject to the Provident Funds Act. It is not clear whether the subscriber whose deposits it was sought to attach was or was not at the time in the employ of the Corporation.

In *Hindley* v. *Joy Narain Marwari* (5) the Provident Fund was that of the East Indian Railway. The depositor had died and a decree for money had been obtained against his father as his legal representative. An attempt made in the course of executing the decree to attach the amount standing to the credit of the deceased in the Fund, was frustrated by Rankin, J.

"Whether," said the learned Judge, "the employee is in the service or out of the service, whether he be alive or dead, his

(2) 29 B. 259; 6 Bom. L. R. 921.
(3) 5 Bom. L. R. 454.

(4) 35 C. 641; 12 C. W. N. 633.
(5) 54 Ind. Cas. 439; 46 C. 962; 24 C. W. N. 288.

share is unattachable in the hands of the institution." That decision is in point and the general observations which the learned Judge makes on the nature of these Funds may also be usefully referred to. For if there be any doubt as to the meaning of the Act, it is permissible to have regard to the state of things to which the Act was intended to apply, the conditions in which it would operate, and the class of persons which it was intended to benefit.

In the result this Rule must, in my opinion, be made absolute. Our order dated 26th January, 1922, in Civil Rule No. 515 of 1921 *Raj Kumar Mookerjee* v. *W. J. Godfrey* (1) should be discharged, and in the amount standing to the credit of W. J. Godfrey in the Railway Provident Institution has been attached or re-attached by the Sealdah Court of Small Causes, the attachment should be withdrawn.

Ghose, J.—I am of the same opinion. The Provident Funds Act seems to be an instance of fragmentary legislation as it does not provide for all the circumstances under which the sums standing to the credit of depositors are payable and complications have arisen in the decision of the case on account of the Rules framed from time to time for the administration of the Fund and the resolution of the 29th of July, 1919, to which our attention was drawn. Rule 10 with reference to which we had decided the case at the previous hearing has now been shown to have been excluded in its operation as regards subscribers to the State Railways Provident Fund. Rule 30 which is applicable to servants employed on State Railways has been relied on by the learned Advocate-General. Under this rule the money in deposit is not liable to attachment. It is contended on behalf of the creditor by Babu Mohendra Nath Roy that this rule is *ultra vires* of the Act. His main contention is that the money was not a compulsory deposit when it was sought to be attached and reference was made to rule 22 which provides, amongst other things, that no compulsory deposit or bonus shall be withdrawn except on the depositor leaving the public service. It is urged that when the money is payable on the employee leaving the service, it is payable on his demand and it therefore ceases to be a compulsory deposit within the definition in section 2 (4) of the Act and is consequently liable to attachment. The observations of Russel, J., in *Miller* v. *B. B. & C. I. Railway Co.* (3) are relied on in support of this argument and it is contended that the case of *Veerchand* v. *B. B. & C. I. Railway Co.* (2) which is a decision on the question in controversy, was wrongly decided and ought not to be followed. It may be observed in passing that there was an appeal from the decision of Russel, J. but the Court of Appeal apparently refrained from expressing any opinion on this question [see *Veerchand* v. *B. B. & C. I. Railway Co.* (2)].

It seems to me that the money in deposit is included within the definition of "compulsory deposit" in the Act. The deposit was not payable on the demand or option of the subscriber but was payable only under certain circumstances. In my opinion it cannot be said that the deposit was payable on demand by reason of the fact that it became payable under the rules on one of the events happening afterwards, and that the character of the deposit that it was not repayable on demand remains unaltered. Hence it is not excluded from the definition of compulsory deposit. The money, therefore, is not liable to attachment under the provisions of section 4 (1) of the Provident Funds Act. In this view I should follow the decision of Jenkins, C. J., in *Veerchand* v. *B. B. & C. I. Railway Co.* (2) and I need not refer further to the Rules or to the policy of the Act on which arguments were addressed to us.

I agree in the order proposed by my learned brother.

Z. K. *Rule made absolute.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1762 OF 1922.
May 16, 1924.
Present:—Mr. Justice Neave.
MADHO LAL—DEFENDANT—APPELLANT
versus
BANARSI DAS AND ANOTHER—PLAINTIFF AND DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XVIII, r. 2 (1)—General Rules (Civil), Ch. 21, r. 1—"Day fixed for hearing of suit," meaning of—Payment of Pleaders' fee—Certificate when should be filed.

The "day fixed for the hearing of the suit" in O. XVIII, r. 2 (1) of the Civil Procedure Code does not mean or include the day on which issues are framed.

For the purpose of determining, whether a certificate of payment of Pleader's fee has been filed in time according to rule 1 of Chapter 21 of the General Civil Rules, the first day of hearing is to be interpreted as the first day fixed for hearing after the framing of issues.

Second appeal against a decree of the District Judge, Benares, dated the 2nd November, 1922.

Dr. *K. N. Katju* and Mr. *Hari Kishen Kaul*, for the Appellant.

Mr. *Bhagwati Shanker*, for the Respondents.

JUDGMENT.—This appeal arises out of an order of the District Judge of Benares upholding the order of the Additional Subordinate Judge admitting a certificate for Pleader's fee which was said to have been filed after the first day of hearing. The facts are that the certificate was filed on the 24th of April, 1922, the issues were framed on that date, and the case was fixed for final disposal on the 12th of May. The Rule governing the question is rule 1 of Chapter 21 of the General Rules (Civil). As it stood at the time, this rule prescribed that no fee to any legal practitioner should be included in any decree or order unless the Judge was satisfied that the fee was paid at or before the commencement of the hearing of the suit. An explanation appended to the rule ran, "By the word 'hearing' is meant the hearing referred to in O. XVIII, r. 2 (1).....but not the day to which such hearing is adjourned." Order XVIII, r. 2 (1) provides that "on the day fixed for the hearing of the suit or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove." It seems to me clear that in this Rule of the Civil Procedure Code "the day fixed for the hearing of the suit" does not mean or include the day on which issues are framed. It is true that elsewhere in the Code, as, for instance, in O. VIII, r. 1 the first day of hearing is used to mean the first day on which the parties appear in Court, but having regard to the express reference made in the explanation to rule 1 of Chapter 21 I take it that for the purpose of determining whether a certificate of payment of Pleader's fee has been filed in time, the first day of hearing is to be interpreted as the first day fixed for hearing after the framing of issues. This interpretation is supported by the recent amendment of the rule in question published in the *U. P. Government Gazette* on the 12th of April of this year. This amendment has altered the rule by allowing the payment of the fee to be made before the conclusion of the hearing of the suit, and has done away with the explanation. The certificate was filed within the time prescribed by the Rule, and the appeal is accordingly dismissed with costs including in this Court fees on the higher scale.

K. S. D. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL SUIT No. 1344 OF 1919.
May 15, 1923.
Present:—Mr. Madgavkar, A. J. C.
RAMJI HANSRAJ—PLAINTIFF
versus
MRS. H. J. CHINAI AND OTHERS—DEFENDANTS.

Specific Relief Act (I of 1877), s. 35, last para.—"In the same case," construction of—Vendor in possession—Consent decree, whether can be varied.

The words "in the same case" in the concluding paragraph of section 35 of the Specific Relief Act are not restricted to the previous paragraph

alone and apply not only when the purchaser is in possession of the subject-matter, but also when the vendor is in possession. [p. 75, col. 1.]

Kurpal Hemraj v. *Sham Rao Raghunath*, 72 Ind. Cas. 321; 25 Bom. L. R. 234; (1923) A. I. R. (B.) 211; 47 B. 589, followed.

The general rule that a decree by consent can only be varied by consent has exceptions. [p. 75, cols. 1 & 2.]

Shankar Sakharam v. *Ratanji Premji*, 79 Ind. Cas. 226; 25 Bom. L. R. 328; 47 B. 607; (1923) A. I. R. (B.) 441, followed.

Lachiram Dagduram Marwadi v. *Jana Yesu Mang*, 27 Ind. Cas. 830; 16 Bom. L. R. 638, referred to.

Application by defendant No. 1 under section 151, Civil Procedure Code and section 35 of the Specific Relief Act.

Mr. *E. Castellino*, for the Plaintiff.

Mr. *Tolasing Khushalsing*, for Defendant No. 1.

Mr. *Issardas Godharam*, for Defendants Nos. 2 and 3.

ORDER.—This is an application in Suit No. 1344 under the following circumstances:—

In that suit for specific performances by the plaintiff-vendee against the defendants-vendors, a consent decree was passed on the 8th September, 1922, by which the plaintiff was, on payment to the defendants of Rs. 1,22,800 and interest, to obtain specific performance: "the decree being executable at the end of six months by either party." The plaintiff has not paid and the defendant No. 1 supported by the other defendants applies for rescision of the contract, as far as the plaintiff is concerned.

It is argued for the plaintiff, firstly, that the words "in the same case" in the concluding paragraph of section 35 of the Specific Relief Act apply to the preceding paragraph only when the purchaser is in possession of the subject-matter, and not as here, when the vendors are in possession; secondly, that the present decree being a decree by consent could only be varied by consent and that the order now sought for the defendant No. 1 would vary the decree; and thirdly, that the Court should grant the plaintiff a further extension of six months in the period of payment of the purchase amount under the decree.

The defendants rely on the broader construction of the words "in the same case" adopted in *Kurpal Hemraj* v. *Sham Rao Rughunath* (1). It is also urged for the defendants that the plaintiff when he himself urges that a decree by consent cannot be varied except by consent, cannot in the same breath ask for a variation of the decree by a further extension of the period of payment, in the decree.

As to the construction of the words "in the same case", the narrower construction argued for the plaintiff undoubtedly rests on the high authority of learned commentators: Collett on Specific Relief, V Edition, page 282, and S. C. Bannerji on Specific Relief (1909 Edition), page 588. Owing to the conflicting authorities on either side it is advisable to consider the section in detail.

Chapter IV of the Specific Relief Act which opens with section 35 deals with rescision of contracts, and the opening section purports to recite cases when rescision may be granted. Three cases are cited in the first paragraph. The second paragraph deals with further relief in addition to rescision, *viz.*, payments of rents and profits, in cases when the purchaser of the lessee is in possession of the subject-matter; and finally comes the concluding paragraph now in question empowering the Court which passes the decree of which default has been made, to rescind the contract either as regards the party making the default or in its entirety.

Undoubtedly the opening words of the concluding paragraph "in the same case" are not very happily chosen. Both Collett and Bannerji agree that the intention of the Legislature was to legalise in India the English practice, under which the party not in default can obtain rescision not merely by a separate suit but also by application in the suit in which the decree for specific performance has been made. If the Legislature had intended the concluding paragraph to apply to cases restricted to the preceding paragraph alone, it would have been more natural

(1) 72 Ind. Cas. 321; 25 Bom. L. R. 234; (1923) A. I. R. (B.) 211; 47 B. 589.

either to use the words "in the last case" rather than the words "in the same case", or to omit these words altogether and not to add a separate paragraph at the end, but to make this a portion of the previous paragraph, adding the words "and the Court may."

Again on enquitable grounds, there seems no reason why the relief and the forum in the concluding paragraph should be restricted to cases where the purchaser is in possession of the subject-matter. On the contrary it would be easy to recite cases when such a relief and such forum would be even more appropriate to the cases when the purchaser is not in possession.

I conclude therefore that even if the words "in the same case" are not very happily chosen, difficulty is not removed by restricting their construction to the previous pragraph alone, as is argued for the plaintiff, but that, if anything the difficulty is thus increased and that the reasons for extending these words to clause "c" of the first paragraph are stronger, and valid. I agree, therefore, for these reasons with the construction in the Bombay case cited above, relied upon for the defendants. In the present decree, the further words "this decree be executable at the end of six months by either side" are also perhaps not very happily chosen. The meaning, however, appears clear, *viz.* that the party not in default was at liberty to apply to the Court at the end of six months. These words, therefore, do not do violence in this particular case to the general conclusion arrived at before.

As to the second argument for the plaintiff it does not appear to me in the first place that there is any question of varying the decree. The real question is whether the defendants have or have not under section 35 the legal remedy they apply for, against the plaintiff who is admittedly in default? In any case the general rule that a decree by consent can only be varied by consent enunciated in cases such as *Lachiram Dagduram Marwadi* v. *Jana Yesu Mang* (2) has exceptions as pointed out in *Shanker Sakharam* v. *Ratanji Premji* (3).

Lastly as to the oral application of the plaintiff further to extend by six months the period of payment granted in the decree, no affidavit or other circumstances are before me to justify the extension. Nor is the plaintiff able to accept the offer of the opposite party to give security for payment before such extension could be granted. As far as I can judge in the present condition of the values of properties in Karachi such a further extension would introduce an element of instability in the contract, which, for aught I know, might not be equitable, to either party concerned. I am unable, therefore, to grant the extension.

It is urged for the plaintiff that the defendants have already received Rs. 20,000 from the plaintiff before the suit. If so, it may be as in many other bargains that the defendants had the better of the bargain, because I presume, the plaintiff entered the market at the time of boom and has to complete the bargain at the time of a slump and tightness of the money market.

I must, therefore, grant the defendant No. 1's application and rescind the contract as far as the plaintiff is concerned.

As the application was argued on the construction of section 35 of the Specific Relief Act, I make no order as to costs.

K. S. D. *Application allowed.*

(2) 27 Ind. Cas. 830; 16 Bom. L. R. 668.
(3) 79 Ind. Cas. 226; 25 Bom. L. R. 328; 47 B. 607; (1923) A. I. R. (B.) 441.

DINARAM SOMANI, *In re.*

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL JURISDICTION

No. 165 OF 1920.

January 9, 1923.

Present:—Mr. Justice Greaves.

In re DINARAM SOMANI AND OTHERS—INSOLVENTS.

BHIM BAHADUR SING CHETRI AND ANOTHER—APPLICANTS.

Presidency Towns Insolvency Act (III of 1909), ss. 36, 90—Civil Procedure Code (Act V of 1908), O. XXI—Witness summoned under Act, position of—Court, jurisdiction of—Witness residing more than 200 miles away.

A person summoned under section 36 (1) of the Presidency Towns Insolvency Act does not, at any rate in all cases, fall within the category of an ordinary witness to whom the provisions of O. XVI of the Civil Procedure Code relate. [p. 76, col. 2.]

The proviso to section 90 of the Insolvency Act makes it quite clear that it was not intended to fetter the Court in the exercise of its jurisdiction under section 36 by any limitation imposed by the Code of Civil Procedure. [p. 77, col. 1.]

The Court has power under section 36 of the Presidency Towns Insolvency Act to summon before it persons who reside at a greater distance than 200 miles. [*ibid.*]

In such cases proper travelling and other expenses should be tendered and so far as possible the convenience of persons required to attend should be considered. [*ibid*]

Application to set aside an order by the Registrar in Insolvency under section 36 of the Insolvency Act, for the examination of the above-named applicants made on the application of Sadiram Chandanmall, a creditor of Insolvency.

Mr. *S. N. Banerjee*, for the Applicants.

JUDGMENT.—This is an application by two persons to set aside an order for their examination under section 36 of the Presidency Towns Insolvency Act made on the 18th August, 1922. By the said order, which was made at the instance of a creditor who had proved his debt and in the presence of the Official Assignee, the applicants were ordered to attend before the Registrar in Insolvency on the 14th September, 1922 to be examined regarding the insolvents, their dealings and properties and they were required to produce their books of account for the year 1920 and a mortgage executed by the insolvents in their favour on the 4th December, 1920. The applicants in fact attended before the Registrar in pursuance of the order on the 14th September, 1922, when the matter was adjourned until the 30th November. The applicants thereupon returned to Darjeeling where they reside, and came down again to Calcutta on the 20th November, one of them was attacked by fever on the 23rd November and they both returned to Darjeeling on the 26th of that month. The application is based on two grounds, (1) that the order should not have been made as the applicants reside more than 200 miles from Calcutta, (2) on the ground that they were not paid travelling and boarding charges. The second ground has not been pressed. So far as the first ground is concerned the applicants rely on section 90 (1) of the Insolvency Act and on O. XVI, r. 19 of the Code of Civil Procedure.

Section 90 (1) provides that in proceedings under the Act the Court shall have the like powers and follow the like procedure as it has and follows in the exercise of its Ordinary Original Civil Jurisdiction with the proviso that nothing in the sub-section is in any way to limit the jurisdiction conferred on the Court under the Act. Order XVI, r. 19 exempts a witness from personal attendance unless he resides within the local limits of the Court's Original Jurisdiction or within 200 miles with the limitation therein provided.

Section 36 (1) of the Insolvency Act provides that the Court may, on the application of the Official Assignee or of any creditor who has proved his debt, at any time after an order for adjudication has been made, summon before it the insolvent or any person known or suspected to have in his possession any property belonging to the insolvent or supposed to be indebted to the insolvent or any person whom the Court may deem capable of giving information respecting the insolvent, his dealings or property.

A perusal of the sub-section makes it clear that the person to be summoned does not, at any rate in all cases, fall within the category of an ordinary witness to whom the provisions of O. XVI relate. It deals rather with the discovery and recovery of property tha

with the ordinary testimony which a witness can give, and the proviso to section 90 (1) of the Insolvency Act makes it clear that it was not intended to fetter the Court in the exercise of its jurisdiction under section 36 by any limitation imposed by the Code of Civil Procedure.

I think the contention of the applicants is not well founded and that the Court has power under section 36 to summon before it persons who reside at a greater distance than 200 miles. I need hardly add that proper travelling and other expenses should be tendered and that so far as possible the convenience of persons required to attend should be considered.

As the application fails the applicants must pay the costs.

K. S. D. *Application rejected.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 274 OF 1921.
April 26, 1922.
Present :—Mr. Hallifax, A. J. C.
LAXMICHAND—PLAINTIFF—APPELLANT
versus
NARAYAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 74—Prior mortgagee obtaining foreclosure decree—Puisne mortgagee's remedy.

If a prior mortgagee obtains a decree for foreclosure against the mortgagor without joining the puisne mortgagee as defendant, because the suit against him is barred by time, the puisne mortgagee's right to redeem the prior mortgagee is not dead; in fact his only remedy is to redeem. [p. 78, col. 1.]

Appeal from the decree of the District Judge, Nagpur, dated the 27th January 1921 in Civil Appeal No. 114 of 1920.

FACTS.—The suit from which this appeal arises was brought on a mortgage-bond, dated 13th July, 1910, executed by Raoji, the deceased father of the first two defendants, for Rs. 1,000. The debt was payable by instalments of Rs. 50 each. Interest at Re. 0-12-0 per cent. per mensem was agreed to be paid with each instalment and in default of such payment compound interest was to be paid. In default of three instalments the whole debt was to become due.

Defendants Nos. 3 and 4, the prior mortgagees of the mortgaged property, sued on their mortgage and obtained possession. They assigned half of their interest in the mortgaged property to Sitaram, defendant No. 5. The first two defendants denied knowledge of the document sued on and pleaded that the property was joint ancestral property of the family and that the mortgage was not for the benefit of the family. Defendants Nos. 3 to 5 stated that the plaintiff was a party to their case. He was joined on his own application but as his joinder took place after the suit against him was time-barred, he was discharged by the Appellate Court. It was contended that the plaintiff could not ask the defendants to redeem him but that he should redeem them. The plaintiff stated that the mortgaged property was the self-acquired property of the mortgagor and not joint family property.

Mr. *M. R. Bobde*, for the Appellant.

Mr. *M. B. Kinkhede*, R. B., for the Respondents.

JUDGMENT.—The first of the two contentions of the learned Pleader for the appellant is based solely on the assumption that the appellant here was impleaded in the previous suit. But he was not. The record of that suit as it stands at present does not show his name in the list of defendants, as it was ordered by this Court to be erased from that list. The fact that he was believed for some time to be one of the defendants and was accordingly treated as one of them makes no difference whatever, as that belief was wrong and was corrected.

In the second place it was argued that though the present plaintiff-appellant was not a party to the previous suit, the right to compel him to redeem is dead along with the right to sue him for foreclosure, as was held in *Raghunath* v. *Sheolal* (1) a ruling which

(1) 39 Ind. Cas. 849; 13 N. L. R. 69.

KRISHNA IYER *v.* GYANADIKKAM PILLAI.

was approved by a Full Bench of this Court on the 9th of July, 1921, in *Jageshwar* v. *Moti* (2). It was there held that the prior mortgagee could not sue the puisne mortgagee to enforce his right to be redeemed, not that the right to be redeemed was dead. The essential distinction between that case and this is that there the prior mortgagee was the plaintiff while here he is a defendant.

The point is very clearly explained in paragraph 1395 of Jones on Mortgage where the learned author says:—"When a party in interest, other than the owner of the equity of redemption, is not made a party to the bill, the foreclosure is not generally for this reason wholly void. It is effectual as against those persons interested in the equity who are made parties. The sale vests the estate in the purchaser, subject to redemption by the person interested in it, who was not made a party to the proceedings. His only remedy, however, is to redeem. He cannot maintain ejectment against the purchaser. He cannot have the sale set aside by intervening by petition in the foreclosure suit. His only right is the right of redemption." The appeal is dismissed and the appellant must pay all the costs.

S. D. *Appeal dismissed.*

(2) 66 Ind. Cas. 631; 5 N. L. J. 157; (1922) A. I. R. (N.) 141.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1071 OF 1921.

March 13, 1924.

Present:—Mr. Justice Krishnan.

K. S. KRISHNA IYER—DEFENDANT—APPELLANT

versus

GYANADIKKAM PILLAI AND OTHERS—PLAINTIFF'S LEGAL REPRESENTATIVES—RESPONDENTS.

Specific performance—Assignment—Agreement to assign decree—Judgment-debtor's insolvency, whether affects agreement—Assignor's right to recover full amount agreed upon—Damages.

An agreement to accept the assignment of a decree, on the payment of a fixed amount, does not become invalid, if the judgment-debtor becomes insolvent; and the assignor in such a case is not entitled only to damages but to the full amount fixed in the agreement. [p. 79, col 1.]

Jatindra Nath Basu v. *Peyer Deye Debi*, 34 Ind. Cas. 69; 43 C. 990 at p. 999; 14 A. L. J. 527; 20 C. W. N. 866; (1916) 1 M. W. N. 403; 18 Bom. L. R. 509; 24 C. L. J. 67; 20 M. L. T. 25; 3 L. W. 553; 31 M. L. J. 248; 43 I. A. 108 (P. C.), distinguished.

There is no invariable rule that in cases of specific performance relating to moveable property damages only can be awarded. [p. 79, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, South Malabar at Palghat, in Appeal Suit No. 103 of 1919 (Appeal Suit No. 482 of 1919, on the file of the District Court, South Malabar), preferred against the decree of the Court of the Additional District Munsif, Palghat, in Original Suit No. 45 of 1919 (Original Suit No. 483 of 1916, on the file of the Court of the Principal District Munsif, Palghat).

Mr. *K. B. Venkatachala Iyer*, for the Appellant.

Mr. *P. S. Narayanaswamy Iyer*, for the Respondents.

JUDGMENT.—This suit was brought on an arrangement, which was made between the plaintiff and the defendant, that the defendant was to take an assignment of a decree which the plaintiff obtained against one Ananthanarayana Ayyar on payment of Rs. 400 in the circumstances that have happened here. Two points were taken before me in second appeal. The first point is that as Ananthanarayana Ayyar has become an insolvent, the defendant is not bound to accept the assignment of the decree and is not bound to pay the money due under the contract. Reliance is placed on a case reported in *Jatindra Nath Basu* v. *Peyer Deye Debi* (1) a decision of the Privy Council. There the decree that was agreed to be assigned subsequently became barred by limitation, as the assignor did not take steps in time to keep the decree alive; their Lordships held that as the plaintiff had agreed to take the assignment of a subsisting de-

(1) 34 Ind. Cas. 69; 43 C. 990 at p. 999; 14 A. L. J. 527; 20 C. W. N. 866; (1916) 1 M. W. N. 403; 18 Bom. L. R. 509; 24 C. L. J. 67; 20 M. L. T. 25; 3 L. W. 553; 31 M. L. J. 248; 43 I. A. 108 (P. C.)

cree, there was a duty on the part of the decree-holder to keep the decree alive and that as he failed to perform that duty and the decree became valueless, the assignee was not bound to take the assignment. That case has no bearing on the present case. Here, there is no difficulty of the decree having become barred as it was expressly kept alive. The judgment-debtor has become an insolvent, but that does not mean that the decree has become entirely infructuous. No doubt, it may be that the amount of the money realisable in execution of the decree had become reduced, but that is no ground for saying that the agreement to assign has become invalid.

The second point taken is that the plaintiff is not entitled to sue for the amount that the defendant agreed to pay but can only sue for damages against the defendant for not accepting the assignment. I do not think that there is any ground for this contention. The defendant agreed to pay for and take the assignment of the decree and the plaintiff was always ready and willing, as found by the lower Court, to make the assignment to the defendant. The plaintiff is entitled to the price arranged under the contract and need not sue for damages. It may be that the recovery of the price is in the nature of a specific performance of the contract, but that does not affect the question; for, in such a contract as this, the payment of the price is the proper remedy that should be allowed. There is no invariable rule that in cases relating to moveable property, damages only should be given. The point was not taken in the First Court nor was it made a ground in the memorandum of appeal to the lower Appellate Court. The point, therefore, should not have been allowed by the Subordinate Judge to be argued at all. However, I consider that there is no substance in the contention. Both the points taken failing, the second appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

S. D.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 105 OF 1921.

February 29, 1924.

Present:—Mr. Justice Das and Mr. Justice Ross.

GAYANI DAS—PLAINTIFF—APPELLANT

versus

DWARKA MANDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), Sch. III, Art. 3—Landlord and tenant—Land given for cultivation—Lessee settling tenants—Lessee, whether raiyat—*Suit for recovery of possession against landlord—Limitation*—Raiyat, *test of.*

Where a landlord, under a *parwana*, gives a person "permission to cultivate" certain land, the latter is a *raiyat*, and limitation for a suit by him for recovery of possession, on dispossession by the landlord, is governed by Art. 3 of Schedule III to the Bengal Tenancy Act. [p. 80, col. 1.]

The mere fact that such a person settles tenants upon the land does not change the nature of his holding. [*ibid.*]

In order to determine whether a tenant is a *raiyat* or not the test is not the use which the tenant has made of the land but the purpose for which the land is leased. [*ibid.*]

Appeal from a decision of the Subordinate Judge, Bhagalpur, dated the 24th February 1921.

Mr. *S. P. Varma* (with him Mr. *Jadubans Sahay*), for the Appellant.

Mr. *K. P. Jayaswal* (with him Messrs. *Susil Madhab Mullick*, *Satya Saran Bose*, *Nirode Chandra Roy* and *Subodh Chandra Mozamdar*), for the Respondent.

JUDGMENT.—This appeal arises out of a suit instituted by the appellant for possession of certain lands described in the schedule annexed to the plaint as:

"1100 *bighas* of *nakdi jote* situate in *Mauza* Dildarpur Mal, *Tauzi* No. 4395, and *Mauza* Dildarpur Taufir, T. N. 52, *Thana* Nathnagar, District Bhagalpur, included within the following boundaries."

Then follow the boundaries, not of the demised lands but of the *mauza* within which the demised lands are situate.

The learned Subordinate Judge has dismissed the suit on a variety of grounds. In my opinion the decision of the learned Subordinate Judge is right and must be affirmed.

It is unnecessary to deal with all the grounds made in the memorandum of

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appeal. It is sufficient to say that the plaintiff's suit is clearly barred by limitation. The learned Subordinate Judge has found that if the plaintiff was ever in possession of the disputed lands, he was clearly dispossessed on the 7th of March, 1917. The suit was instituted on the 3rd of January, 1920. The plaintiff's case is that he was dispossessed by the defendants first party acting in collusion with the defendants second party. It may be stated that the defendants first party are the proprietors of the *mauza* in question; the defendants second party are the lessees under the defendants first party; and the plaintiff's case is that on the expiry of the lease, in favour of the defendants second party, he obtained a *hukumnama* from the proprietors allowing him to cultivate 1100 *bighas* of land within the *mauza*. Clearly then the case in the plaint is one of dispossession by the landlords; and to such a suit Art. 3, Schedule III of the Bengal Tenancy Act applies. Mr. Varma, on behalf of the appellant, argues before us that his client is not a *raiyat* and, therefore, Art. 3 has no application to the suit; but the *hukumnama* upon which he relies shows that he is a *raiyat*. The critical words in that document are as follows:

"I permit you under this *parwana* to cultivate the said lands—boundaries whereof are given below—for this year."

It is contended before us that there is evidence that the plaintiff settled tenants upon the land. That may be so; but the test is not the use which the tenant has made of the land but the purpose for which the land is leased. Clearly under the *hukumnama* the land was let to the plaintiff to enable him to cultivate it. That being so, Art. 3, Schedule III of the Bengal Tenancy Act clearly applies.

It is unnecessary to go into the other points raised in the appeal, because, in our opinion, the learned Subordinate Judge was right in dismissing the suit on the ground of limitation.

The appeal is dismissed with costs. There will be two sets of costs payable to the defendants first party and the defendants second party.

N. H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 938 OF 1922.

May 1, 1924.

Present :—Mr. Justice Daniels and Mr. Justice Boys.

Lala DWARKA DASS—PLAINTIFF—APPELLANT

versus

Rai Bahadur Shah DURGA PRASAD—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47—Decree, execution of—Dispossession in execution—Party dispossessed, remedy of—Suit for recovery of possession, whether maintainable.

A person who has been dispossessed under the terms of a decree to which he was a party is not competent to bring a suit for recovery of possession. His remedy is by way of an application to the Execution Court. [p. 81, col. 1.]

Second appeal from a decree of the Officiating District Judge, Agra, dated the 11th April, 1922.

Mr. *S. K. Dar*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondent.

JUDGMENT.—In 1906 two simple mortgages were executed over the property in suit one in favour of the plaintiff and the other in favour of one Bhagirath. The defendant acquired the right of Bhagirath and brought the property to sale under his mortgage. The plaintiff was made a party to the suit. It should be mentioned that the plaintiff had also acquired the equity of redemption from the original mortgagor and was in possession of the property in that capacity. The decree in the defendant's suit was for sale of the property subject to the prior lien of the plaintiff though it is said that that lien was not entered in the final decree. On the property being brought to sale, the defendant purchased it himself. He thereupon obtained possession through the Court as against the plaintiff. He also obtained mutation of names in the revenue papers. It is admitted in the plaint

and has been admitted throughout the proceedings that the plaintiff has lost possession. He brings the present suit, not for recovery of his mortgage money under his prior lien, but to be restored to possession of the property.

His suit has been dismissed by both the Courts below and it appears to us that it has been rightly dismissed both on the merits and as being barred by section 47 of the Code of Civil Procedure. The plaintiff is not entitled to possession as mortgagee, because the mortgage in his favour was a simple mortgage. He is not entitled to possession as owner of the equity of redemption, because the equity of redemption has been sold and purchased by the defendant. His only right, if any, under the decree was to bring the property to sale for the enforcement of his prior lien. The suit is also barred under section 47. The plaintiff was a party to the decree. He has been dispossessed under the terms of the decree and his remedy for recovery of possession was by application to the Execution Court. It is not possible now to treat this suit as an application under section 47 because the defendant obtained possession in the year 1915 and the present suit was not brought till the year 1920.

We accordingly dismiss the appeal with costs including in this Court fees on the higher scale.

K. S. D. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEALS NOS. 13 AND 29 OF 1922.

May 16, 1923.

Present:—Mr. Kemp, A. J. C.

(*On difference between* Kincaid, J. C. and Madgavkar, A. J. C.)

FIRM OF SODAWATERWALA—APPELLANTS

versus

MESSRS. VOLKART BROTHERS—RESPONDENTS.

Arbitration—Construction of contract—Agreement to refer all disputes arising out of contract to arbitration—Dispute relating to terms of contract, nature of—Stay of suit—Discretion of Court—Burden of proof—Statutes, construction of—Courts, duty of—Arbitration Act (IX of 1899), s. 19—Civil Procedure Code (Act V of 1908), s. 104—Order staying suit—Appeal, whether lies.

Per *Kincaid, J. C.*—Under a submission to refer all disputes arising out of a contract, the arbitrators have authority to decide what are the terms of the contract. [p. 85, col. 2.]

Produce Brokers Co. v. *Olympia Oil & Cake Co.*, (1916) 1 A. C. 314; 85 L. J. K. B. 160; 114 L. T. 94; 21 Com. Cas. 320; 60 S. J. 74; 32 T. L. R. 115, *In the matter of an Arbitration between Baijnath Kalooram and Alibhoy Mahomed*, 59 Ind. Cas. 139; 24 C. W. N. 567, relied on.

A suit to avoid a contract on the ground of misrepresentation and fraud, based on the allegation that a certain term was inserted in the contract without the plaintiff's knowledge, is a suit arising out of the contract and is liable to be stayed under section 19 of the Arbitration Act, where the parties have agreed to refer all disputes arising out of the contract to arbitration. [p. 84, col. 2.]

Per *Madgavkar, A. J. C.*—The question of staying a suit under section 19 of the Arbitration Act is one of discretion by the Trying Court to be judicially exercised, rather than an absolute right of the defendant. [p. 87, col. 1.]

A defendant claiming a stay of a suit must show, that the suit is in respect of a matter agreed to be referred. [p. 87, col. 2.]

An application by a defendant for stay of a suit must be distinguished from an application for a stay of the arbitration proceedings in which a different set of considerations would arise. [p. 87, col. 2.]

A suit to avoid a contract on the ground of misrepresentation and fraud is not a suit relating to a dispute arising out of the contract and is not, therefore, liable to be stayed under section 19 of the Arbitration Act, on the ground that the parties had agreed to refer all disputes arising out of the contract to arbitration. [p. 89, col. 1.]

Case-law discussed.

The province of the Courts is confined to ascertaining the law and to applying it to the facts of each particular case, it is not for the Courts to judge of the consequences, good or bad or indifferent of the application of the law or the hardship resulting in any case or any class of cases. These are matters proper for the Legislature but not to be avoided by the Courts. [p. 88, col. 2.]

Per *Kemp, A. J. C.*—No appeal lies under section 104 of the Civil Procedure Code from an order passed under section 19 of the Arbitration Act, staying a suit. [p. 89, col. 2.]

Mr. *Dipchand*, for the Appellants.

Mr. *Rupchand*, for the Respondents.

JUDGMENT.

Kincaid, J. C.—The facts of the case underlying the two appeals before

us are quite simple but they involve a question of great importance.

On the 19th February 1920, the plaintiff Sodawaterwala signed an indent on the defendants Volkart Brothers for 1040 Axle Arms. The defendants were to get them from Henry Rogers Sons & Co., in two lots of 520 in each lot. The first lot was to be of May-June 1920 shipment and the second lot to be of July 1920 shipment. The defendants communicated with Rogers & Sons and received the reply that they could not guarantee the shipment. They, therefore, on the 8th March 1920 sent to the plaintiff the following paper for signature :—

"DEAR SIRS,

"We beg to acknowledge receipt of your notice dated the 8th March 1920 advising the execution of our indent 1040 Axle Arms from Henry Rogers Sons & Co. Limited, shipment in 2 lots of 520 Axle Arms each 1st May-June, and 2nd lot in July 1920, both unguaranteed. Price and all other conditions as per indent No. 1580, dated 19th February 1920, which is in order."

This document was in duplicate and the plaintiff retained the original and signing the counterpart returned it to the defendants.

The 1st lot of the Axle Arms arrived in October 1920. The plaintiff did not take delivery, but, on the 29th October 1920, he asked the defendants Volkart Brothers to store them. Volkart agreed, provided the plaintiff signed the following document which he did.

Appendix and Indent No. 1480 for 520 Axle Arms and 3 bags keys per *S. S. "City of Marseilles"* (All other terms as per original indent including arbitration clause).

"We shall feel obliged if you will have the goods removed to your godown for our account at our sole risk. We agree to pay all expenses for cartage, etc., piling and storage in addition to insurance and godown rent. We also agree that Messrs. B. B. may insure these goods for its value and we shall pay for and remove them within 10 days. We agree to pay to you Rs. 1,000 as deposit and balance to be paid within 10 days."

The plaintiff admittedly paid the Rs. 1,000. But he did not pay the balance. The defendants stored the Axle Arms in their godown. In the meantime, the exchange fell and so did price and the plaintiff began to repent of his bargain. He took delivery of neither the 1st lot nor the 2nd lot.

On the 6th November 1920 Sodawaterwala wrote to say, that in the indent the words "unguaranteed shipment" did not occur. He, therefore, declined absolutely to take delivery of the 2nd lot. He agreed to take delivery of the 1st lot provided, Volkart Brothers paid him "the difference of price and exchange ruling in the months of May and June." Volkart Brothers protested. The 2nd lot of Axle Arms came in December 1920 and as the plaintiff would not take delivery, Volkart Brothers sold the goods by public auction at a loss of some Rs. 13,000.

Now in the indent was a clause 10 which ran as follows ;—"Disputes of whatever nature *arising out of this contract* to be referred to the surveyors' arbitration of two European merchants in Karachi, one to be chosen by each party, whose decision we agree to accept as binding and final, but should the two surveyors, or arbitrators (as the case may be) be unable to agree, they shall refer the case to an Umpire, whose decision shall be final and binding upon both parties."

On the 8th February 1921, Volkart Brothers nominated Mr. L. Brachi as their arbitrator and called upon Sodawaterwala to nominate his. On 15th February 1921 he nominated Mr. Gartley. In July 1921, Sodawaterwala filed a suit in the Court of Kennedy, A. J. C. for the return of Rs. 1,000. Messrs. Volkart Brothers filed an application under section 19 of the Arbitration Act to stay the suit. On the 7th February 1922, Kennedy, A. J. C. granted the stay application. On 21st November 1921 Sodawaterwala filed in the Court of Raymond, A. J. C. a second suit against Volkart Brothers for a declaration that the contract between the parties was

void on the ground of fraud. Volkart Brothers applied under section 19 of the Arbitration Act for a stay of the suit. On the 24th July 1922 Raymond, A. J. C. rejected the application. Against Mr. Kennedy's decision Sodawaterwala has lodged Appeal No. 13 of 1922. Against Mr. Raymond's decision Messrs. Volkart Brothers have lodged Appeal No. 29 of 1922. Both appeals have been heard together.

I wish at the outset of my judgment to express my appreciation of the great ability shown by the learned Pleaders on both sides. Their industry has greatly lightened our labour.

Mr. Dipchand has argued that Mr. Kennedy was wrong in holding that the indent was a contract. A contract requires unqualified acceptance. The terms in the indent were never accepted by Volkart Brothers. They modified it on receipt of a letter from Rogers & Sons. Thus, there was no contract between the parties until Volkart Brothers on the 8th March sent Sodawaterwala their acceptance memo. This Sodawaterwala signed and the contract was completed. But as the defendants were guilty of fraud and the parties were not *ad idem* the contract was void. If the contract was void, the submission clause was void. As this objection strikes at the root of the contract, and is outside the jurisdiction of the arbitrators, it must be decided by the Court.

Before I examine the law on the point, I wish to scrutinize the plea itself. What has Sodawaterwala said in his plaint before Raymond, A. J. C.? He has declared (1) that the words "to be unguaranteed" were subsequently inserted by the defendants in the alternative:—

(2) That it was the defendants' duty to inform the plaintiffs of the new words and their silence amounted to a misrepresentation.

I shall deal with plea (1) later: it was on plea (2) that Mr. Dipchand has chiefly relied. But in my opinion even if the facts stated by Sodawaterwala were true, it would not render the contract void.

Section 17 of the Contract Act contains the following explanation:—

"Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them it is the duty of the person keeping silence to speak, or unless his silence is in itself equivalent to speech".

Illustration.

(*a*) A sells by auction to B a horse which A knows to be unsound; A says nothing to B about the horse's unsoundness. This is not fraud in A.

(*b*) B is A's daughter and has just come of age. Here the relation of the parties would make it A's duty to tell B if the horse is unsound.

Thus the only circumstances in which Volkart Brothers' silence would amount to fraud would be (1) if it was their duty to speak and (2) if their silence was equivalent to speech. It has not been contended that their silence was equivalent to speech. It has been contended that it was their duty to speak. But they stood in no fiduciary relation to Sodawaterwala. It has been said that Volkart Brothers "took advantage of his (the plaintiff's) illiteracy. But Sodawaterwala is not illiterate. He has signed all the documents in the transaction before us. Then it has been urged that he knows no English. But he has conducted the whole lengthy correspondence in English. There was thus no duty on Volkart Brothers to draw his special attention to the words "both unguaranteed". They were in the document written in a language which he or his staff well understood. If it was not Volkart Brothers' duty specially to draw Sodawaterwala's attention to the change in the wording, there was no fraud.

But as a matter of fact the words "strike at the root of the contract" are vague and of little meaning. What the Court has to decide is whether the disputes between the parties "arise out of the contract", see clause 10 of the Indent. Mr. Dipchand has relied strongly on the

case of *Monro* v. *Bognor Urban Council* (1). Therein the plaintiff a contractor had agreed to construct for the Bagnor District Urban Council certain sewage works. There was a clause binding the parties to refer their disputes to the Council's Engineer. The plaintiff brought a suit for a declaration that the contract was void, owing to fraudulent misrepresentations in the specification of the soil in which the work had to be done. The specification described the soil as other than what the plaintiff alleged the soil actually was. The Urban Council applied for a stay. But the Court of Appeal rejected the application on the ground that the action was not an action on the contract at all. Pickford, L. J. observed:—

"Nor do I think that it is an action in relation to or in connection with the contract. In the one sense it is an action in relation to and in connection with the contract because if there had never been any contract there would never have been any cause of action, there would never have been any representation and there never would have been any action for damages. But it is not in relation to or in connection with the contract, in my opinion, within the meaning of the arbitration clause". The question, therefore, for the Court to decide is whether the claim comes within the submission to arbitration. In the case just referred to their Lordships held that the misrepresentation was something quite distinct from and previous to the contract. We have to see whether that is the case here.

I shall now again revert to the two pleas of the plaintiff. But before I do so, I wish to emphasize my opinion that pleas such as his should be examined with the utmost rigour. They are not pleas that an honest man would make, save in the most exceptional circumstances. They are pleas, too, which if allowed, would be capable of the most dangerous extension. If all that is needed for the rejection of a stay application is for the opposite party to allege that he was misled or browbeaten or hypnotized when signing the contract, it is clear that the provisions of the Arbitration Act will become valueless. In the Court such a possibility can only be contemplated with dismay. A suitor cannot hope to have his case heard for several years. To deprive him, therefore, of the right to submit his disputes to the speedy decision of an arbitration tribunal is to do him the most serious wrong and to do the commerce of Karachi a very grave injury.

I shall now return to the plea of the plaintiff. The first is that the defendants deliberately forged an interpolation in the acceptance memo after Sodawaterwala had signed it. Now that forgery could not have occurred before the completion of the contract but after. It is, therefore, clearly a dispute which arises out of the contract itself. Mr. Dipchand, however, did not rely so much on this plea as on the second. That plea was that Mr. Sodawaterwala misread the acceptance memo and believed it to be something different from what it was. I have already expressed the opinion that even if the plea were true it would not vitiate the contract. Apart from that, however, it is a dispute that, in my judgment, arises out of the contract. Sodawaterwala signed the document in March. In October he made no objection to it but asked the defendants to store the first lot of Axle Arms. It was not till after this that he found out that the contract which he had signed was somewhat different from what he believed it to be. Surely, that is a dispute arising out of the contract. It is in fact a question as to what the contract was into which the parties entered. I am fortified in this view by the decision of the Privy Council in the case of *Produce Brokers Co.* v. *Olympia Oil & Cake Co.* (2). In that suit there was a clause in the contract which referred to arbitration all suits arising under the contract. The arbitrators in the course of their award interpreted the contract in the light of an existing custom. It was argued that the

(1) (1915) 3 K. B. 167; 84 L. J. K B. 1091; 112 L. T. 969; 79 J. P. 286; 13 L. G. R. 431; 59 S. J. 318.

(2) (1916) 1 A. C. 314; 85 L. J. K. B. 160; 114 L. T. 94; 21 Com. Cas. 320; 70 S. J. 74; 32 T. L. R. 115.

arbitrators had gone beyond their jurisdiction, because the scope of the submission was to ascertain the contract as it really was. This objection was overruled. Lord Loreburn observed. "When an arbitrator has power, as here, to decide all disputes arising out of a contract, including questions of law, surely he must decide what the contract is and he cannot decide that without introducing the custom." And Lord Atkinson added:—"*Prima facie* one would suppose that authority to decide disputes arising out of a contract necessarily conferred authority to decide what were the terms of that contract. It would appear to me to be impossible for any Judge or arbitrator to determine, whether any particular dispute arose out of a contract unless and until he knows what that contract is."

This view was adopted by Greaves, J. *In the matters of an Arbitraton between Baijnath* v. *Kalooram and Alibhoy Mohammed.* (3) There a plea was advanced as here, that there had been an interpolation in the contract. But Greaves, J. held "that it was competent for the arbitrators under the terms of the submission to decide whether or not the particular term was in the contract as originally made. It must be noted that Mr. Dipchand has strenuously contended that the contract was void because the parties were not "*ad idem*". But I find some difficulty in following this reasoning. Under section 20 of the Contract Act, it is only where both parties are under a mistake of fact that an agreement is void. Now Volkart Brothers were under no mistake of fact. The only person who has alleged a mistake of fact is Sodawaterwala. But section 22 lays down "A contract is not voidable merely because it was caused by one of the parties to it, being under a mistake as to a matter of fact." Thus the only dispute which the defendant can raise is that the contract he signed was not the real contract between the parties. In order to settle that dispute the terms of the contract have to be ascertained; and according to Lord Atkinson's dictum, that is an enquiry within the jurisdiction of the arbitrators. I am supported by another passage from the judgment of Greaves, J.

"Now as I read the decision in *Produce Brokers Co.* v. *Olympia Oil & Cake Co.* (2) it is a decision that under a submission to refer all disputes arising out of a contract the arbitrators have authority to decide what are the terms of the contract.

I, therefore, hold that the disputes raised by Sodawaterwala all "arise out of the contract." It follows from this finding that Volkart Brothers have under the submission clause in the contract the right to ask the Court to stay the suits brought by Sodawaterwala under section 19 of the Arbitration Act. Kennedy, A. J. C., granted such a stay and in my judgment his order should be upheld. The appeal is, therefore, dismissed with costs. Mr. Raymond, A. J. C., refused to stay and in my judgment his order should be set aside, and the stay granted and Messrs. Volkart Brothers' appeal allowed with costs.

Madgavkar, A. J. C.—The question in both these appeals is whether the defendants sellers are entitled to a stay under section 19 of the Indian Arbitration Act (IX of 1899) of the two suits against them by the plaintiffs-buyers. The suits were on the file of two different Judges of this Court who arrived at different conclusions. Accordingly the buyers are appellants in one appeal Miscellaneous No. 13 of 1922 and the sellers are appellants in the other appeal No. 29 of 1922.

The Buyer signed an indent on the 19th February agreeing to purchase a certain number of Axle Arms at a certain rate half May, June and half July shipments. The sellers after communicating with the office in Europe presented an acceptance memorandum on the 8th of March under which the Indent was accepted. That acceptance note was in counter-foil, the foil being signed by the buyers, the other by the sellers, each foil being retained by the party other than the signatory. The buyers have not produced the foil with them alleging that they have lost it,

(3) 59 Ind. Cas. 439; 24 C. W. N. 567.

The counter-foil produced by the sellers contains the words in ink "Both unguaranteed", referring to the shipments.

The only dispute between the parties relates to those two words in the acceptance memo. The buyers contend that they contracted for half May, June and half July shipments and never consented to shipments unguaranteed and their grounds are:

Firstly they do not know English, secondly, these two words and the consequent modification of the terms in the indent were not known to them and were not brought to their notice when they signed the acceptance memo, thirdly these conditions may be an interpolation on the part of the sellers added to the acceptance, after the buyers had signed and without their knowledge or consent.

The sellers' contention is that these two words were contained in both files and the buyers signed with full knowledge and understanding.

The first consignment arrived in October. The buyers raised no objection though it was not May, June, July shipment but signed an appendix promising to take delivery within 10 days and deposited Rs. 1,000 with the sellers and asked them to take delivery of the goods and bring them to the godown although under the indent the delivery was "Karachi Harbour." Subsequently the buyers refused to take delivery of either consignment on the grounds mentioned above. The Indent which was also incorporated in the acceptance memo contained the usual arbitration clause. Each party nominated its arbitrator. No reference, however, was actually made and no further steps in arbitration were taken. On the 12th of July 1921 the buyers filed the first Suit No. 1000 of 1921 for return with interest of Rs. 1,000 which they had paid to the sellers on the arrival of the first lot. In October 1921 the sellers tried to proceed with the arbitration and the buyers filed on the 21st of November 1921 a second Suit (No. 1572 of 1921) in which they claimed a declaration that the contract was, owing to the misrepresentation or fraud as to the addition of the words "both unguaranteed" void or in the alternative for a declaration that there was no complete and binding contract between the parties as they were not *ad idem* and therefore there was no clause compelling them to submit to arbitration and for perpetual injunction to restrain the sellers from proceedings to arbitration. The sellers applied for a stay under section 19 of the Arbitration Act in both the suits. Kennedy, A. J. C., in the former suit granted a stay, Raymond, A. J. C. in the latter refused it. Hence these two appeals.

The contracts, the parties and the disputes are all identical. And whatever the difference in the relief claimed in the two suits, the questions in these are identical, with one material exception, *viz.*, the appendix and the buyers' conduct in regard to the first lot on arrival. Both the appeals can be conveniently disposed of in the same judgment.

Kennedy, A. J. C., thought that there was no substance in the contention of the buyer that there was no contract between the parties. He held that whatever the dispute as regards the two words in the acceptance memo, the contract was contained in the indent, according to the case of the plaintiffs-buyers themselves. And the real dispute was whether or not the *prima facie* breach of the contract in the indent in respect of the late shipments on the part of the sellers was or was not excused by the fact, disputed by the buyers, that the buyers had consented, subsequently to the indent, to the term 'both shipments unguaranteed.' He held that the dispute was thus one arising out of the contract and within the submission clause referable to the arbitrators and not triable by the Court. He therefore granted a stay.

On the other hand, Raymond, A. J. C., held that the indent itself did not establish a contract as it was subject to confirmation, and that the addition of the two disputed words in the acceptance memo constituted a counter proposal to which the consent of the buyers

was necessary before a complete contract between the parties including the submission clause could be held established. The dispute raised by the buyers in respect of these two words went to the root of the contract and raised a contention that they had never accepted the counter proposal as the sellers alleged. The dispute was, therefore, not one arising out of the contract which could be referred to arbitration but one triable solely by the Courts. He thought that he was bound by the law as laid down in cases such as *Monro* v. *Bognar Urban Council* (1). He, therefore, refused to stay the suit before him.

In view of this difference of opinion between the two learned Judges and also the different conclusion reached in these appeals by the learned Judicial Commissioner, I have given my anxious consideration to the question at issue in these appeals. I have arrived at the conclusion that the view of the law adopted by Raymond, A. J. C., and its application by him to the facts of this case, in so far as they are before us at the present stage, is correct.

The application of the sellers for the stay of the suits could only be made under section 19 of the Indian Arbitration Act. I do not desire to lay stress on the concluding words "may make an order" although they make it clear that the question of stay is one of a discretion by the Trying Court to be judicially exercised rather than an absolute right of the defendants. The question in these suits appears to me to be whether the two legal proceedings instituted by the buyers are "in support of any matter agreed to be referred" within the meaning of section 19 or whether they are outside of such matter.

The only contract which the defendants sellers set up is not the indent but the indent as modified by the acceptance memo. Whatever doubts might have existed as to the correctness of either view, if the acceptance memo. had been a mere confirmation of the indent on the facts of the present case, it appears to me indisputable that as to the completed agreement or contract the view of Raymond, A. J. C., is correct rather than that of Kennedy, A. J. C. The plaintiff does not in either suits set up a contract in terms of the indent. In both the suits he claims to avoid the contract set up by the sellers and on the sellers' own showing the contract is contained not in the indent but in the acceptance memo. incorporating the indent and on the strength of the signature of the buyers on the acceptance memo. It does not appear to me relevant in this connection for either side to extract a stray word on a particular portion of the pleadings of the other in support of their contention as to what the contract was. The buyers say there was no contract, on the ground of misrepresentation or fraud and the parties not being *ad idem*. The sellers say the contract was the acceptance memo incorporated in the first indent. It is not the case of either side that the contract is the indent pure and simple.

As to what the precise dispute is, there is no doubt. Into the merits of the dispute or which side is right or wrong we are obviously precluded from forming or expressing any opinion, to the prejudice of the tribunals whether the Court or of the arbitrators, which may have to decide the question. An application by the defendant for the stay of the suit must in law be clearly distinguished from an application for a stay of the arbitration proceedings, in which a different set of considerations would arise involving equitable grounds and permitting perhaps a *prima facie* view of these matters. *Cf. Kitts* v. *Moore* (4), *Gajanand Maskara* v. *Taleb Jalaludin* (5), *Joylal & Co.* v. *Gopiram Bhotica* (6), *G. M. Birlad & Co.* v. *Johurmull Premsukh* (7). Nor is there any question here of custom of the trade into which the arbitrators could go; *Produce Brokers Companys Limited* v. *Olympia Oil & Cake Co. Limited* (2). No stay of arbitration proceedings is here asked for. Therefore, for the purposes of the present appeals which relate to stay of the suits, we

(4) (1895) 1 Q. B. 253; 64 L. J. Ch. 152; 12 R. 43; 71 L. T. 676; 43 W. R. 84.
(5) 46 Ind. Cas. 173; 22 C. W. N. 535.
(6) 55 Ind. Cas. 778; 31 C. L. J. 167.
(7) 55 Ind. Cas. 817; 31 C. L. J. 158.

must assume as in the case of a preliminary issue whether suit discloses a cause of action assuming that the allegations in the plaint might be true and proveable.

It is argued by Mr. Rupchand for the sellers that the indent was a contract contingent on the consent of the home firm. A reference to section 31 of the Indian Contract Act suffices to rebut this argument. And whatever the possible difficulties if the indent had been accepted without any modification whatever, it appears to me indisputable that the defendants-sellers having themselves made a counter proposal in respect of an essential term such as shipment, are precluded from saying that the original offer of the buyers in the indent was complete and formed a contract. Under section 7 of the Indian Contract Act before a proposal can be converted into a promise, the acceptance must be absolute and unqualified. The fact that the plaintiff alleges a misrepresentation on the sellers' part that the acceptance was absolute and unqualified cannot help the defendants sellers to prove that the agreement to refer was, therefore, contained in the indent apart from the acceptance memo. It is the defendants who claim a stay, it is for them to show the suits are "in respect of any matter agreed to be referred" and it is for them to prove this agreement to refer. The only agreement to refer which is open to them to set up and which they set up, is the acceptance memo which they have produced incorporating the indent.

But this acceptance memo itself the plaintiff in his suit alleges was the subject certainly of misrepresentation if not of fraud. The authorities such as *Munro* v. *Bagnor Urban Council* (1) seem to be clear that such an allegation of misrepresentation or fraud is not a dispute arising out of the contract but is a dispute regarding the validity of the contract. From the opinion of Pickford, L. J., it follows that such suits are not suits upon contracts and cannot be tried by arbitrators under the reference clause in the contract. To take an extreme case, if the buyer in the present case had denied his signature or had alleged that it was a forgery, such a dispute would, I think, clearly have been outside the purview of the arbitrators and would have to be tried by the Civil or Criminal Court: see Russell on Arbitration, pp. 91-92, 10th Edition. The case above is clear that if the cause of action is definite misrepresentation to avoid the contract set up by the opposite party, such a dispute is not a dispute arising out of the contract within the submission clause in the contract and the Court has no power to stay. There is one Indian authority referred to: *Alibhoy Mahomed* v. *Baijnath Kalooram* (3) in support of the proposition that question of interpolation or fraud such as that now sought to be raised was within the province of the arbitrators. That decision, however, is the decision of a single Judge and was based apparently on the case of *Produce Brokers Co.* v. *Olympia & Cake Co. Ltd.* (2) referred to above which, however, is hardly authority for the proposition enunciated. It only decided that the arbitrators are competent to go into the question of the custom of trade in the light of the contract which had been entered into. Greaves, J., in that judgment appears to differ from the view of two other Judges of that Court and Walsh, J., in a recent decision of a Bench of the Allahabad High Court *Sushil Chandra Das* v *Sukhamat Bansidhar* (8) where the decision of Greaves, J. in the case above has been dissented from. With all respect I agree with the decision of the Allahabad Bench, which appears to me to be rightly based on the case of *Monro* v. *Bagnor Urban Council* (1) referred to by Raymond, A. J. C.

It is argued for the sellers that ill consequences result from this state of the law and enable parties without any substantial claim or relief to delay and hamper arbitration proceedings; as to this it is to be observed that the province of the Courts is confined to ascertaining the law and to applying it to the facts of each particular case, it is not for the Courts to judge of the consequences, good or bad or indifferent of the application of the law or the hardship resulting in any case or any class of cases. These

(8) 67 Ind. Cas. 487; 4 U. P. L. R. (A.) 69; (1922) A. I. R. (A.) 219; 44 A. 472; 20 A. L. J. 377.

are matters proper for the Legislature but not to be avoided, as I conceive by the Courts. Nor does the arbitration Act or the other law enable us to take account of possible delays in applying and enforcing the law. In the present case, for instance, there was admittedly a certain amount of delay on the part of the sellers in proceeding to arbitration between February 1921 when the arbitrators were named to October 1921 when the sellers decided to continue the arbitration proceedings. But this delay, in my opinion, should not prejudice the stay of application of the sellers on the one hand any more than the possible delay in the trial of the suits should prejudice the plaintiffs buyers.

Shortly, therefore, I am of opinion that the two suits by the buyers are not in respect of any matter agreed to be referred under the contract set up by the sellers but are to avoid this contract for alleged misrepresentation on the ground that the sellers represented it as a contract for half May-June, half July shipments. If so then neither suit can be stayed under section 19 of the Indian Arbitration Act.

For the reasons stated above I am of opinion that the Miscellaneous Appeal No. 13 of 1922 should be allowed with costs and the Suit No. 1000 should not be stayed and Miscellaneous Appeal No. 29 of 1922 should be dismissed with costs.

Kincaid, J. C.—As Mr. Madgavkar, A. J. C. and I differ in opinion, as to the decision in Appeals Nos. 13 and 29 of 1922 I in substitution of my reference to a Full Bench, do now with the consent of the Pleader on each side, refer the case to a third Judge who shall be the Barrister A. J. C. for the time being.

Kemp, A. J. C.—This is a reference owing to a difference in opinion between the learned Judges sitting in Appeals Nos. 13 and 29 of 1922 against orders passed by my brothers Raymond and Kennedy, A. J. Cs. respectively in certain applications under section 19 of the Indian Arbitration Act (IX of 1899).

In Suit No. 1572 of 1921 Raymond, A. J. C., refused a stay of the suit; in Suit No. 1000 of 1921 Kennedy, A. J. C., granted it.

The points in both suits are the same and it is clear that there is a conflict of opinion amongst the Judges of this Court as to whether the stay should be granted. In the appeals Kincaid, J. C., considered that the order of Kennedy, A. J. C., should be upheld and that of Raymond, A. J. C., set aside: Madgavkar, A. J. C., who sat with him was of the contrary opinion.

Accordingly, on 27th February 1923 the Judicial Commissioner referred the case to the Barrister A. J. C.

Since the order of reference, however, a Full Bench of this Court which included the learned Judicial Commissioner and Madgavkar, A. J. C., decided on 6th March 1923 in Miscellaneous Application 6 of 1920 (*Mengharaj Khialdas* v. *Firm of Langley Billimoria* (9)) that no appeal lies under section 104 of the Civil procedure Code from an order passed under section 19 of the Indian Arbitration Act, staying a suit. This decision is binding on me and it appears, therefore, that no appeal lies. The appeals have been referred to me for disposal and I must decide accordingly.

The Indian Arbitration Act (IX of 1899) itself makes no provision for an appeal and I cannot treat what was referred to me as an appeal as a revision application.

Both appeals must accordingly be dismissed but as this consequence ensues from a Full Bench ruling passed since the Judicial Commissioner's order of reference to me I pass no order as to costs.

Z. K. *Appeals dismissed.*

(9) 81 Ind. Cas. 759; (1923) A. I. R. (S.) 38; 17 S L. R 195.

ALLAHABAD HIGH COURT.

MISCELLANEOUS CASE No. 121 OF 1924.

April 28, 1924.

Present:—Mr. Justice Daniels and Mr. Justice Boys.

BRIJ BHUSHAN LAL—APPLICANT

versus

THE MUNICIPAL BOARD OF KANAUJ—OPPOSITE PARTY.

U. P. Municipalities Act (II of 1916), s. 128 (1)

ISWAR CHANDRA NATH *v.* GOUR SUNDAR NATH.

(ix)—"Trade", meaning of—Tax on circumstances and property—Salaried clerk, whether liable to be taxed.

"Trade" implies buying and selling or dealing in money or at least the making of some article for the purpose of sale. Further, a person can only be said to be carrying on trade in the ordinary sense of the word when he is working for his own profit and not when he is in receipt of a fixed salary.

Therefore a person who resides outside the Municipal limits but is employed during business hours as a clerk on a salary within Municipal limits is not liable to be taxed under a tax on circumstances and property imposed on persons "residing or carrying on any trade or owning property within the limits of the Municipality" under clause (*ix*) of section 123 (1) of the U. P. Municipalities Act.

Reference under section 162 of the Municipal Act by the District Magistrate, Farrukhabad.

Mr. *Gulzari Lal*, for the Applicant.

Mr. *U. S. Bajpai*, for the Opposite Party.

JUDGMENT.—This is a reference under section 162 of the U. P. Municipalities Act. The question referred is whether the applicant who resides outside the Kanauj Municipality but is employed during business hours as a clerk on a salary within Municipal limits is liable to be taxed under a tax on circumstances and property imposed under clause (*ix*) of section 123 (1) of the Act. Section 123 permits the Municipality to impose the tax on all classes of inhabitants as defined in section 2 (7). They have however chosen to limit the tax to persons "residing or carrying on any trade or owning property within the limits of the Kanauj Municipality," *vide* Notification No. 6575 XXIII-9, dated 7th August 1920, printed on page 324 of Part III of the *U. P. Gazette* for 1920. The expression "carrying on a trade" has a well-recognised meaning and cannot by any straining of language be made to include a person who merely works for an employer as a salaried clerk. "Trade" implies buying and selling or dealing in money or at least the making of some article for the purpose of sale. Further, a person can only be said to be carrying on trade in the ordinary sense of the word when he is working for his own profit and not when he is in receipt of a fixed salary. Mr. Bajpai for the Municipal Board has drawn our attention to the very wide definition of the word "trade" in Webster's Dictionary, but it may be pointed out that the Act itself in clause (*iii*) of section 123 distinguishes between trades, callings, and vocations, and includes under vocations all employments remunerated by salary. It is clear therefore that in the very section under which the tax is imposed occupation as a salaried clerk is not included under the word "trade." Our answer to the reference is that the applicant is not liable to assessment under the tax on circumstances and property imposed by the Kanauj Municipal Board.

K. S. D. *Reference answered in the negative.*

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL No. 45 OF 1922.

January 10, 1923.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Rankin.

ISWAR CHANDRA NATH AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

GOUR SUNDAR NATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 115—Estoppel—Lease by raiyat—Recital that grantee shall be raiyat, effect of—Ejectment.

Plaintiffs granted a lease to the predecessor-in-title of the defendants for a term of twenty years which recited that the grantee would have the status of a *raiyat*. The grantee continued in possession till after the expiry of the term and after his death the defendants got into possession of the tenancy. Plaintiffs sued to eject the defendants on the allegation that the tenancy was not heritable, the grantee being an under-*raiyat*, as the grantors themselves were only *raiyats*:

Held (1) that the grantee having acted on the faith of the recital in the grant that he would have the status of a *raiyat* the plaintiffs were estopped from contending that his status was other than what was described in the grant; [p. 91, col. 1.]

(2) that, therefore, the defendants were not liable to ejectment. [p. 91, col. 2.]

Bamandas Bhattacharjya v. Nilmadab Saha, 35 Ind. Cas. 754; 44 C. 771; 20 C. W. N. 1340; 24 C. L. J. 541, followed.

RAM v. GAMAN RAM.

Chandra Kant v. *Amjad Ali*, 61 Ind. Cas. 446; 48 C. 783; 32 C. L. J. 296; 25 C. W. N. 4 (F. B.); referred to.

Letters Patent Appeal against the judgment of Mr. Justice Ghose, dated the 9th May 1922.

Mr. *J. K. Sen Gupta*, for the Appellants.

Messrs. *D. L. Khastgir* and *N. C. Das*, for the Respondents.

JUDGMENT.—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice B. B. Ghose in a suit for ejectment.

On the 1st June 1892, the predecessors-in-interest of the plaintiffs granted a lease to the predecessor of the defendants. A premium of Rs. 30 was paid by the grantee to the grantor. The lease was for a term of 20 years and expressly provided that the grantee would have the status of a *raiyat*. The term of the lease expired on the 31st May 1912, yet the grantee continued in occupation till his death in 1914. Thereafter the heirs of the grantee have remained in possession.

On the 16th April 1916, the plaintiffs commenced the present action to eject the defendants on the allegation that the tenancy was not heritable and that they were consequently liable to be ejected, as trespassers. The contention that the tenancy was not heritable was founded on the allegation that although the lease stated that the grantee was a *raiyat*, he was in fact an under-*raiyat* in as much as the grantor had no higher status than that of a *raiyat*. The question consequently arises, whether it is open to the plaintiffs to eject the defendants on proof that the allegations in the primary contract between the parties were false. Mr. Justice Ghose has held that the doctrine of estoppel applies and that the plaintiffs are not competent to prove that the status of the original grantee was other than what was described in the grant. We are of opinion that this view is clearly well-founded, and is supported by the decision in *Bamandas Bhattacharjya* v. *Nilmadhab Saha* (1) which has not been affected in any way by the decision of the Full Bench in *Chandra Kant* v. *Amjad Ali* (2). To test the contention of the appellants we may put the question, would it have been competent to the plaintiffs, after the lapse of seven years from the date of the grant, to eject the grantee on the allegation that his status was not that of a *raiyat* as stated in the lease but only that of an under-*raiyat*, and that the registration of the document was invalid because effected in contravention of the provisions of section 85, sub-section 2 of the Bengal Tenancy Act. The answer must obviously be in the negative. There is no room for doubt that the grantee acted on the faith of the recitals in the grant, which in fact were very material for the purposes of the tenancy. We are consequently of opinion that the decree made by Mr. Justice Ghose must be affirmed and this appeal dismissed with costs.

Z. K. *Appeal dismissed.*

(1) 35 Ind. Cas. 754; 44 C. 771; 20 C. W. N. 1340; 7 C. L. J. 541.

(2) 61 Ind. Cas. 466; 48 C. 782; 32 C. L. J. 296; 25 C. W. N. 4 (F. B.).

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1646 OF 1920.
April 19, 1923.

Present :—Mr. Justice Harrison and Mr. Justice Zafar Ali.

RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GAMAN RAM—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Arts. 64, 65, 115, applicability of—Account in terms of grain—Suit to recover value of grain—Limitation.

Article 64 of Schedule I to the Limitation Act can apply only where the money found to be due is a definite sum entered in the account-books of the plaintiff. [p. 92, col. 1.]

Where a suit is based on an account which is kept throughout in terms of grain, the article applicable is Art. 65 or Art. 115 and not Art. 64 of Schedule I to the Limitation Act. [*ibid.*]

Muhammad Din v. *Sohan Singh*, 65 Ind. Cas. 691; 4 L. L. J. 268 and *Labh Singh* v. *The Firm Rur Chand-Tulsi Ram*, 4 L. L. J. 64; (1922) A. I. R. (L.) 122, relied on.

MAQBUL-UN-NISSA v. BANSIDHAR.

Second appeal from a decree of the Additional Judge, Muzaffargarh, dated the 22nd March 1920, modifying that of Sub-Judge, Muzaffargarh, dated the 17th December 1919.

Mr. *Hargopal*, for the Appellants.

Mr. *Devi Dayal*, for the Respondent.

JUDGMENT.—The plaintiff in this case sued to recover an ascertained sum of cash as fixed in a balance signed by the defendant's father and also for the cash value of 180 maunds of wheat being the net result of the account or 120 *chauths* principal and 180 *chauths* interest in kind calculated at the rate of 150 per cent. per annum. The suit regarding the wheat has been dismissed and on second appeal Counsel urges that the limitation is governed by Art. 64 and not by Art. 65 or 115. Even if it were conceded that in order to bring a suit within the purview of Art. 64 it is not necessary to show that there have been cross or reciprocal demands between the parties the article can only apply where the money found to be due is a definite sum entered in the account-books. Here no sum of money is entered. The account was kept throughout in terms of grain, a different rate of interest was charged on this grain account from that charged on the cash account and, as laid down in *Muhammad Din* v. *Sohan Singh* (1) and also in *Labh Singh* v. *The Firm Rur Chand-Tulsi Ram* (2) the articles governing the case so far as the grain is concerned are Arts. 65 or 115. Finally, relying on *Sohan Singh* v. *Muhammad Din* (3) Counsel urges that a demand was made within three years of the institution of the suit. He cannot say when this demand was made, his own plaint states clearly that the cause of action arose on the 19th day of October 1913, or when the entry was made in the account-book, and it is wholly impossible that he should be allowed, as he asks to have a remand in order to enable him to ascertain whether or not a demand was made within three years of the institution of the suit which would save limitation. We find that the portion of the suit which relates to re-payments of the grain is barred by limitation and we, therefore, dismiss the appeal with costs.

Z. K. *Appeal dismissed.*

(1) 65 Ind. Cas. 691; 4 L. L. J. 268.
(2) 4 L. L. J. 61; (1922) A. I. R. (L.) 122.
(3) 56 Ind. Cas. 162; (1923) A. I. R. (L.) 271.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 14 OF 1923.

February 13, 1924.

Present:—Syed Wazir Hasan, J. C., and Mr. Neave, A. J. C.

MAQBUL-UN-NISSA AND OTHERS—DEFENDANTS—APPELLANTS

versus

BANSIDHAR—PLAINTIFF, SULTAN-UN-NISSA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Pre-emption—Wajib-ul-arz giving full liberty of transfer—Partition of village—Agreement between proprietors recognising pre-emption—Agreement, nature of—Successors-in-interest of proprietors, whether bound.

A custom excluding the right of pre-emption can be validly superseded by the agreement of the proprietors of the village and such an agreement binds their successors-in-title. [p. 94, col. 2.]

Bunyad Husain v. *Abdul Subhan*, 50 Ind. Cas. 809; 22 O. C. 20; 1 U. P. L. R. (O.) 34, followed.

In a suit for pre-emption of a sale the defence was the existence of a custom contrary to the right of pre-emption. The *wajib-ul-arz* of the village provided that every co-sharer was at liberty to transfer his share to any one he pleased. Another *wajib-ul-arz* prepared subsequently at the time of the partition of the village modified this provision by saying that in case of a sale the pre-emptor had the right to pre-empt:

Held, (1) that the original *wajib-ul-arz* did establish a custom excluding the legal right of pre-emption, but this custom was abrogated by the agreement of the proprietors at the time of the partition of the village; [p. 94, col. 1.]

(2) that the agreement to supersede the custom was an agreement in relation to the right of transfer of the proprietary interest in the soil of the village and must run with the land; [p. 94, col. 2.]

(3) that consequently the agreement was binding on the successors-in-interest of the proprietors, [*ibid.*]

MAQBUL-UN-NISSA *v.* BANSIDHAR.

Bunyad Husain v. *Abdul Subhan*, 50 Ind. Cas. 800; 22 O. C. 20; 1 U. P. L. R. (O.) 34, referred to.

Appeal from the decree of the Subordinate Judge, Bara Banki, dated the 29th January 1923.

Messrs. *Niamat Ullah* and *Muhammad Ayub*, for the Appellants.

Mr. *Bisheshwar Nath Srivastava*, for Respondent No. 1.

JUDGMENT.—This is an appeal against the decree of the Subordinate Judge of Bara Banki dated the 29th January 1923. It arises out of a suit brought by the respondent Bansidhar. The suit has been decreed. The appeal is preferred by *Musammat* Maqbul-un-nissa, *Musammat* Mumtaz-un-nissa, Tafsil-un-nissa, Abdul Wahid and Abdul Jalil defendants. Bansidhar claimed to exercise his right of pre-emption in respect of a sale dated the 19th August 1920 under which *Musammat* Sultan-un-nissa and *Musammat* Rafiq-un-nissa defendants Nos. 4 and 5 respectively sold 2 annas share in village Bisara, Pargana Kursi, District Bara Banki, to Abdullah, Abdul Wahid and Abdul Jalil, defendants Nos. 1 to 3 respectively. Abdullah died after the institution of the suit. Abdussattar, Abdul Jalil, Abdul Hafiz, Maqbul-un-nissa, Mumtaz-un-nissa and Tafazzul-un-nissa are his legal representatives.

Bansidhar's right of pre-emption was obviously founded on the provisions of sections 6 and 7 of the Oudh Laws Act (XVIII of 1876). The only defence, with which we are concerned in this appeal, was the existence of a custom to the contrary. The provisions of section 7 mentioned above are as follows:—

"Unless the existence of any custom or contract to the contrary is proved, such right shall, whether recorded in the Settlement Record or not, be presumed (*a*) to exist in all village communities, however constituted, and whether proprietary or under-proprietary, and in the cases referred to in section 40 of the Oudh Land Revenue Act, and (*b*) to extend to the village site, to the houses built upon it, to all lands and shares of lands within the village boundary, and to all transferable rights affecting such lands."

It would seem to follow from these provisions that the alleged custom, if established, would constitute a valid defence to this claim for pre-emption. In proof of the custom the vendee relied on the *wajib-ul-arz* of the village prepared at the First Regular Settlement. A certified copy of this *wajib-ul-arz* is produced (Exhibit A 3). It is dated the 20th January 1870. The *wajib-ul-arz* was duly verified and attested by the Settlement Officer. Paragraph 4 of the *wajib-ul-arz* relates to the rights of transfer and inheritance. Under this paragraph occurs the following statement which is relevant to the question under consideration:—"In this village each co-sharer has power to transfer his share by sale, mortgage, etc. He is at liberty to transfer it to any one he pleases." Similar statements in other *wajib-ul-araez* of villages in the Province of Oudh prepared at the First Regular Settlement have consistently been construed by this Court as proof of custom excluding the legal right of pre-emption. The decisions of this Court to the effect mentioned above cover a long period of time, the earliest of which seems to have been passed so far back as the year 1885 in the case of *Bholai Singh* v. *Tale Singh* (Miscellaneous Appeal No. 132 of 1885) and the latest was given by a Bench of two Judges in the year 1919 in the case of *Bunyad Husain* v. *Abdul Subhan* (1). It thus appears that the phrase "liberty to transfer it to any one he pleases" has acquired the characteristic of a term of art always connoting the existence of custom contrary to the right of pre-emption. We are not prepared to disturb this course of decision. It would follow that if there were nothing else to support the plaintiff's claim for pre-emption he must lose it. He has, however, produced a copy of the *wajib-ul-arz* of the village prepared at the partition of it which took place in the year 1886 (Exhibit 9). The first part of paragraph 4 of this exhibit is

(1) 50 Ind. Cas. 800; 22 O. C. 20; 1 U. P. L. R. (O.) 34.

as follows:—"Every co-sharer has the power to transfer his share by means of mortgage, sale and gift but the pre-emptor shall have the pre-emption right in the case of sale." His contention on ths basis of this entry is that the custom in derogation of the right of pre-emption, which right was affirmed by the Statute mentioned before, was abrogated by the agreement of the co-sharers of the village at the time of the partition of 1886. This contention was accepted by the Court below and is now impugned before us on two grounds. (1) That there is no proof of any such agreement, and (2) that the agreement (if any) is not binding on the successors of the co-sharers who were parties to it.

In support of the first ground, reliance was placed upon certain papers (Exhibits A9 and A12 to A18) which are copies of the order-sheet relating to the partition proceedings, and upon the testimony of three witnesses, Abdus-sattar, Tajammul Husain and Abdullah. In agreement with the Court below we are unable to attach any importance to the evidence of these witnesses. Abdus-sattar and Abdullah are obviously highly interested witnesses. Tajammul Husain's statement does not bear directly on the circumstances in which the *wajib-ul-arz* was prepared. The evidence furnished by the order sheet does not in any manner lead to the inference that paragraph 4 of Exhibit 9 was prepared without the consent of the co-sharers concerned. The preparation of *wajib-ul-arz* on partition of a village is enjoined by the rules framed by the Board of Revenue relating to partition proceedings. These proceedings are certainly of *quasi judicial*, if not wholly judicial, character. The subject-matter of paragraph 4 of a *wajib-ul-arz* is such as it would not ordinarily be possible to make a record of it without the knowledge and consent of the co-sharers of the village. The public officials engaged in the preparation of a *wajib-ul-arz* would be guilty of dereliction in the performance of their duty if they failed to obtain such consent. In the absence of any reliable evidence that they did fail in the discharge of their duty we must hold that the maxim *omnia presumuntur rite esse acta* applies.

As to the second ground, we are of opinion that it has no substance. The agreement related to a right in *esse* founded on the custom excluding pre-emption then in vogue. It also related to the lands in the village. It was not a custom binding on the co-sharers then in existence alone. It was a custom in relation to the right of transfer of lands possessed by the co-sharers. The agreement to supersede that custom was therefore an agreement in relation to the right of transfer of the proprietary interest in the soil of the village. Such an agreement must, therefore, run with the land. The proposition that the custom of excluding the right of pre-emption could be validly superseded by the agreement of the proprietors of the village and that such an agreement would bind their successors-in-title was affirmed by a Bench of this Court in the case of *Bunyad Husain* v. *Abdul Subhan* (1) already referred to. We are content to follow that decision.

The appeal, therefore, fails and is dismissed with costs.

K. S. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CIVIL REVISION NO. 1317 OF 1923.
March 14, 1924.

Present:—Mr. Justice Mukerji.

JADAB CHANDRA SANTRA—DEFENDANT—PETITIONER

versus

GOPAL CHANDRA DEBNATH—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 8—Landlord and cultivator—Settlement of land on share of crop—Cultivator, whether tenant or servant—Suit by landlord—Small Cause Court, jurisdiction of.

Plaintiff settled certain land with the defendant, the latter stipulating to deliver to him a half share of the paddy and straw to be grown on the land, and in case of default, to deliver 25 per cent. more as interest in accordance with local usage. In a suit by the plaintiff to recover the price of his share:

Held, that there was nothing to suggest that the defendant was a tenant, and not a servant

JADAB CHANDRA SANTRA *v.* GOPAL CHANDRA DEBNATH.

and the suit was not for rent so as not to be cognisable by a Court of Small Causes.

In a suit by a landlord, against a person cultivating the land, to recover a sum agreed to be paid to him for its use, the question whether the defendant is a tenant or a servant of the plaintiff depends upon the terms of the agreement and all the circumstances of the case.

Shoma Mehta v. *Rajani Biswas*, 1 C. W. N. 55, *Lalji Pande* v. *Brahmadeo Pandey*, 13 Ind. Cas. 29; 16 C. W. N. 89, *Kade Mandal* v. *Ahadali Molla*, 6 Ind. Cas. 594; 14 C. W. N. 629 and *Shaikh Pokan* v. *Rajani Kamal Chakravarty*, 50 Ind. Cas. 285; 23 C. W. N. 614, distinguished.

Rule against the decision of the Munsif, 3rd Court, Burdwan, exercising Small Cause Court powers, dated the 24th September 1923.

Babu *Narendra Nath Chaudhuri*, for the Petitioner.

Babu *Narendra Nath Dalal*, for the Opposite Party.

JUDGMENT.—The question which arises in this Rule is whether the Small Cause Court had jurisdiction to try the suit. The plaintiff instituted the suit for recovery of a sum of Rs. 49 alleged to have been due as price of *bhag* paddy and straw. The plaint alleged that the land had been settled with the defendant in the month of Jaistha and the defendant had stipulated to deliver to the plaintiff by the month of Falgoon a half share of the paddy and straw that would be grown on the land, and in case of default would be liable to deliver 25 per cent. more as *bridhi* or interest in accordance with local usage; that the defendant, in accordance with the aforesaid promise or stipulation, after having taken settlement of the land cultivated the land and grew paddy and straw of which the quantities were also stated and the price of half thereof was claimed together with interest as aforesaid. One of the objections taken in the written statement was that the suit was one for rent and so was not within the cognizance of the Small Couse Court. The opposite party in an affidavit filed in this Court has stated that this objection was not pressed at the hearing of this suit. This, however, is a question affecting the jurisdiction of the Court and there can be no waiver in a matter of this description.

The answer to this question would depend upon the determination of the question as to whether the petitioner under the terms of the contract with the opposite party was a tenant or a servant, and in determining that question, the terms of the agreement and the whole of the circumstances must be taken into consideration.

On behalf of the petitioner reliance has been placed upon the decisions of this Court in *Shoma Mehta* v. *Rajani Biswas* (1) and *Lalji Pande* v. *Brahmadeo Pandey* (2), and upon the allegation in the plaint that the land had been settled with the defendant and on the plaintiff's evidence to the effect that it was so settled and on the finding of the Judge that the defendant held the land. On behalf of the opposite party the cases of *Kade Mandal* v. *Ahadali Molla* (3) and *Shaikh Pokan* v. *Rajani Kamal Chuckravarty* (4) were relied upon.

It is unnecessary to refer to earlier cases which deal with this point, as most of them have been elaborately discussed in the judgment of this Court in the case of *Lalj Pande* v. *Bradmadeo Pandey* (2). As observed by Mookerjee, J., in that judgment there is no real conflict in the decisions bearing upon this question and the real question to be determined first is whether the defendant is a tenant or not. With regard to this matter each case will depend on its own facts.

In the case of *Shoma Mehta* v. *Rajani Biswas* (1) the judgment proceeded upon the assumption that the suit was one for recovery of produce rent. In the case of *Kade Mandal* v. *Ahadali Molla* (3) the contract alleged in the plaint made the *bargadar* a servant. In the case of *Lalji Pande* v. *Brahmadeo Pandey* (2) the distinguishing features were that the claim was in respect of crops for four years and the claim was explicitly described as the *malik's* share; and

(1) 1 C. W. N. 55.
(2) 13 Ind. Cas. 29; 16 C. W. N. 89.
(3) 6 Ind. Cas. 594; 14 C. W. N. 629.
(4) 50 Ind. Cas. 285; 23 C. W. N. 614.

these features enabled the Court to pronounce on the status of the defendant as that of a tenant. In the case of *Shaikh Pokan* v. *Rajani Kamal Chuckravarty* (4), the *kabuliyat* was described as one for agricultural labour for cultivating in partnership the *khas khamar* land, the executant stipulated that every year before growing crops he would ask the grantor which kind of paddy was to be grown on which land, and shall grow paddy according to the grantor's desire, and further agreed to take the whole of the paddy to the grantor's house for threshing and that he shall get the remaining paddy (after delivery of the grantor's share) as remuneration for cultivation, seeds, looking after the labour, instead of money in cash. This unmistakeably showed that the executant of the *kabuliyat* was a servant.

In the present case the distinguishing features of the cases noted above are entirely absent. The plaint on the face of it is for recovery of price of a share of paddy and straw. The expressions "settlement" and "holding the land" may be consistent with either view of the defendant's status. If it was a tenancy, the period for which it was to last is not stated. The words "promise" and "stipulation" are used, which point more to a mere contract than to a contract of tenancy. On the face of this plaint, therefore, there was nothing to suggest that the defendant was a tenant.

If, therefore, the petitioner's case was that he was one and on that ground the Court had no jurisdiction, it was for him to bring before the Court materials which would have proved the same. This he has not done. The Rule, therefore, must be discharged with costs, hearing fee one gold *mohur*.

N. H. *Rule discharged.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 385 OF 1920.
March 24, 1924.
Present :—Mr. Justice Broadway and Mr. Justice Campbell.

THAKAR DAS AND OTHERS—DEFENDANTS—APPELLANTS
versus
Musammat PUTLI—PLAINTIFF—RESPONDENT.

Minor—Assignment of debt in favour of minor—Consideration, payment of—Minor, whether can sue—Hindu Law—Joint family—Acknowledgment by head of family, when binds co-parceners.

A minor is not precluded from suing on an assignment of a debt in his favour when the consideration for it has been paid for in full to the assignor. [p. 98, col. 2.]

Mohori Bibee v. *Dharmodas Ghose*, 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114 (P. C.), distinguished.

Raghava Chariar v. *Srinivasa Raghava Chariar*, 36 Ind. Cas. 921; 40 M. 308; 31 M. L. J. 575; 20 M. L. T. 407; (1916) 2 M. W. N. 363, *Munni Kunwar* v. *Madan Gopal*, 31 Ind. Cas. 792; 38 A. 62; 13 A. L. J. 1084, *Narain Das* v. *Dhania*, 35 Ind. Cas. 23; 38 A. 154; 14 A. L. J. 65, *Ulfat Rai* v. *Gouri Shankar*, 11 Ind. Cas. 20; 33 A. 657; 8 A. L. J. 670, *Bahal-ud-Din* v. *Rafaqat Hussain*, 18 Ind. Cas. 451 and *Steinberg* v. *Scala (Leeds) Limited*, (1923) 92 L. J. K. B. 911; 129 L. T. 624; 67 S. J. 656; 39 T. L. R. 542, followed.

The head of a Hindu joint family cannot bind his co-parceners by an acknowledgment of a time-barred debt, but an acknowledgment by him of a debt within time binds all the other members of the joint family. [p. 99, col. 1.]

First appeal from a decree of the Senior Subordinate Judge, Delhi, dated the 3rd January 1920.

The Hon'ble Pandit *Sheo Narain* R. B., and Sardar *Dalip Singh*, for the Appellants.

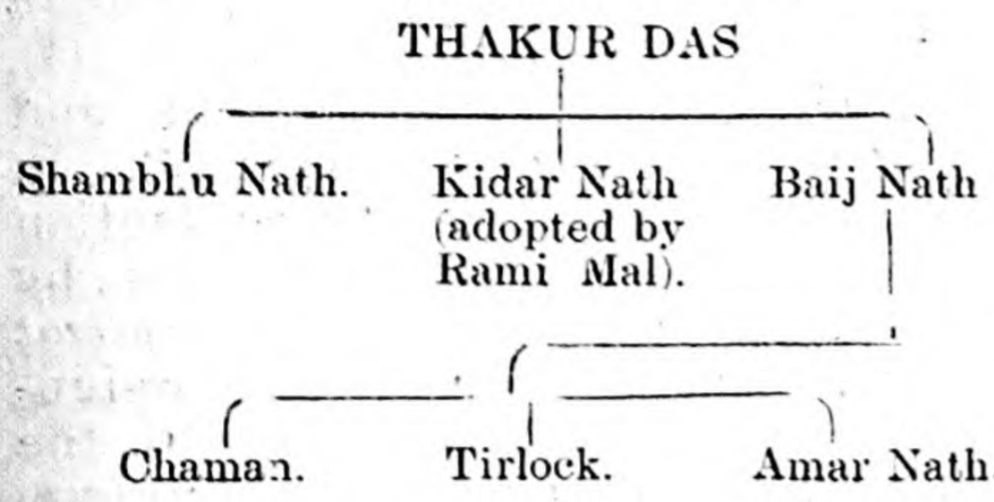
Bakhshi *Tek Chand* and Lala *Mehr Chand Mahajan*, for the Respondent.

JUDGMENT.

Broadway, J.—The suit out of which this appeal has arisen was instituted by *Musammat* Putli, a minor, acting through her husband, Sat Narain. She claimed from the defendants a sum of Rs. 5,127. During the pendency of the suit she attained majority and, at her instance, her next friend was discharged and she was allowed to proceed with the suit in her own name.

THAKUR DAS *v.* PUTLI.

The following pedigree-table will show the relationship between the defendants :—



One Ram Rachhpal was also made a defendant. He is connected with Kidar Nath through Kidar Nath's adoptive father. The suit as against Ram Rachhpal was dismissed as being barred by time. As against the other defendants, the plaintiff's claim was decreed. The Trial Court, apparently through an oversight, did not allow interest from date of suit to date of realisation and refused to allow the plaintiff's costs. Against this decree the defendants have preferred this appeal. Ram Rachhpal was made one of the appellants although the suit as against him had been dismissed. The plaintiff filed cross-objections through Mr. Tek Chand, claiming interest from date of institution of the suit till date of decree and costs.

The facts are given and discussed at great length in the judgment of the Trial Court, and it is only necessary to state them briefly here. It appears that in 1907 Kidar Nath was concerned in certain litigation with one Nathu Mal. It became necessary for Kidar Nath to prefer an appeal to the Privy Council and he was called upon to deposit Rs. 4,000 or security to that extent in connection with that appeal. His natural father Thakar Das was in the employ of Rai Bahadur Lala Sri Kishen Das as his Head Clerk. He asked Rai Bahadur Lala Sri Kishen Das for assistance. Ultimately he, Kidar Nath, Shambu Nath, Baij Nath and Ram Rachhpal are said to have gone together to Rai Bahadur Lala Sri Kishen Das and asked him to arrange for this Rs. 4,000. Out of consideration for his employee Rai Bahadur Lala Sri Kishen Das agreed, and it appears that a fixed deposit to the extent of Rs. 4,000 with the Allahabad Bank was tendered to the Chief Court. The fixed deposit was refused and ultimately Government Promissory-Notes of the face value of Rs. 4,000 were acquired and deposited with the Registrar of the Chief Court. Kidar Nath lost his appeal in the Privy Council. In the meantime on the 26th of September 1913 Rai Bahadur Lala Sri Kishen Das was adjudicated an insolvent by the High Court of Bombay, and the Official Assignee took possession of his estate including all outstandings. The Official Assignee transferred the outstandings, including the present claim, to one Chhabil Das, the necessary assignments being drawn up. Chhabil Das in his turn transferred the present claim to *Musammat* Putli, then a minor, under a deed, dated the 2nd of November 1917. On the basis of this assignment *Musammat* Putli sought to recover the amount.

The suit was filed on the 1st of December 1917. It has been shown that the debt sought to be recovered was incurred on the 18th February 1907. The defendants set up various pleas, one of these being that the assignment to Chhabil Das by the Official Assignee was invalid, and another being that the suit was barred by limitation. The plea of limitation rested on the assertion by the defendants that the transaction sued upon was not a loan made by Rai Bahadur Lala Sri Kishen Das, but was really one by which Rai Bahadur Lala Sri Kishen Das became a surety to the extent of Rs. 4,000 for Kidar Nath. It was contended, therefore, that the claim really was by a surety against his principal and was governed by Art. 81 which provides a limitation of three years. It was admitted by Mr. Tek Chand that if this plea of the defendants was correct the suit was barred. He contended, however, that the transaction was really a loan, and that, therefore, the suit was governed by the six years' rule and was within time owing to the payment of interest by Kidar Nath and Thakar Das; the payment by Thakar Das being binding on Shambhu Nath

and Baij Nath, and further, that Thakar Das had admitted his liability in two letters Exhibits P-1 and P-2, dated respectively 22nd and 27th February 1913.

Although Mr. Sheo Narain for the appellants devoted most of his time to an endeavour to show that the transaction was really as alleged by the defendants, at the conclusion of his address he advanced a contention which, if given effect to, would conclude the case in his favour. This contention was that inasmuch as *Musammat* Pulti was a minor on the 2nd of November 1917 when the assignment of the debt was executed by Chhabil Das in her favour, the contract evidenced by that assignment was void and could not be made the basis of a suit. In support of his contention he referred to *Mohori Bibee* v. *Dharmodas Ghose* (1). On the other hand, Mr. Tek Chand pointed out that this was an entirely new point, not raised in the written statement, and urged that Mr. Sheo Narain should not be allowed to take it at this late stage. He contended that had this plea been advanced at the outset it could have been proved that the negotiations had been carried out on her behalf by her husband. He drew attention to Sat Narain's statement at page 55, line 30, to the effect that he had acted for *Musammat* Putli in the matter. He further contended that *Mohori Bibee* v. *Dharmodas Ghose* (1) was distinguishable as it dealt with a transfer by a minor, that the suit which was decided by their Lordships of the Judicial Committee was one between the parties to the contract, and that in that suit it was sought to enforce an obligation entered into by a minor. The question whether a minor could purchase property and could enforce an obligation entered into in his favour was not before the Privy Council. In *Raghava Chariar* v. *Srinivasa Raghava Chariar* (2) it was held by a Full Bench that a mortgage in favour of a minor was enforceable by the minor, and the view was also expressed that in the same way a sale in favour of a minor could be enforced. This view is in consonance with *Munni Kunwar* v. *Madan Gopal* (3), *Narain Das* v. *Dhania* (4), *Ulfat Rai* v. *Gouri Shankar* (5) and *Bahal-ud-Din* v. *Rafaqat Husain* (6). In my opinion Mr. Tek Chand's contention is correct. The assignment was by Chhabil Das in favour of *Musammat* Putli. The consideration for the assignment had been paid in full to the assignor. The minor was, therefore, under no further obligation to anyone, and I am unable to see any reason why a minor in such circumstances is precluded from suing on such a contract. I am supported in this view by *Steinbery* v. *Scala (Leeds) Limited* (7).

Next, as to the nature of this transaction the plaintiff has produced the *naql bahi*, *lekha bahi* and *rokar* of the firm of Rai Bahadur Lala Sri Kishen Das. The relevant entries have been proved by witnesses against whose reliability nothing has really been urged.

* * * * *
* * * * *

After a consideration of all the evidence on the record and the arguments advanced at the Bar I have no hesitation in agreeing with the Court below and hold that the transaction was a loan.

It was admitted by Mr. Sheo Narain that in the event of the transaction being found to be a loan, the suit as against Thakur Das and Kidar Nath was within limitation. He, however, contended that any payment of interest or any acknowledgment made by Thakar Das could only be binding on *him* in order to save limitation, and on his sons, as members of a joint Hindu family, only if the payments of interest made by him had been paid *as such*, within the meaning of section 20. A reference to the account-books shows that at the outset the payments made amounted to the interest due. The last payment was a

(1) 30 C. 539; 5 Bom. L. R. 421; 7 C. W. N. 441; 30 I. A. 114 (P. C.).
(2) 36 Ind. Cas. 921; 40 M. 308; 31 M. L. J. 575; 20 M. L. T. 407; (1916) 2 M. W. N. 363.
(3) 31 Ind. Cas. 792; 38 A. 62; 13 A. L. J. 1084.
(4) 35 Ind. Cas. 23; 38 A. 154; 14 A. L. J. 65.
(5) 11 Ind. Cas. 20; 33 A. 657; 8 A. L. J. 670.
(6) 18 Ind. Cas. 451.
(7) (1923) 92 L. J. K. B. 944; 129 L. T. 624; 67 S. J. 656; 39 T. L. R. 542.

little short of the actual interest, the shortage being Re. 1 odd. Having regard to the previous nature of the payments I am of opinion that all these payments of interest, whether made by Thakar Das or through him, were intended to be payments of *interest as such* within the meaning of the section, and that, therefore, these payments bring the suit within limitation as against all the appellants.

Further I think Mr. Tek Chand's contention is correct that Thakar Das could, as head of the joint Hindu family, acknowledge the debt on behalf of the joint Hindu family and did so acknowledge the debt in his letters dated the 22nd February 1913 and the 27th February 1913 Exhibits P-1 and P-2. It is true that while he could bind himself in an acknowledgement of a time-barred debt, he could not bind his co-parceners. When these letters were written, however, having regard to the payments of interest already made by him, the claim was within time, and these letters therefore must be regarded as acknowledgments binding not only on Thakar Das but on the other members of the joint Hindu family of which he was the head. In this view of the case the appeal fails and is dismissed with costs.

Turning to the cross-objections, no real reason has been assigned by the Court below for disallowing costs. The defendants certainly are not entitled to any sympathy. The interest claimed is from the date of institution till the date of decree. Such interest is usually allowed, and the omission to do so in this case appears to be due to an oversight. I would, therefore, accept the cross-objections and modify the decree of the Court below by adding to it interest from date of institution to date of decree and allow the plaintiff her costs in the Court below.

Campbell, J.—I agree.

K. S. D. *Appeal dismissed; Cross-objection accepted.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 2195 AND 2546 OF 1921.

July 20, 1923.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, and Justice Sir Thomas Richardson, Kt.

GOPI SUNDARI DASI AND OTHERS —DEFENDANTS—APPELLANTS

versus

KHEROD GOBINDA CHOWDHURY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 13—Judgment not inter parties, *whether relevant—Probative value.*

A judgment in a previous suit to which one of the parties in a subsequent suit was not a party is relevent under section 13 of the Evidence Act. [p. 100, col. 2; p. 101, col. 1.]

Tepu Khan v. *Rajani Mohan Das*, 25 C. 522; 2 C. W. N. 501; 13 Ind. Dec. (N. S.) 347 (F. B.) and *Dinomoni Chaudhurani* v. *Brojo Mohini Chaudhurani*, 29 I. A. 21; 29 C. 187; 6 C. W. N. 386; 12 M. L. J. 83; 4 Bom. L. R. 167; 8 Sar. P. C. J. 224 (P. C.), followed.

The legal effect of the judgment as between the parties to the previous suit has to be determined from the judgment itself and, when determined, it does not become conclusive, as between the parties to the subsequent suit, but is a fact to be weighed in the balance like any other fact. [p. 101, cols. 1 & 2.]

Appeal against a decree of the Additional District Judge, Pabna and Bogra, dated the 31st May, 1921, affirming that of the Additional Subordinate Judge, Pabna, dated the 14th March, 1919.

Dr. *Dwarka Nath Mitter* and Babu *Tarakeswar Pal Chaudhuri*, for the Appellants.

Babus *Ram Chandra Majumdar* and *Jotindra Nath Choudhuri*, for the Respondent in No. 2195.

Babus *Surendra Chandra Sen* and *Surendra Nath Bose*, for the Respondent in No. 2546.

JUDGMENT.

Richardson, J.—This is an appeal from the appellate judgment of the Additional District Judge of Pabna, dated the 31st May, 1921. The questions which the learned Additional Judge had to consider are thus stated by him:

"(1) Was *Mouza* Chur Raninagar included within the *putni* held by the plaintiffs and other *pro forma* defendants under the *malik* defendants? Was

GOPI SUNDARI DASI *v.* KHEROD GOBINDA.

mehal No. 2159 created out of the lands of that *putni*?

(2) Are the plaintiffs entitled to a refund of the amount claimed."

Some short explanation is necessary to the nature of the dispute in connection with which these questions arose.

The plaintiffs and those defendants in the suit who are described as *pro forma* defendants are the proprietors of *putni* tenure within the estate of the principal defendants Nos. 1 to 7. The tenure is bounded on one side by the river Ganges and in the year 1912 1913 a survey was made by the Government with the result that certain lands were formed into a separate estate No. 2159 known as *Mouza* Chur Raninagar, on the footing that the lands were an accretion to the parent estate, Raninagar, the estate that is of the principal defendants. On that footing a settlement was made under which the *putnidars* were to pay rent for these lands at the rate of Rs. 189 a year in addition to the rent payable for the original *putni*. It is stated in the judgments of the Courts below that in the Settlement the Government were recorded as *tahsildars* of the proprietors of the estate. No suggestion appears to have been made that the *putnidars* were party to or bound by the proceedings. In the result, however, they were compelled to pay this additional rent for four years and they then brought the present suit to retrieve the amount so paid. Their case is that the original *putni*, the *putni* as originally created, for which rent was payable under their engagement with the proprietors, included the lands of the new estate No. 2159 and they contend accordingly that in respect of this area rent has been recovered from them twice over. They succeded in the Courts below and three of the principal defendants (Nos. 1 to 3) have preferred this appeal.

Now it is conceded by Dr. Mitter, the learned Vakil who has argued the case on behalf of the appellants, that the questions above set out were essentially questions of fact. The main burden of Dr. Mitter's argument has been that in deciding those questions of fact, the Courts below have committed an error of law in respect of the use which they have made of a certain judgment of the year 1874. The principal defendants, the proprietors, were not parties to the litigation or bound by the result. The judgment, it seems, decided a suit or suits between the *putnidars* as plaintiffs and the Secretary of State as defendant, in which the *putnidars* successfully asserted their title to Chur Raninagar as part of this *putni*. The learned Additional Judge says: "It appears, that the plaintiffs in those cases obtained decree for lands of Raninagar and *Mouza* Chur Raninagar as appertaining to their *putni taluk*, and the entire lands were made into one new *Mouza* named Decreer Chur Raninagar." Then the learned Judge continues: "It is contended for the appellants that they were not parties to those suits, and, therefore, the judgment and decree in those cases are not admissible against them. The argument is against established case-law, and I have no doubt that they are admissible in evidence. The decree and judgment prove that the predecessors of the plaintiffs claimed in 1874 lands of *Mouza* Chur Raninagar as appertaining to the *putni taluk*; their claim was upheld, and they remained in possession as before."

Dr. Mitter has not, I think, disputed that the proceedings of 1874 and their result were relevant under section 13 of the Evidence Act. Nor could he have successfully taken this position. In the judgment of a Full Bench of this Court in *Tepu Khan* v. *Rajani Mohan Das* (1) the following passage occurs:—"It is clear from the decisions in the Privy Council that under certain circumstances, and in certain cases, the judgment in a previous suit, to which one of the parties in the subsequent suit was not a party, may be admissible in evidence for certain purposes and with certain objects in the subsequent suit." In a later case which came before the Privy Council [*Dinomoni Chaudhurani* v. *Brojo Mohini Chaudhurani* (2)] Lord Lindley delivering

(1) 25 C. 522; 2 C. W. N. 501; 13 Ind. Dec. (N. S.) 347 (F. B.).

(2) 29 I. A. 24; 29 C. 187; 6 C. W. N. 386; 12 M. L. J. 83; 4 Bom. L. R. 167; 8 Sar. P. C. J. 224 (P. C.).

their Lordships' judgment observed that the words of section 13 of the Evidence Act were very wide. I have no doubt that the litigation of 1874 was within the meaning of section 13, a transaction or instance in which the right of the plaintiffs to hold the disputed lands as part of their *putni* was successfully asserted and this transaction or instance was relevant or admissible in evidence in the present suit. So far, I think, Dr. Mitter would not disagree. His objection, as I understand it, is that the learned Additional Judge in some way gave judicial force to the judgment as against the petitioners who are not bound by it. Of course if the learned Judge had expressed himself to the effect that the judgment was in law conclusive against the proprietors, he would have been guilty of serious error. As I read his words, however, I do not think that the learned Judge has attributed to the judgment any judicial force as against the proprietors. He treats the judgment or the transaction which it discloses, as an item of fact in the history of the disputed lands. This clearly appears from what he says later in his own judgment which must be read as a whole. Two or three paragraphs further down after referring to other matters, he says "all these go to prove," meaning each of the different events or items in the history of the land to which he had referred together went to show, the title of the *putnidars*.

In the circumstances it seems to me merely hypercritical to find fault with the learned Additional Judge's statement that the judgment proves "that the predecessor of the plaintiff claimed in 1874 lands of *Mauza* Chur Raninagar as appertaining to the *putni taluk*, their claim was upheld, and they remained in possession as before." The relevancy of the previous suit and its result necessarily gave access to the judgment in that suit, and, in my opinion, the learned Judge was right in saying that the judgment proved the nature of the claim made and the legal effect or result that the claim was upheld. He was at liberty to use the judgment for that purpose and to that extent. The legal effect of the judgment as between the parties to the previous suit had to be determined from the judgment itself and, when determined, it became not conclusive as between the parties to the present suit but a fact to be weighed in the balance like any other fact. Its probative force or weight in the circumstances was matter for a Court of fact to decide.

The point that this judgment of 1874 does not prove the previous or subsequent state of the possession is really a very small one. In the first place the learned Judge may have expressed himself badly. The subsequent state of the possession must clearly have depended on other evidence and there may have been other evidence also as to the previous state of the possession. But in any case, the judgment of 1874 declares the right of the *putnidars* to possession and as to subsequent possession there appears to be no dispute at all.

As to the case of *Kashi Nath Pal* v. *Raja Jagat Kishore Acharjee Choudhury* (3), to which Dr. Mitter referred, in my opinion, the learned Additional Judge has not committed the error which was there condemned. Apart from the negligible point as to the previous state of the possession, the learned Judge had not treated recitals in the judgment of 1874 as substantive proof in the present case of the truth of the facts recited. His treatment of the judgment of 1874 is within the principle that where a judgment is admissible it is "conclusive evidence for or against all persons, whether parties, privies or strangers, of its own existence, date and legal effect as distinguished from the accuracy of the decision rendered."

The result is that, in my opinion, the learned Vakil's main contention is not substantiated.

The learned Vakil raised another point in connection with a document described as a document of the year 1287 which is Exhibit A on the record. This point, however, was not seriously pressed and no more need be said about it.

The last contention of the learned Vakil is that the Secretary of State should have been a party to this suit. As to this point, it appears, that a complaint made in the Trial Court that the Secretary of State was not a party was overruled

(3) 35 Ind. Cas. 298; 20 C. W. N. 643; 23 C. L. J. 583.

by the learned Munsif. The complaint, however, does not appear to have been repeated in the lower Appellate Court, and there is no decision of the learned Additional Judge upon it. It would seem that if this objection was ever seriously put forward it was afterwards abandoned. Moreover, the position of the Government in respect of the disputed lands is not very clear. I have referred to the statement in the judgments of the Courts below that the Government is recorded in the Settlement proceedings as the *tahsildar* of the proprietors. Before we could say that the Secretary of State should or should not be a party, some further enquiry would be necessary as to the facts. That being so, I think this point fails in second appeal.

For the reasons I have stated I would dismiss this appeal with costs.

It is conceded that this judgment will govern Appeal No. 2546 of 1921, which should accordingly be also dismissed with costs.

Sanderson, C. J.—I agree.

K. S. D. *Appeals dismissed.*

MADRAS HIGH COURT. FULL BENCH.

CIVIL REVISION PETITION No. 899 OF 1922.

April 11, 1924.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, Mr. Justice Ramesam and Mr. Justice Wallace.

V. MANICKAM PILLAI—DEFENDANT No. 6—PETITIONER

versus

MAHUDUM BATHUMMAL AND OTHERS—PLAINTIFFS AND DEFENDANTS Nos. 1 TO 5 AND 7—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. III, r. 4—"Appearance," meaning of—Pleader reporting no instructions except to apply for adjournment—Endorsement on back of plaint—Adjournment refused—Withdrawal of vakalat*—Leave of Court.*

Where a Pleader for the plaintiff in a case asks for an adjournment and states that, if the adjournment is refused, he has no further instructions to go on with the case, and makes an endorsement to that effect on the back of the plaint, there is no "appearance" and the endorsement by the Vakil is a perfectly good written withdrawal from his duties and obligations under the *vakalat*. [p. 103, col. 2.]

Where a Court assents to such conduct of the Vakil and raises no question about his withdrawal, it must be taken to have given its consent. [p. 103, col. 2.]

Order III, r. 4, Civil Procedure Code, does not require the writing containing the withdrawal by a Pleader of his *vakalat* to be in any specified form, nor is any formality necessary for the leave of Court. [p. 103, col. 1.]

Per *Coutts Trotter, J.*—*Quære:*—Whether the withdrawal of *vakalat* under O. III, r. 4 must be in writing?

Radha Kishan v. *The Collector of Jaunpur*, 23 A. 220; 28 I. A. 28; 5 C. W. N. 153 (P. C.), referred to.

Petition, under section 115 of Act V of 1908, praying the High Court to revise an order of the Court of the Subordinate Judge, Tuticorin, dated the 2nd of August 1922, and made in Interlocutory Application No. 558 of 1922, in Original Suit No. 16 of 1921.

This petition coming on for hearing in pursuance of the Order of Reference to a Full Bench made by the Hon'ble the Chief Justice at the suggestion of the Hon'ble Mr. Justice Wallace, contained in his Lordship's note, dated the 1st April, 1924, and made herein, upon perusing the petition, the order of the lower Court and the record in the case and the said note and upon hearing the arguments of Mr. *P. V. Krishnaswami Ayyar*, for the Petitioner, and of Mr. *A. Swaminatha Ayyar*, for the First Respondent, and of Mr. *K. R. Rangaswami Ayyangar*, for Respondents Nos. 2, 4 and 5 and the other respondents not appearing in person or by Pleader the Court expressed the following

OPINION.

Coutts Trotter, C. J.—In this case the plaintiff's Vakil appeared in Court on the day fixed for the hearing of the suit, asked for an adjournment and stated that, if that adjournment was not granted, he had no further instructions to go on with the case. He had previously filed a *vakalat* in the ordinary form. He did something more than the mere asking for an adjournment. He took the plaint which he had drawn and signed and endorsed on it as follows: "I have no instructions except to apply for an adjournment

(Signed) A. V. Krishnaswami Ayyar, Vakil for the plaintiff (with the date)."

The relevant provision of the Code is said to be O. III, r. 4. Sub-rule (1) of that rule is "The appointment of a Pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person or by his recognized agent or by some other person duly authorized by power-of-attorney to act on this behalf." Sub-rule (2) is, "Every such appointment, when accepted by a Pleader, shall be filed in Court, and shall be considered to be in force until determined with the leave of the Court, by a writing signed by the client or the Pleader, as the case may be, and filed in Court....."

It is sought to be said here that, although this Vakil wrote what I have read on the back of the plaint after having filed a *vakalatnama*, the *vakalatnama* must be considered to continue in force until something further was done, and it is also argued that the effect of the *vakalatnama* being considered to be in force is to make the Pleader constructively appear in a proceeding in which he has explicitly stated that he does not appear. In our opinion, the Statute does not require the writing containing the withdrawal by the Pleader of his *vakalat* to be in any specified form, and it appears to us that that which he has endorsed on the back of the plaint would be a perfectly good written withdrawal from his duties and obligations under the *vakalat*. That is really sufficient to dispose of this case, and Mr. Krishnaswami Ayyar very frankly said that, if we take that view as to the proper construction of the writing, the case, so far as he is concerned, was unarguable. But, while basing our decision on that short ground, we think, in view of some decision of this Court,—one a very recent decision and the other which is unreported—that we ought to point out that when this matter has been discussed in those cases, attention does not seem to have been drawn to the decision of the Privy Council *Radha Kishan* v. *The Collector of Jaunpur* (1). The facts of that case are set out in a quotation from the judgment of the Subordinate Judge, which runs as follows: "That day (*i.e.*, the day fixed for hearing) the Pleader for the applicant stated that he could not conduct the case, and he had received no instructions from his client. Thereupon the Court proceeded to try the case and tried and decided the issues on the evidence adduced on the plaintiff's behalf and decreed the suit against the applicant." Their Lordships held in that case that the applicant could not be held in the circumstances to have appeared. We trust that when this matter comes before the Courts again notice will be taken of that decision, because, so far as appears, a wider question is determined there, as there is no statement—a feature that exists in this case—to the effect that the Pleader has filed an instrument in writing taking himself out of his *vakalat*, a withdrawa- on his part which O. III, r. 4 conteml plates.

The exact question put to us is, whether when a Pleader reports no instructions, whether after he has asked for an adjournment, and been refused or not, the Court is correct in holding that the party for whom the Pleader was appearing has not appeared. We think that the only answer can be that, at any rate, in the circumstances of this case, the Pleader cannot be deemed to have appeared.

I should add one other word. The section says that the withdrawal of the Pleader must be with the leave of the Court. It does not say, nor do I think we are to import into it, that any formality is necessary about the leave of the Court and in the circumstances, we must presume that, in a case like the present, the Court in assenting to the conduct of the Vakil and in raising no question about his withdrawal, must be taken within the meaning of the section to have given its consent.

The case will go back to the Single Judge for disposal on any point not determined by this Full Bench.

(1) 23 A. 220; 28 I. A. 28; 5 C. W. N. 153 (P. C.).

INDRA BHUSAN SAHA *v.* JANARDHAN SAHA.

Ramesam, J.—I agree.

Wallace, J.—I agree.

V. N. V. *Case sent back.*

N. H.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2358 OF 1921.

February 25, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Chotzner.

INDRA BHUSAN SAHA AND OTHERS—DEFENDANTS Nos. 1 TO 9—APPELLANTS

versus

JANARDAN SAHA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 27—Defendant's status, question of—Record of Rights not produced in lower Courts—Due diligence—Second appeal—Finding of fact, whether can be disturbed.

In a suit for recovery of possession of the property in dispute the District Judge on appeal found that the defendants were neither occupancy nor under-*raiyats* and on this finding decreed the suit. The defendants having preferred a second appeal to the High Court, it was urged (1) that the finding was not based on legal evidence, and (2) that the Record of Rights which raised a presumption in favour of the defendants could not be placed before the lower Appellate Court owing to its late publication and the case should be re-tried in the light of this record:

Held, (1) that the findings of fact of the lower Appellate Court could not be disturbed in second appeal; [p. 105, col. 1.]

(2) that as the defendants could not produce the Record of Rights in the lower Appellate Court in spite of all due diligence it should be admitted in evidence under O. XLI, r. 27 of the Civil Procedure Code; [*ibid.*]

(3) that the case should be remitted to the Court of first instance in order that that Court may try the question of the status of the defendants after admitting the Record of Rights as evidence in the case. [p. 105, col. 2.]

Appeal against a decree of the Additional District Judge, Jessore, dated the 15th of August, 1921, affirming the decree of the Munsif, First Court at Magura, dated the 21st June, 1920.

Babus *Surendra Chandra Sen* and *Bhuban Mohan Saha*, for the Appellants.

Babu *Kshetra Mohan Ghose*, for the Respondents.

JUDGMENT.—In this appeal the question raised is whether the plaintiffs' suit is barred by limitation under Art. 3 of Schedule III of the Bengal Tenancy Act. Both the Courts below decreed the plaintiffs' suit for recovery of possession of the property in dispute and the defendants have preferred the present appeal. The decree passed by the lower Appellate Court is supported by the finding arrived at by that Court to the effect that the tenancy was neither an occupancy nor an under-*raiyati* one. The learned Judge, therefore, finds that Art. 3, Schedule III, Bengal Tenancy Act, does not apply in this case. This finding virtually makes the status of the defendants that of a tenure-holder. The controversy between the parties centred round the question whether the defendants' interest in the land was that of an occupancy *raiyat* or of a tenure-holder. The plaintiffs are the tenants of the defendants' tenant. Their case is that the defendants are the landlords of their landlord. The questions, therefore, that arise are, first, whether as the defendants are the landlords of the plaintiff's landlord, Art. 3 of Schedule III applies to this case; secondly, whether the defendants are *raiyats* within the meaning of that Article. The first question was not determined by the lower Appellate Court and the defendants' appeal to that Court was dismissed on the finding that they were neither occupancy nor under-*raiyats*. With reference to this question the learned Vakil for the appellants contends that the finding of the lower Appellate Court is not based on legal evidence. It appears that under the *Talukdars*, Gumani and Nakari held a non-transferable occupancy and under them Tilak Saha—the predecessor-in-title of the defendants—held a *bekayemi jama*. Gumani and Nakari surrendered their holding and the learned Judge says that Tilak then became a tenant under the *Talukdars* of the village. He does not say how Tilak on the surrender of the tenancy by the superior landlord became a tenant directly under the *Talukdars*—whether there was a fresh settlement with Tilak or whether by virtue of the surrender by the superior landlord he became a tenant directly under the *Talukdars*. The learned Judge further does not state the circumstances under which Tilak who

had a *bekayemi jama* under the *raiyat* of a non-transferable occupancy holding obtained a *kayemi maurusi jama* under the landlords. These are, no doubt, omissions in the judgment of the lower Appellate Court. But on a consideration of the evidence before him the learned Judge has come to the conclusion that the tenancy is neither an occupancy nor an under-*raiyati* one. We are not justified in second appeal in disturbing that finding of fact.

The appellants have, however, raised another point.

They say that the Record of Rights which has been prepared with reference to the land in dispute could not be produced in time before the lower Appellate Court and that the case should, therefore, be re-tried in the light of the Record of Rights which raises a presumption in favour of the appellants. It appears that the Record of Rights was published after the decision of the suit by the First Court but before the lower Appellate Court pronounced its judgment. The appellants have filed an affidavit to show that with all diligence they were not in a position to produce the Record of Rights in the lower Appellate Court before the hearing of the appeal and we are satisfied that they were unable to produce it through no laches on their part. That is an important piece of evidence which should be taken into account in determining the present question. As this evidence could not be produced before the lower Appellate Court, we are of opinion that it should be considered in determining the status of the defendants by the Courts which are entitled to deal with facts. We, therefore, propose to admit the Record of Rights in evidence under O. XLI, r. 27 on the application of the appellants. The course which we propose to adopt is justified by the observations made by their Lordships of the Privy Council in the case of *Raja Indrajit Pratap Bahadur Sahi* v. *Amar Singh* (1). A similar course was followed in the case of *Bhairab Chandra Dutt* v. *Kali Kumar Dutt* (2). The order that we make in this case is that this case should be remitted to the Court of first instance in order that that Court may try the question of the status of the defendants after admitting the Record of Rights as evidence in the case. The defendants will be entitled to adduce such evidence, if any, as is necessary to prove the Record of Rights. The plaintiffs will be entitled to adduce such evidence as they consider necessary to rebut the presumption arising from the Record of Rights. It is not intended that there should be a *de novo* trial or that fresh evidence in respect of other points involved in this litigation should be adduced. The Court of first instance will then dispose of the case according to law.

The result is that this appeal is allowed, the decrees of the lower Courts are set aside and the case sent back to the Court of first instance to be re-tried according to the observations made above. The costs of this appeal will abide the result.

K. S. D. *Appeal allowed.*

(1) 74 Ind. Cas. 747; 50 I. A. 183; 28 C. W. N. 277; 21 A. L. J. 554; 4 P. L. T. 447; (1923) A. I. R. (P. C.) 128; 1 P. L. R. 345; 2 Pat. 676; 33 M. L. T. 233; 45 M. L. J. 578; 18 L. W. 723; 25 Bom. L. R. 1259; 39 C. L. J. 318 (P. C.).

(2) 71 Ind. Cas. 453; 37 C. L. J. 491.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 35-B OF 1923.
August 6, 1924.

Present:—Mr. Kinkhede, A. J. C.

ABDUL MAJID KHAN—PLAINTIFF—APPELLANT

versus

BALAPPA AND OTHERS—DEFENDANTS—RESPONDENTS.

Specific performance, suit for—Delay, how far effective reply—Abandonment—Waiver—Time not of essence of contract—Equity, when can be invoked—Second appeal—Delay, finding of—Question of fact or law.

Delay in itself is no reply to a suit for specific performance unless it amounts to a waiver or abandonment of the contract or to latches on the part of the party seeking specific performance. [p. 106, col. 2.]

ABDUL MAJID KHAN *v.* BALAPPA.

Kissen Gopal Sadaney v. *Kally Prosonno Sett*, 33 C. 633 at p. 636, *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai*, 32 Ind. Cas. 246; 40 B. 289; 30 M. L. J. 186; 3 L. W. 239; 19 M. L. T. 184; 14 A. L. J. 225; (1916) 1 M. W. N. 229; 18 Bom. L. R. 163; 23 C. L. J. 358; 20 C. W. N. 744; 43 A. I. 26 (P. C.), *Chamarti Suryaprakasarayadu* v. *Arardhi Lakshminarasimhacharyulu*, 23 Ind. Cas. 560; 26 M. L. J. 518, referred to.

Mere delay does not amount to waiver or abandonment. [p. 106, col. 2.]

A plea of delay should not be allowed to prevail if the parties have not by their words or conduct or by express stipulation made time of the essence of the contract. [*ibid.*]

Equity will not assist where there has been undue delay on the part of one party to a contract, and the other has given him reasonable notice that he must complete within a definite time. [p. 107, col. 2.]

A finding of delay is a finding of fact but whether the conclusion drawn therefrom, that it disentitles the plaintiff from claiming the particular relief, is right or wrong is a matter which is open to consideration in second appeal as the legal result of certain facts is a question of law. [p. 107, col. 1.]

Appeal against a decree of the Additional District Judge, Amraoti, in Civil Appeal No. 97 of 1922, dated the 13th October 1922.

Dr. *H. S. Gour* and Mr. *K. K. Gandhe*, for the Appellant.

Sir *B. K. Bose*, for the Respondents.

JUDGMENT.—The second and third grounds of appeal in this case challenge the correctness of the judgment dismissing plaintiff's suit on the ground of delay. Delay always involves a question of fact because delay may or may not be accountable and whether it has been in the particular case, reasonable or unreasonable and whether it has been duly accounted for or not, is always a matter on which the First Appellate Court must have a final say. The matter cannot be said to be necessarily open to second appeal. The learned Counsel for the appellant has argued that though the finding of delay may remain a finding of fact still whether the conclusion drawn therefrom that it disentitles the plaintiff from claiming the particular relief is right or wrong is a matter which is open to consideration in second appeal. That the legal result of certain facts is a question of law and can, therefore, be raised in second appeal, is a proposition which is amply supported by authority.

I admit that delay is itself no reply to a suit for specific performance unless it amounts to a waiver or abandonment of the contract or to latches on the part of the party seeking specific performance. *Kissen Gopal Sadaney* v. *Kally Prosonno Sett* (1), *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (2), *Chamarti Suryaprakasarayadu* v. *Arardhi Lakshminarasimhacharyulu* (3). Mere delay does not also amount to waiver or abandonment Delay short of limitation does not disentitle a person from enforcing his rights. Ordinarily the plea of delay is discouraged if the circumstances are such that the parties have not by their words and conduct or by express stipulation, made time of the essence of the contract.

The respondents' contention is that the question of delay is concluded by the lower Appellate Court's finding. The defendants-respondents had distinctly pleaded that the plaintiff failed to perform his part of the contract, and, therefore, as there was default or breach on the plaintiff's part which entitled the defendants to rescind the contract, they actually rescinded the same and put an end to it. The lower Appellate Court has found, agreeing with the First Court, that the contract was expressly rescinded and the plaintiff had expressly abandoned the contract. This finding is supported by evidence proper for consideration and excludes the plaintiff from claiming to enforce the right once expressly abandoned. I have gone through the evidence and I clearly see the defendants' notice dated the 26th September 1918, by which the defendants gave the ultimatum to the plaintiff that he must exercise his option to purchase the field within the particular time thereby limited, otherwise the agreement was to be treated as cancelled. The plaintiff did not comply with this notice, beyond merely expressing a verbal willingness

(1) 33 C. 633 at p. 636.

(2) 32 Ind. Cas. 246; 40 B. 289 at p. 299; 30 M. L. J. 186; 3 L. W. 239; 19 M. L. T. 184; 14 A. L. J. 225; (1916) 1 M. W. N. 229; 18 Bom. L. R. 163; 23 C. L. J. 358; 20 C. W. N. 744; 43 I. A. 26 (P. C.).

(3) 23 Ind. Cas. 560; 26 M. L. J. 518.

to perform. He did not offer or tender any draft of a sale-deed or tender the amount of the consideration payable under the contract and thus failed to carry out his part of the contract. The result of this failure as was expected was that the contract stood rescinded as soon as time limit expired and the parties became liberated from their obligations to perform the contract and one party only remained accountable for damages, if any, for breach of the contract of specific performance, to the other party who may not be in the breach.

It is said that it was the defendants' duty to execute a sale-deed in plaintiff's favour and he need not have waited for plaintiff to tender a draft sale-deed for his approval and for execution. This again raises a question of fact, as the parties have chosen to make it a mixed question of law and fact. Parties took an issue on this point to the following effect, after the case was remanded :—

"Was defendant to perform his contract without application by plaintiff."

The First Court held that it was not proved that defendant had agreed to buy the stamp and bear the expenses of sale and that conclusion drawn by that Court from this is that the contract was not to be performed without application by the plaintiff and that this comes within section 48 of the Contract Act. That Court also held on another issue as to whether time was of the essence of the contract, in the affirmative; the defendant being in need of money had to sell the property. This clearly shows that the defendants suffered detriment by the breach on plaintiff's part and the latter cannot now, that a third party has become interested in the property, be allowed to turn round to say that it is still open to him to enforce his so-called rights after they have been allowed to vanish away by default on his own part.

In this view of the case the question of *res judicata* needs no decision.

The remarks quoted by the lower Appellate Court from the Privy Council case of *Jamshed Khodaram Irani* v. *Burjorji Dhunjibhai* (2) very fittingly apply to the facts found here;

"But equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time."

There is thus undue delay coupled with a definite abandonment on plaintiff's part of his rights under the contract, and on both these grounds the plaintiff's suit must fail. I, therefore, hold that the dismissal is proper and there is no valid ground for interference. I dismiss the appeal with costs. The plaintiff shall pay costs in all Courts.

G. R. D. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS NOS. 212 AND 213 OF 1923.

March 11, 1924.

Present:—Mr. Justice Venkatasubba Rao.

ARUNACHALA GOUNDAN—RESPONDENT No. 4—PETITIONER IN BOTH

versus

KATHA GOUNDAN AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 TO 3—RESPONDENTS IN C. R. P. No. 212 OF 1923.

KATHA GOUNDAN—DEFENDANT No. 2 RESPONDENT IN C. R. P. No. 213 OF 1923.

Civil Procedure Code (Act V of 1908), O. III, r. 1, O. V, r. 1, cl. (2), O. IX—Absence of party—Vakil having no instructions—"Appearance" of party Ex parte *decree—Formal withdrawal of Vakil, if necessary.*

Where a Pleader appears for a party in default and states that he has no instructions, there is no "appearance" of the party, and the provisions of O. IX, Civil Procedure Code, are applicable. [p. 108, col. 2.]

When a Pleader appears and says he has no instructions, he intends to inform the Court that though he has filed an appearance he does not propose to appear for his client. It is not necessary for him to say that he severs his connection with the case or that he withdraws his *vakalat*. No set form of words is necessary to convey to the Court the information that he has ceased to appear. [*ibid.*]

Failure to appear and *refusal to appear* stand on the same footing. In neither case is there an "appearance." [p. 109, col. 1.]

Gopala Row v. *Maria Susaya Pillai*, 30 M. 274; 17 M. L. J. 225, *Soonderlal* v. *Goorprasad*, 23 B. 414; Chitty's S. C. C. R. 561; 12 Ind. Dec. (N. S.) 275, *Satis Chandra Mukerjee* v. *Ahara Prasad*

ARUNACHALA GOUNDAN *v.* KATHA GOUNDAN.

Mukerjee, 34 C. 403; 5 C. L. J. 247; 2 M. L. T. 123; 11 C. W. N. 329 (F. B.), followed.

Petitions under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the orders of the District Court of Coimbatore, in Civil Miscellaneous Appeals Nos. 65 and 67 of 1922, preferred against the orders in Civil Miscellaneous Petitions Nos. 321 and 320 of 1922 in Original Suits Nos. 333 and 286 of 1921 of the file of the Court of the Additional District Munsif, Coimbatore.

Mr *W. S. Subrahmanya Iyer*, for the Petitioner.

Mr. *T. Ramachandra Row*, for the Respondents.

JUDGMENT.—There were two suits before the District Munsif, the one he dismissed for default on account of the non-appearance of the plaintiff, and in the other he passed an *ex parte* decree on account of the defendant not having appeared. The plaintiff in the first suit and the defendant in the second suit happen to be the same person. Applications were made to the District Munsif to set aside the order of dismissal for default in the first suit and to set aside the *ex parte* decree in the second suit. The District Munsif refused to allow these applications, but on appeal the District Judge made orders favourable to the applicant. The propriety of these orders is challenged in the revision petitions before me.

A Vakil appeared for the party in default and stated he had no instructions. It is argued that notwithstanding this the Pleader must be held to have appeared on his client's behalf and, therefore, the provisions of O. IX do not apply. I am utterly unable to follow this argument. Order III, r. 1 so far as it is material for the present purpose runs thus:—"Any appearance in any Court required by law to be made by a party may be made by a Pleader duly appointed to act on his behalf." Order V, r. 1 sub-clause (2) provides: "A defendant to whom a summons has been issued under sub-rule (1) may appear (*a*) in person, or (*b*) by a Pleader duly instructed and able to answer all material questions relating to the suit, or (c) by a Pleader accompanied by some person able to answer all such questions." This provision, no doubt, refers in terms to a defendant, but in principle there seems to be no distinction for this purpose between a defendant and a plaintiff, and I am quite clear that the same rule is to be applied in regard to both. When a Pleader appears and says he has no instructions, I take it that he intends to inform the Court that he has no instructions to conduct the case either wholly or partially; in other words, he tells the Court, that though he has filed an appearance he does not propose to appear for his client. It seems to me to be a contradiction in terms to hold that a person who says he does not appear does, in fact, appear. It has been argued that it is necessary for a Pleader to say in such circumstances that he severs his connection with the case, or that he withdraws his *vakalat*. I do not think any set form of words is necessary to convey to the Court the information that he has ceased to appear and that he, in fact, does not appear for his client. There is no magic in the words "I have ceased my connection with the case." In my opinion the mere attendance of a Pleader who for want of instructions is unable "to answer all material questions relating to the suit" is not an appearance on behalf of his client. Another case may arise where the Pleader appears and says that he applies for an adjournment and on the adjournment being refused informs the Court that he has no instructions. Here again, I am perfectly clear that there is no appearance on behalf of the party. Then a third contingency may arise; the Pleader may be duly instructed and be able to answer all material questions, but still he may tell the Court "I have no instructions." This conduct may render him liable at the instance of his client, but the question that is material for the present purpose is, was there or was there not an appearance? Supposing that a Pleader who has been retained is actually engaged in another Court and fails to appear, can it be said that there is an appearance on behalf of his client? *Failure to appear* and *refusal to appear*,

do, I think, stand on the same footing. In neither case can there be said to be an appearance. The matter seems to be simple in the extreme and but for the large body of conflicting decisions on the point, I should have had no difficulty in deciding the case. There is abundant authority in favour of the proposition, as I have stated it—*Gopala Row* v. *Maria Susaya Pillai* (1) and *Soonderlal* v. *Goorprasad* (2) and *Satis Chandra Mukerjee* v. *Ahara Prasad Mukerjee* (3) and I am not prepared to follow the decisions which take a different view.

The civil revision petitions therefore fail and are dismissed; No. 212 with costs. In No. 213 the petitioner will pay the counter-petitioner only the printing charges; no Vakil's fee is allowed.

V. N. V. *Petitions dismissed.*

(1) 30 M. 274; 17 M. L. J. 225.
(2) 23 B. 414; Chitty's S. C. C. R. 561; 12 Ind. Dec, (N. S.) 275.
(3) 31 C. 403; 5 C. L. J. 247; 2 M. L. T. 123; 11 C. W. N. 329 (F. B.).

CALCUTTA HIGH COURT. FULL BENCH.

REFERENCE No. 1 OF 1924.

August 8, 1924.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Mr. Justice Walmsley, Mr Justice Newbould, Mr. Justice Mukerji and Mr. Justice Chotzner.

BARADA KANTA RAY—PLAINTIFF—APPELLANT

versus

Sheikh MAIJUDDI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 7, 94, 151, O. XXXVIII, rr. 5, 6—Attachment before judgment of immoveable property—Small Cause Court, whether can order attachment—Provincial Small Cause Courts Act (IX of 1887), s. 17—"Attachment" and "order of attachment", distinction between—"Interlocutory order," meaning of—Small Cause Court, whether has inherent powers.

Per *Curiam* (*Walmsley and Chotzner, JJ.*, dissentiente).—A Provincial Small Cause Court has jurisdiction to make an order for attachment of immoveable property before judgment. [p. 114, col. 1.]

Kedarnath Paramanik v. *Hem Nath Karmakar*, 79 Ind. Cas. 841; 19 C. 994; (1923) A. I. R. (C.) 1.6, overruled.

Sadek Ali v. *Samed Ali*, 80 Ind. Cas. 300; 28 C. W. N. 16 at p. 19; (1924) A. I. R. (C.) 193, affirmed.

There is a difference between ordering the attachment of property and attaching the property. If a Provincial Small Cause Court makes an order for attachment of immoveable property, it would have to send it to an ordinary Civil Court for execution. [p. 113, col. 1.]

Per *Sanderson, C. J.*—In construing an Act words found therein should not be regarded as surplusage and full effect should be given to them if a reasonable interpretation can be found. [p. 112, col. 1.]

The only reasonable interpretation to be placed upon the words "so far as they relate to injunctions and interlocutory orders" in section 7 (*b*) of the Civil Procedure Code is that it was intended to exclude from the jurisdiction of a Provincial Small Cause Court the matters particularly specified in clauses (*c*) and (*e*) of section 94. [*ibid.*]

The meaning of the words "if it is so prescribed" in section 94 of the Civil Procedure Code is, if it is prescribed by the rules and orders contained in the First Schedule of the Code. [p. 112, col. 2.]

The order for attachment contemplated by section 94, clause (*e*) of the Code must be such an order as is specified in O. XXXVIII, r. 6, *viz.*, an order for attachment before judgment. [p. 113, col. 1.]

Per *Mukerjee, J.*—Something which is done between the commencement and the end of a suit or action, which decides some point or matter which, however, is not a final decision of the matter in issue, is known as an interlocutory order. [p. 118, col 1.]

Order XXXVIII of the Civil Procedure Code has not been excluded either by section 7 read with section 94 or by O. L and is applicable to a Provincial Court of Small Causes. [p. 120, col. 1.]

Even a Provincial Court of Small Causes can act under section 151, Civil Procedure Code, and pass such orders as may be necessary. [p. 121, col. 1.]

Per *Chotzner, J.*—A Court which has not the power of executing a decree by attachment of immoveable property after judgment, cannot have the power of attaching such property before judgment. [p. 122, col. 1.]

Per *Walmsley, J.*—A Small Cause Court cannot attach property whether moveable or immoveable before judgment. [p. 115, col. 1.]

Reference to Full Bench by Mr. Justice Newbould and Mr. Justice B. B. Ghose on a Reference by the Court of Small Causes at Madaripur:—

ORDER OF REFERENCE.

"This is a Reference by the Judge of the Court of Small Causes at Madaripur

under O. XLVI, r. 1, Civil Procedure Code, for the decision by this Court of the question whether the Provincial Small Cause Court is competent to attach immoveable property before judgment. The reason for the Reference is given to be the existence of conflicting decisions in this Court and apparently for this the Referring Judge has not recorded his own opinion on the question. In the case of *Kedarnath Paramanik* v. *Hem Nath Karmakar* (1), it was held that the Provincial Small Cause Court can attach immoveable property before judgment while the contrary view was taken in *Sadek Ali* v. *Samed Ali* (2). The earlier case was not evidently brought to the notice of the Division Bench which decided the latter case. Each of us was a party to one of the two cases cited, one of which must be overruled. Under this circumstance, we are unable to decide the question finally and we find it necessary to refer the matter to a Full Bench. We, therefore, refer the following questions for decision by a Full Bench:—

(1) Whether a Provincial Small Cause Court has jurisdiction to order an attachment of immoveable property before judgment?

(2) Whether the case of *Kedarnath Paramanik* v. *Hem Nath Karmakar* (1) or the case of *Sadek Ali* v. *Samed Ali* (2) was correctly decided?"

Babu *Santosh Kumar Bose*, for the Reference.

Babu *Sitaram Banerjee*, against the Reference.

JUDGMENT.

Sanderson, C. J.—The questions referred to the Full Bench are as follows:—

(1) Whether a Provincial Small Cause Court has jurisdiction to order an attachment of immoveable property before judgment?

(2) Whether the case of *Kedarnath Paramanik* v. *Hem Nath Karmakar* (1) or the case of *Sadek Ali* v. *Samed Ali* (2) was correctly decided?

(1) 70 Ind. Cas. 841; 49 C. 994; (1923) A. I. R. (C.) 176.

(2) 80 Ind. Cas. 300; 28 C. W. N. 16 at p. 19; (1924) A. I. R. (C.) 193.

The reference arises by reason of conflicting decision of this Court in two cases *viz.*, *Kedarnath Paramanik* v. *Hem Nath Karmakar* (1) and *Sadek Ali* v. *Samed Ali* (2).

In the former case it was decided that a Provincial Small Cause Court can attach before judgment immoveable property under the Code of Civil Procedure of 1908. In the latter case it was decided that a Provincial Court of Small Causes has no power to attach immoveable property before judgment under O. XXXVIII of the Civil Procedure Code of 1908 and that an order of such a Court adjudicating a claim to property so attached is *ultra vires*.

The decision in the case of *Kedarnath Paramanik* v. *Hem Nath Karmakar* (1) was not brought to the attention of the learned Judges who decided the latter case.

I am not surprised that there has been and is a difference of judicial opinion in respect of this question, for, in my opinion, it is by no means easy upon an examination of the various provisions relating to it to ascertain what was the intention of the Legislature with regard to this matter when the Civil Procedure Code of 1908 was passed. This presents an unsatisfactory situation, for the Provincial Small Cause Courts are obviously intended for the expeditious disposal of small causes, and it is desirable that those who preside over such Courts and those who practise in them should be able to ascertain without any difficulty what are the jurisdiction and procedure applicable thereto. So far from that being the case in respect of the matter now under discussion, it has become necessary, in order to ascertain the powers of the Provincial Small Cause Courts, to refer the question to a Full Bench and during the argument it was necessary to examine minutely sections of the Provincial Small Cause Courts Act of 1887, the Civil Procedure Code of 1882 and the Civil Procedure Code of 1908 and the result is a difference of opinion.

This therefore appears to be a matter which should engage the attention of

the Legislature so that the jurisdiction of the Provincial Small Cause Courts may be made clear beyond all question.

Section 15 of the Provincial Small Cause Courts Act, 1887, provides that a Court of Small Causes shall not take cognizance of the suits specified in the Second Schedule as suits excepted from the cognizance of a Court of Small Causes and amongst the suits excepted by that Schedule from the cognizance of a Court of Small Causes are a suit for the possession of immoveable property or for the recovery of any interest in such property, a suit for partition of immoveable property, a suit for purchase or sale or redemption of mortgaged property, a suit for assessment, etc., of rent of immoveable property.

Section 17 of the Provincial Small Cause Courts Act, 1887, provides that the procedure prescribed in the chapters and sections of the Code of Civil Procedure (*viz.*, Act XIV of 1882) specified in the Second Schedule to that Code shall, so far as these chapters and sections are applicable, be the procedure followed by a Court of Small Causes in all suits cognizable by it and in all proceedings arising out of such suits.

Section 5 of the Code of Civil Procedure, 1882, provided that the chapters and sections specified in the Second Schedule thereto should extend to the Provincial Small Cause Courts and that the other chapters and sections of the Code should not extend to such Courts.

The Second Schedule included Chapter XIX (which dealt with the execution of decrees), section 266, but there was added the exception as follows:—"Except so far as relates to immoveable property."

The schedule also included Chapter XXXIV "Of arrest and attachment before judgment except as regards immoveable property."

It is therefore clear that at the time of the passing of the Provincial Small Cause Courts Act in 1887 the intention of the Legislature was that a Provincial Small Cause Court should not have power to attach immoveable property before judgment.

The Code of Civil Procedure, 1882, was repealed by the Code of Civil Procedure, 1908 and section 158 provided as follows:—

"In every enactment or notification passed or issued before the commencement of this Code in which reference is made to or to any chapter or section of Act VIII of 1859 or any Code of Civil Procedure or any Act amending the same or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding part, Order, section or rule."

There is, however, no part of the Code of 1908 which corresponds to the Second Schedule of the Code of 1882 and whereas the scheme of the 1882 Code was to specify the provisions of the Code which should apply to a Provincial Small Cause Court, the scheme of the 1908 Code is to make all the provisions of the Code of 1908 applicable except those which are expressly excepted. The result is that section 17 of the Provincial Small Cause Courts Act is entirely inapposite although it remains unrepealed. This is one reason for the difficulty which has arisen.

On examination of the Code of 1908 and the Orders contained in the First Schedule thereto, it seems to me that the most material sections and Orders are as follows:—

Sections 7, 36, 94 and 95; O. XVI (r.10), O. XXI (r. 82); O. XXXVIII, O. XXXIX, O. L.

Section 7 of the 1908 Code provides as follows:—"The following provisions shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, that is to say,

(*a*) so much of the body of the Code as relates to

(*i*) suits excepted from the cognizance of a Court of Small Causes; (*ii*) the execution of decrees in such suits;

(*iii*) the execution of decrees against immoveable property; and

(*b*) the following sections, that is to say. . . . . sections 94 and 95 so far as they relate to injunctions and interlocutory orders."

On reference to section 94 it will be found that all the orders therein mentioned are "interlocutory orders" in the ordinary meaning of the phrase and clause (*e*) runs as follows:—"Make such other interlocutory orders as may appear to the Court to be just and convenient." This clause therefore would go to show that all the orders specifically mentioned in section 94 are "interlocutory orders."

It was, therefore, argued on the one hand that the intention of the Legislature was to exclude all the matters mentioned in section 94 from the jurisdiction of a Provincial Small Cause Court. On the other hand it was argued that, if this contention were adopted, no effect would be given to the words, "so far as they relate to injunctions and interlocutory orders" in section 7. It was argued that some effect must be given to these words, and that they cannot be regarded as a surplusage, and further that if it had been intended to except all the matters mentioned in section 94, there would have been no necessity to refer to "injunctions" in section 7 for the only injunctions mentioned in section 94 are "temporary injunctions" which would be included in the phrase "interlocutory orders" which are the subject-matter of clause (*e*) of section 94.

It is a well-known rule that in construing an Act, words found therein should not be regarded as surplusage, and full effect should be given to them, if a reasonable interpretation can be found.

In section 94 "temporary injunctions" and "interlocutory orders" are specifically mentioned in separate clauses, *viz.*, (*c*) and (*e*) and in my judgment the only reasonable interpretation to be placed upon the words in section 7, *viz.*, "so far as they relate to injunctions and interlocutory orders" is, that it was intended to exclude from the jurisdiction of a Provincial Small Cause Court the matters particularly specified in clauses (*c*) and (*e*).

I am confirmed in this opinion by the words which are to be found at the beginning of section 94, *viz.*, "if it is so prescribed."

Having regard to the definitions in the second section of the Code the meaning of these words is, if it is prescribed by the rules and Orders contained in the First Schedule of the Code.

On reference to the First Schedule, it will be observed that O. XXXVIII deals with "arrest and attachment before judgment" and O. XXXIX deals with "temporary injunctions and interlocutory orders."

Therefore, although "orders for attachment before judgment" are in the ordinary meaning of the words "interlocutory orders" they are placed in a different category to "temporary injunctions" and "interlocutory orders."

Again although "temporary injunctions" are really "interlocutory orders" they are specifically mentioned in the schedule as being something special and distinct from "interlocutory orders."

The result of my examination of these sections therefore is the conclusion that the framers of this legislation were dealing with "temporary injunctions" and "other interlocutory orders" as matters distinct from the matters specifically mentioned in clauses (*a*), (*b*) and (*d*) of section 94 and that it was intended that the provisions of section 94, which were not to extend to Courts constituted under the Provincial Small Cause Courts Act, 1887, were the provisions contained in clauses (*c*) and (*e*) of section 94.

Clause (*b*) of section 94 empowers the Court to "order the attachment of any property."

Section 7 of the Code therefore does not prevent a Provincial Small Cause Court from making such an order.

But such order must be of an interlocutory nature, for section 7 of the Code and O. L in the First Schedule expressly provide that the provisions of

the Code relating to the execution of decrees against immoveable property shall not extend to a Provincial Small Cause Court.

Therefore the order for attachment contemplated by section 94, clause (*b*), must be such an order as is specified in O. XXXVIII, r. 6, *viz.*, an order for attachment before judgment.

As I am of opinion that the provisions of clause (*b*) of section 94 are not excluded by reason of section 7 and that the order for attachment there referred to must mean an order for attachment before judgment, it follows that, in my opinion, a Provincial Small Cause Court has jurisdiction to make an order for attachment before judgment of any property, which would include immoveable property.

I agree that at first sight it may appear strange that a Provincial Small Cause Court, which cannot entertain suits relating to immoveable property, and which cannot execute a decree by attachment of immoveable property or entertain a claim, which an attachment may produce, should have been given power to make "an order for attachment of immoveable property before judgment." There is, however, a distinction between making an order for attachment and making an attachment. It may be that if a Provincial Small Cause Court were to make an order for attachment of immoveable property before judgment, it would be necessary for that Court to transmit the order to a Court of Ordinary Civil Jurisdiction for the purpose of the order being carried out and the property attached.

In this connection I desire to refer to a passage in the judgment of Rankin, J., in *Sadek Ali* v. *Samed Ali* (2) which is as follows :—

"It is by no means absurd to suppose that the Code of 1908 may have meant, subject to the right of the High Courts to amend the rules, to extend the power of attachment before judgment to immoveable property in the case of Provincial Small Cause Courts while refusing to such Courts the right to attach such property in execution of decrees."

I agree with that passage if the words "power to order attachment before judgment" are substituted for the words "power of attachment before judgment."

The question, however, is whether the Legislature has extended such a power to the Provincial Small Cause Courts.

It is to be noted that O. L, clause (*a*), excludes from the jurisdiction of the Provincial Small Cause Courts the matters mentioned in clause (*a*) of section 7 of the Code and two other matters, *viz.*, the execution of a decree against the interest of a partner in partnership property and the settlement of issues, and in clause (*b*) specifies certain rules and orders which are not to extend to Provincial Small Cause Courts.

This order, however, does not mention O. XXXVIII which deals with attachment before judgment, and it does not mention O. XVI, r. 10 or O. XXI, r. 82.

Order XVI, r. 10, deals with the procedure where a witness fails to comply with a summons to give evidence or produce a document.

One of the powers given to the Court under that rule, is to attach his property.

But it is expressly provided that no Court of Small Causes shall make an order for attachment of immoveable property in respect of the matters referred to in that rule.

Similarly in dealing with the question of what Courts may order sales in execution of decrees or orders, O. XXI, r. 82, expressly provides that sales of immoveable property in execution of decrees may be ordered by any Court other than a Court of Small Causes.

These two rules, therefore, show that in respect of matters which are not dealt with in O. L, when the Legislature desired to exclude them from the jurisdiction of the Provincial Small Cause Courts, it expressly said so.

In my opinion, therefore, it is not unreasonable to assume that if the Legislature had intended to exclude the powers conferred upon the Court by O. XXXVIII, rr. 5 and 6, from the jurisdiction of the Provincial Small Cause Courts, it would have expressly so provided as in the case of O. XVI, r. 10 and O. XXI, r. 82.

On the whole, therefore, though I think the matter is by no means free from difficulty as I have already indicated, I am of opinion that the first question referred to the Full Bench, *viz.*, whether a Provincial Small Cause Court has jurisdiction to order an attachment of immoveable property before judgment, should be answered in the affirmative.

The subject of the decisions in the two cases referred to in the second question was the power of a Provincial Small Cause Court to attach immoveable property before judgment and in *Sadek Ali* v. *Samed Ali* (2) the question whether the Small Cause Court could adjudicate upon a claim to immoveable property arising by reason of the attachment was also involved. The decisions were not confined to the mere question whether a Provincial Small Cause Court has power to order attachment of immoveable property before judgment. In my judgment, therefore, the answer to the second question should be that *Kedarnath Paramanik* v. *Hem Nath Karmakar* (1) was wrongly decided, and *Sadek Ali* v. *Samed Ali* (2) was rightly decided.

Walmsley, J.—The questions referred are whether a Provincial Small Cause Court can attach immoveable property before judgment, and which of the two decisions, opposed to one another, is correct.

There was no doubt upon the main question before the present Code of Civil Procedure came into force: a Court exercising the powers of a Provincial Small Cause Court could not order such an attachment. The manner in which this restriction was enacted was as follows: The Provincial Small Cause Courts Act, section 17, runs as follows:—"The procedure prescribed in the chapters and sections of the Code of Civil Procedure specified in the Second Schedule to that Code, shall, so far as those chapters and sections are applicable, be the procedure followed in a Court of Small Causes in all suits cognizable by it and in all proceedings arising out of such suits." The Second Schedule to the Code then in force (that of 1882) enumerated the chapters and sections of that Code extended to Provincial Courts of Small Causes and among them was Chapter XXXIV "Of arrest and attachment before judgment," with the addition "except as regards immoveable property."

The Code now in force proceeds on entirely different lines: there is no Schedule corresponding to the Second Schedule of the Code of 1882, and although the sections of Chapter XXXIV are reproduced with slight modifications in the rules of O. XXXVIII and in section 95 of the present Code, there is nothing to be found which corresponds to the clear words "except as regards immoveable property." The method has in fact been changed: in place of a detailed list of provisions which do apply to Provincial Small Cause Courts, there is first in the body of the Code in section 7 a description of the classes of provisions which do not apply, and in the First Schedule, in O. L] there is both an exclusion by class, and a list of particular provisions which do not apply. In spite of this radical change the language of the Provincial Small Cause Courts Act remains unaltered.

The position is, therefore, very obscure, and it is difficult to say whether the Legislature intended to lay down any rule on the subject or not. The learned Vakils, who have been good enough to lend us their help, have not, in my opinion, been able to advance any convincing argument in either direction.

It appears to me that we must approach the matter from the standpoint that by the Act of 1887 Provincial Courts of Small Causes are generally forbidden to have any dealings with immoveable property, both in suits and in execution proceedings. No change has been made in that principle by the new Code of Civil Procedure, and in one instance, that is, in the matter of compelling the attendance of a witness, there is a specific direction that no Court of Small Causes shall make an order for the attachment of immoveable property.

It would be surprising if a Court that could not execute a decree by attachment of immoveable property should be able to attach the same immoveable property before a decree came into being, and I am disposed to think that the provisions of

section 7 may fairly be construed to give effect to this natural inference. That section says:—The following provisions shall not extend to Courts constituted under the Provincial Small Cause Courts Act of 1887 or to Courts exercising the jurisdiction of a Court of Small Causes under that Act, *viz*

(*a*) so much of the body of the Code as relates to—

(*i*).....

(*ii*)...

(*iii*) the execution of decrees against immoveable property.

(*b*).....Sections 94 and 95, so far as they relate to injunctions and interlocutory orders. Of these two sections, the latter is practically the same as section 491 of the old Code, the last section of Chapter XXXIV, which, as I have mentioned, was one of the chapters enumerated in the Second Schedule. The former authorises the Court to take certain measures to prevent the ends of justice being defeated. The measures are not new but the section is. The measures mentioned are the power to demand security from a defendant to call upon a defendant to produce property, to attach property, to issue an injunction, to appoint a Receiver. This list is followed by a fifth clause in these words "make such other interlocutory orders as may appear to the Court to be just and convenient."

The term "interlocutory orders" is not defined in any Statute but the orders mentioned in the first four clauses are generally regarded as interlocutory orders and I do not think that the heading to O. XXXIX can be taken to mean that only the orders mentioned in rr. 6 to 10 of that order are interlocutory orders. Moreover the reference in the fifth clause of section 94 to "other interlocutory orders" seems to mean that the preceding orders are also interlocutory orders.

On this view of the section, I must hold that the Small Cause Court cannot attach property whether moveable or immoveable. That view is contrary to the view taken in the case of *Kedarnath Paramanik* v. *Hem Nath Karmakar* (1) except in so far as I hold that the present Code makes no distinction between the power to attach moveable property and the power to attach immoveable property. The earlier case of *Kumud Behari Pal* v. *Hari Charan Sardar* (3) to which the learned Judges referred for their reasons, was a reference as to the power to attach moveable property, and the learned Judges were considering whether the present Code had taken away that power, and they held that an attachment of moveable property before judgment was not an "interlocutory order" for the purpose of section 7 (*b*), because that construction would render the words "so far as they relate to injunctions and interlocutory orders" superfluous. With all deference, I venture to differ, although I confess I can find no use for the phrase just mentioned in the view that I take.

The conclusion to which I come is that of Rankin, J., that the power to attach immoveable property before judgment is sufficiently, if not too clearly, negatived.

I would, therefore, answer the first question in the negative and the second question by saying that the case of *Sadek Ali* v. *Samed Ali* (2) was correctly decided.

Newbould, J.—The questions which we have to decide in this Reference depend primarily on the proper interpretation of clause (*b*) of section 7 of the Code of Civil Procedure, 1908, which enumerates certain sections in the Code which shall not extend to Provincial Small Cause Courts. Among these sections are included "sections 94 and 95 so far as they relate to injunctions and interlocutory orders." As pointed out by Rankin, J., in his judgment in *Sadek Ali* v. *Samed Ali* (2) "this provision is badly drafted." The difficulty arises from the fact that section 94 apparently refers entirely to interlocutory orders if the expression 'interlocutory order' be given its ordinary meaning, as for example its definition in Wharton's Law Lexicon. But if this is done this qualification of section 94 in clause (*b*) of section 7 becomes meaningless. It is a general rule of construction that full effect must be given to every word and

(3) 53 Ind. Cas. 814; 46 C. 717; 31 C. L. J. 179.

the words of a Statute must be construed so as to give a sensible meaning to them, if possible. It is possible to give a sensible meaning to the words "so far as they relate to injunctions and interlocutory orders" by interpreting them as used in a technical sense and as referring to orders expressly described in the Code itself as injunctions or interlocutory orders. That these words were used in this technical sense by the framers of the Code would appear from the inclusion of the word "injunctions" in the sentence. The only injunctions referred to in sections 94 and 95 are temporary injunctions and these would be included in interlocutory orders if these words were used in the ordinary sense. This was the view I held in 1918 when I was one of the Judges who decided the case of *Kumud Behary Pal* v. *Hari Charan Sardar* (3) and I see no reason to change my view as to the principle to be followed in interpreting clause (*b*) of section 7 of the Code. But now that I have had the advantage of hearing the point more fully argued I think that in applying this principle some modification should be made. My attention has now been drawn to the fact that the words "if it is so prescribed" at the end of the first sentence in section 94 render this section inoperative apart from the rules which are contained in the First Schedule to the Code. A reference to the First Schedule makes it easier to give a technical meaning to the words "injunctions and interlocutory orders." We there find that O. XXXIX is headed "temporary injunctions and interlocutory orders" and the order is divided into two parts with separate headings, rules 1 to 5 being described "temporary injunctions" and rules 1 to 10 "interlocutory orders." It, therefore, appears to me that the meaning to be given to clause (*b*) of section 7, so far as it relates to section 94, is that the provisions in O. XXXIX of the First Schedule of the Code shall not extend to Provincial Small Cause Courts, but that it does not exclude the extension of the provisions in O. XXXVIII to such Courts. The present Code of Civil Procedure has the effect of making applicable to Small Cause Courts all the provisions of the Code that are not expressly excluded. I can find nothing in the Code apart from section 7, which could be interpreted to exclude the application of O. XXXVIII to such Courts. Under rules 6 and 7 of that order a Court has power to order attachment of immoveable property. I would, therefore, answer the first question referred to the Full Bench, "Whether a Provincial Small Cause Court has jurisdiction to order an attachment of immoveable property before judgment?" in the affirmative.

At the hearing of this Reference my attention was drawn to a point that escaped my notice when delivering judgment in the cases of *Kumud Behary Pal* v. *Hari Charan Sardar* (3) and *Kedarnath Paramanik* v. *Hem Nath Karmakar* (1), that is, that there is a difference between ordering the attachment of property and attaching property. It does not follow that because, as I hold, a Small Cause Court has the power to order the attachment of immoveable property, it has also the power to attach it. From the provisions of section 36 and O. XXXVIII, r. 7 of the Code it appears that when it is sought to give effect to an order of attachment before judgment, this must be done in accordance with the provisions of the Code for attaching property in execution of a decree. Since a Small Cause Court is prevented by the provision of section 7 (*a*) (*iii*) and O. L of the Code from executing decrees against immoveable property it would appear that it is equally debarred from executing an order of attachment of immoveable property passed by it. In order to give effect to such an order the assistance of the Civil Court of ordinary jurisdiction would have to be invoked and claims to immoveable property attached under the order of a Small Cause Court would be heard and decided by the attaching Court and not by the Small Cause Court.

I would, therefore, answer the second question in this Reference "whether the case of *Kedarnath Paramanik* v. *Hem Nath Karmakar* (1), or the case of *Sadek Ali* v. *Samed Ali* (2) was correctly decided?" as follows:—

Having regard to the fact that the power to attach and not the power to order at-

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tachment is the subject of these decisions, *Kedarnath Paramanik* v. *Hem Nath Karmakar* (1) was wrong and *Sadek Ali* v. *Samed Ali* (2) was correctly decided.

Mukerji, J.—The two questions referred to us for decision are simple enough. They resolve themselves into the question as to whether O. XXXVIII of the Code of Civil Procedure applies to a Provincial Court of Small Causes. The solution is not quite so simple.

The two views that may be taken of the matter and the arguments in support of them may shortly be summarised thus.

Section 17 of the Provincial Small Cause Courts Act (IX of 1887) lays down that the procedure prescribed in the chapters and sections of the Code of Civil Procedure specified in the Second Schedule to that Code shall, so far as those chapters and sections are applicable, be the procedure followed in a Court of Small Causes in all suits cognizable by it and in all proceedings arising out of such suits. Then follows a proviso which need not be considered for our present purpose. Section 5 of the Code of Civil Procedure (Act XIV of 1882) provided that only certain chapters and sections of the Code (all specified in the Second Schedule thereof) were to extend to the Provincial Courts of Small Causes. From that schedule it would appear that the provisions regarding arrest and attachment before judgment (Chapter XXXIV) though made applicable to Provincial Small Cause Courts did not apply to such suits when they related to immoveable property. It is, therefore, quite clear that so long as the Code of 1882 was in force a Provincial Court of Small Causes could not make an order of attachment in respect of any immoveable property before judgment. The scheme of the Civil Procedure Code (Act V of 1908) now in force is entirely different. It does not profess to lay down which particular provisions of the new Code are to apply to the Provincial Small Cause Courts but simply lays down that certain provisions are not applicable to such Courts. These provisions are to be found in section 7 and O. L. of the Code and also in O. XVI, r. 10 and O. XXI, r 82. The two rules last mentioned do not refer to the present question beyond suggesting that the scheme of the Code is to exclude by express mention. Section 7 is divided into two parts. Part (*a*) is confined to the provisions contained in the body of the Code relating to suits excepted from the cognizance of a Court of Small Causes, to the execution of decrees in such suits and to the execution of decrees against immoveable property. Part (*b*) mentions some of the sections, of which sections 9 91 and 92 have obviously no application to a Court of Small Causes, sections 96 to 112 relate to appeals and section 115 relates to revision. Part (*b*) also excludes sections 94 and 95 "so far as they relate to injunctions and interlocutory orders." Although all the orders mentioned in section 94 may in one sense be said to be interlocutory orders, the Legislature intended by the use of the words "so far as they relate to injunctions and interlocutory orders" in section 7 to mean only such of them as are specified as such in the Code, that is to say, injunctions and such orders as are said to be interlocutory orders in O. XXXIX of the Code. The precise effect, therefore, of providing for exclusion of the operation of sections 94 and 95 "so far as they relate to injunctions and interlocutory orders" is to exclude in reality orders which come under clause (*c*) and (*e*) of section 94 and not orders passed under the other clauses of the section. Clause (*b*) of section 94 under which a Court can order the attachment of any property is therefore not affected by section 7. O. L which specifies the portions of the First Schedule and the rules and orders which shall not extend to Courts constituted under the Provincial Small Cause Courts Act, 1887, or to Courts exercising the jurisdiction of a Court of Small Causes under that Act does not refer to O. XXXVIII at all. Consequently a Provincial Court of Small Causes is competent to make an order of attachment before judgment in respect of moveable as well as immoveable property.

In support of this view it may be urged that the main object of an attachment before judgment is to enable the plaintiff to realise the amount of the decree, supposing a decree is eventually

passed, from the defendants' property. It is a step taken merely for the purpose of preventing the debtor from delaying or defeating the enforcement of a decree and thereby obstructing or preventing the creditor from reaping its fruits. Unquestionably that is a much valued right; and so far as moveable property is concerned the plaintiff enjoyed that right so long as the Code of 1882 was in force. The scheme of the Code of 1908 is radically different from that of the Code of 1882. Unlike the latter it by implication makes the whole Code applicable to Provinicial Courts of Small Causes subject to certain express restrictions.

For the contrary view the reasoning in substance is this. The rules under O. XXXVIII have been prescribed to enable the Court to make an order for the attachment of any property for preventing the ends of justice from being defeated. Therefore the order is one which comes expressly within the last part of clause (*b*) of section 94 of the Code. An attachment before judgment cannot but be an interlocutory order. The Code does not define what orders are interlocutory and what are not. Order XXXIX only specifies certain classes of interlocutory orders. Something which is done between the commencement and the end of a suit or action, which decides some point or matter which, however, is not a final decision of the matter in issue is known as an interlocutory order. An attachment before judgment is undoubtedly an interlocutory order according to the general acceptance of the expression. Section 94 refers entirely to interlocutory orders in all its clauses, and this is clear also from the wording of clause (*e*) which speaks of "such other interlocutory orders." Therefore by section 7 of the Code they are all excluded, and a Provincial Court of Small Causes is no longer competent to make any orders for attachment of property, either moveable or immoveable, before judgment.

The considerations that favour this view are that a Provincial Court of Small Causes is prohibited by its constitution from entertaining questions of rights in immoveables, and rights to or interests in immoveable property are elaborately excluded from its consideration. It can only go into such questions incidentally, and there is in section 23 of the Provincial Small Cause Courts Act (IX of 1887) a provision enabling but not making it obligatory for the Court to send the matter for decision to the ordinary Civil Court. A Provincial Court of Small Causes cannot deal with immoveables in execution of its decree, it cannot levy on immoveables, nor can it order the attachment of immoveable property to make a witness to appear. To hold that it is competent to attach immoveable property before judgment will be to open the gates for claims to such property being put in and allow the Court to investigate and decide on them with no right of appeal to the party aggrieved by its decision therein, and to countenance the eventuality of its decision being final if no suit is instituted to establish the right within the time allowed by law. To hold that it is competent to attach moveables before judgment, when undoubtedly O. XXXIX, r. 6 which gives the power to order *interim* sale of moveables which are subject to speedy and natural decay or which for any other just and sufficient cause it may be desirable to have sold at once, does not extend to the Court—an order under O. XXXIX, r. 6 being an interlocutory order specified as such in the Code and therefore expressly excluded by section 7 read with section 94, clause (*e*)—would lead to an anomaly.

A close examination of these rival contentions leads us to a position which can scarcely be ignored. To accept the former view would be to hold that the Legislature intended to extend in respect of immoveable property the powers which the Provincial Courts of Small Causes enjoyed with regard to moveables ever since the said Courts came into existence by Act XLII of 1860; to adopt the latter view would be to hold that the object was to take away those powers. There is no escape from this position. It is difficult to imagine that such a salutary power which affords protection to plaintiffs without causing any

appreciable inconvenience to defendants—for the proceedings in a Court of Small Causes are meant to be summary, and if the plaintiff fails, the attachment fails under O. XXXVIII, r. 9, and when there are ample provisions made under O. XXXVIII, rr. 6, 9 and 12 protecting the defendant and also the rights of strangers, and the Code lays down stringent safeguards in the shape of conditions which must be shown to exist before an order can be made under O. XXXVIII, r. 5—was intended to be taken away without some express words indicating such intention. On the other hand the scheme adopted by repealing Schedule II of Act XIV of 1882 which expressly extended only some of the powers under the Code to Provincial Courts of Small Causes and adopting in the Code of 1908 the other mode of expression, namely, of restricting only the application of some of the provisions specifically mentioned therein, favours the view that the object was to enlarge the powers rather than to limit them.

Now, it is to be regretted that section 17 of the Provincial Small Cause Courts Act has not yet been amended as was absolutely necessary on the amendment of the Civil Procedure Code in 1908. The language of the section, as it is, is wholly inapposite. With the repeal of the Code of 1882 and of its Second Schedule the words of section 17 of the Provincial Court of Small Causes can no longer have any meaning : for though by section 8 of the General Clauses Act and section 158 of the Code of Civil Procedure (Act IX of 1908) we have, as far as practicable, to look to the part, Order, section or rule which corresponds to the chapter or section of the earlier Codes, it will be seen that the Code of 1882 excluded the same by express mention whereas the Code of 1908 has restricted them by express mention.

There is little doubt that the amendments made by the Code of 1908 in this respect are anything but satisfactory. An examination of the provisions discloses a want of care and precision which is regrettable in an enactment dealing with procedure so largely in use. It is difficult to reconcile the expression "so far as they relate to injunctions and interlocutory orders" appearing in section, 7 with the provisions of section 94 all of which deal with interlocutory orders of one kind or the other. There is a clear ambiguity to the dispel which it is permissible to look to the earlier enactments ; but the earlier enactments afford us no real assistance, because in view of the fact upon either view it being admitted that a change has been effected—an extension of the powers to immoveables on the one view and a curtailment of the powers in the case of moveables on the other—it would be impossible to proceed on the assumption of a supposed policy on the part of the Legislature not to depart from the law as it stood before. A change was intended and has been effected: and judging from the express words of the governing clauses of section 7 and O. L there is no doubt in my mind that it was intended to extend the whole of the Code to Provincial Courts of Small Causes unless expressly provided for. The provisions of section 7 have to be reconciled with those of section 94 and that can only be done by treating interlocutory orders as meaning only such orders as are expressly said to be interlocutory orders in the Code, that is to say, those that are mentioned in O. XXXIX. That the Legislature had this in view is apparent also from the fact that in section 7 as also in O. XXXIX injunctions are treated as something other than interlocutory orders while in reality they are not so. I am of opinion that effect must also be given to the words "so far as they relate to injunctions and interlocutory orders" appearing in section 7 even at the risk of restricting the meaning of the expression "interlocutory orders" in section 94 to such orders as are mentioned as such in the Code and attributing to the Legislature a redundancy in the use of the word "other" in clause (*e*) thereof. In my opinion section 7 only excludes orders passed under clause (*c*) and clause (*e*) of section 94 and not under any of the other clauses thereof. I find it difficult to imagine that if the Legislature intended to deprive the Pro-

vincial Courts of Small Causes of the power to order attachment of moveables they could not think of a better way of expressing themselves. I am therefore of opinion that O. XXXVIII has not been excluded either by section 7 read with section 94 or by O. L, and that it is applicable to a Provincial Court of Small Causes.

It remains now to consider some of the difficulties that are said to follow from the acceptance of this interpretation. The principle that a Court which cannot attach primarily in execution of its decree cannot attach in anticipation of it which was applied in the case of *Marthamma* v. *Kittu Sheragara* (4) to the Code of 1859 in a case decided under Act XI of 1865 which provided by section 17 for the application of the provisions of that Code to Provincial Courts of Small Causes "so far as the same are or may be applicable," cannot have any appreciable force under the present enactments, the more especially as the immediate objects of the two kinds of attachment are widely different. No doubt a Provincial Court of Small Causes cannot deal with immoveables in execution of its decree, or order a sale of immoveables; nor can it be doubted that it cannot make an order of attachment of immoveable property to compel a witness to appear and that is so because it cannot order the sale thereof. The occasion for the exercise of these powers and the circumstances connected therewith, however, are so different from those relating to the power to order attachment of immoveables before judgment for protecting the plaintiffs' interest, that no analogy can be drawn from the exclusion of those powers. The objection as to the investigation and adjudication of claims, which an attachment may produce, is more substantial, but is there a real difficulty on that ground?

Order XXXVIII, r. 6 says that "where the defendant fails to show cause why he should not furnish security or fails to furnish the security required, within the time fixed by the Court, the Court may order that the property specified or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit be attached." The Court therefore under this rule makes an order that the property be attached. In order to make the attachment or to attach the property this order has got to be executed. Rule 7 says that save as otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree. If a Provincial Court of Small Causes makes an order of attachment before judgment in respect of immoveable property the order has to be executed under section 36 which lays down that "the provisions of this Code relating to the execution of decree shall so far as they are applicable be deemed to apply to the execution of orders." Under the provisions of section 38 and section 39 clause (*d*) the order should be sent to an ordinary Civil Court within the local limits of whose jurisdiction the immoveable property is situate, and that Court should, under the provisions of O. XXI which deals with execution of decrees and orders, proceed to execute it. That Court would then attach the immoveable property in accordance with r. 54 and investigate the claims, if any, under the provisions of r. 58 and the subsequent rules.

If the above procedure is followed, as I think it must under the Code, the objections as to investigations or adjudications of claims will lose all their force. As to the argument based on the absence of the right of appeal, orders of far greater importance passed by a Provincial Court of Small Causes are also not open to appeal; and in any event the suit itself being expected to be disposed of summarily no appreciable hardship is likely to be caused. As to the non-applicability of O. XXXIX, r. 6 it seems to be due to an omission on the part of the Legislature. In the Code of 1882 the provision was confined to moveable property which was the subject of a suit; in the Code of 1908 the words "or attached before judgment in such suit" were added, but no provision was made extending the application of the rule to Provincial Courts of Small

(4) 6 M. H. C. R. 92.

Causes. The matter is not of any great consequence, for I take it that even a Provincial Court of Small Causes can always act under section 151, Civil Procedure Code, and pass such orders as may be necessary.

On the whole, I am of opinion, that O. XXXVIII, rr. 5 and 6 apply to the Provincial Courts of Small Causes and I would therefore answer the first question in the affirmative. The answer to the second question follows from the answer given to the first one and I would answer it by saying that the case of *Kedarnath Paramanik* v *Hem Nath Karmakar* (1) if it purported to lay down that a Provincial Small Cause Court can attach immoveable property and not merely make an order of attachment thereof, was not correctly decided, nor was the case of *Sadek Ali* v. *Samed Ali* (2) correctly decided if it meant to lay down that no such order can be passed by a Provincial Court of Small Causes. In conclusion I should like to add that this is a matter to which the attention of the Legislature should be directed as early as possible in order that the defects pointed out above may be remedied.

Chotzner, J.—The question referred for the decision of the Full Bench is whether the Provincial Small Cause Court is competent to attach immoveable property before judgment.

That question was decided in the affirmative in the case of *Kedarnath Paramanik* v. *Hem Nath Karmakar* (1) and in the negative in the case of *Sadek Ali* v. *Samed Ali* (2). It may be conceded that while the former Code of Civil Procedure (Act XIV of 1882) was in force, such attachments were beyond the jurisdiction of the Small Cause Court. The procedure prescribed in section 17 of the Provincial Small Cause Court's Act (IX of 1887) was regulated by the Second Schedule of the Code, which was also in conformity with the provisions of section 15 of the Act and the Second Schedule appended thereto, whereby all suits relating to immoveable property were comprehensively excluded from the cognizance of the Small Cause Court. Chapter XXXIV of the Code dealt with arrest and attachment before judgment except as regards immoveable property.

It has now to be considered what changes have been introduced into the procedure laid down in section 17 of the Small Cause Court Act by the Code of Civil Procedure (Act V of 1908).

It should be premised that no alteration has been made in the wording of the Small Cause Court Act so far as the Second Schedule and sections 15 and 17 are concerned, though in the case of the latter section it is plainly inapposite. In view, however, of section 158 of the Code, it must be taken to refer to section 7 and O. L of the Code the schedule to which declares that certain of its provisions do not apply to Small Cause Courts. It will be noticed that in the Code of 1908 the Second Schedule of the Code of 1882 has disappeared, and that no new Schedule has been provided in its place. On the other hand sections 477 to 490 of the former Code are now with slight modification reproduced in O. XXXVIII, rr. 1-11 while section 491 reappears (again with slight modification) in section 95 of the new.

Order XXXVIII deals with "arrest and attachment before judgment." Rule 1 says: "Where at any stage of a suit other than a suit referred to in section 16, clauses (*a*) to (*d*) the Court is satisfied" (to put it broadly) as to any dishonest intention of the defendant in regard to the disposal of his property or person, it may issue a warrant for his arrest.

Section 16 lays down the Courts in which suits relating to immoveable property are to be instituted and *ex-hypothesi* excludes suits which are not cognizable by the Small Cause Court. It would follow therefore that a Small Cause Court is not competent to arrest a defendant in any suit other than one where the subject-matter is moveable property.

Rule 5 says: "Where at any stage of a suit, the Court is satisfied that the defendant is about to dispose of his property or remove it from the local limits of the Court, it may direct him to furnish security to produce and place it at the disposal of the Court," failing which it may, under r. 6, order it to be attached.

Now if it be correct that O. XXXVIII substantially represents Chapter XXXIV of the Code of 1882, there seems to be no good reason for importing into r. 5 a meaning which was specifically negatived in section 483 of that Code by extending the jurisdiction of the Small Cause Court to attach immoveable property before judgment.

The difficulty in the way of this interpretation lies in the wording of section 94 (*b*) where the Court may order the attachment of any property and the Small Cause Court seems under section 7 (*b*) to be given the power of attaching such property before judgment. Section 7 moreover makes certain sections inapplicable and these include sections 94 and 95 so far as they relate to injunctions and interlocutory orders, but as Rankin, J., points out section 94 appears to refer entirely to interlocutory orders and even to call them so but the parts of this section intended to be excluded are apparently clauses (*c*) and (*e*).

On the other hand powers under section 94 are only conferred "if it is so prescribed" and if it is said that they are so prescribed under section 7 (*b*), it would seem to be inconsistent with clause (*a*) immediately preceding it, which excludes from the jurisdiction of the Small Cause Court so much of the body of the Code as relates to suits excepted from the cognizance of a Court of Small Causes, the execution of decrees in such suits and the execution of decrees against immoveable property.

Again O. XVI, r. 10 prohibits the attachment of immoveable property by a Small Cause Court to enforce the attendance of a witness and O. XXI, r. 82 forbids the sale of such property by a Court of that description. It would therefore be anomalous that a Court, which has not the power of executing a decree by attachment of immoveable property after judgment, should have the power of attaching such property before judgment.

The conclusion, therefore, at which I arrive is that under the Code of 1908 there has been no departure from the principles underlying Chapter XXXIV of the Code of 1882, and that consequently ths question referred should be decided in the negative.

Per Curiam.—The result is that the Reference will be answered in accordance with the opinion of the majority of the Judges constituting the Full Bench, and will therefore be answered in the manner stated in the judgment of the learned Chief Justice.

No order is made as to the costs of the Reference.

We direct that a printed copy of the judgments of the Full Bench be forwarded to the Government of India as early as possible.

K. S. D. *Reference answered.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 22 OF 1924.
July 3, 1924.
Present:—Mr. Kendall, A. J. C.
Raja MOHAMMAD MUMTAZ ALI KHAN—DEFENDANT—APPLICANT
versus
Lala GANGA PERSHAD AND ANOTHER—PLAINTIFFS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 20—Cause of action—Implied contract to pay—Jurisdiction of Court.

Defendant selected some cloth in District B. and ordered it to be sent to District G. when he promised to purchase such pieces as should be selected by his wife. The cloth was sent accordingly. Some pieces were selected and the remainder returned with a payment of price. Subsequently other consignments of cloth were sent to G. either by parcel post or were taken there in person. In a suit brought at *B.* by the seller for the balance of price:

Held, that there was an implied contract to pay at B and the Court had jurisdiction to try the suit. [p. 123, col. 1.]

Where no place of payment is specified either expressly or by implication a debtor must follow his creditor and pay where his creditor is. [*ibid.*]

Suraj Kumar v. *Gokal Chand*, 11 O. C. 191, referred to.

Application for revision under section 115, Civil Procedure Code, from the order of the Subordinate Judge, Bahraich, in Original Suit No. 192 of 1923, dated the 26th November, 1923.

SUNKER PEDDAPPA v. VENKATAPPA.

Mr. *Hyder Husain*, holding brief of Mr. *M. Wasim*, for the Applicant.

Mr. *Zahoor Ahmad*, for the Opposite Party.

ORDER.—The applicant in this case is the defendant in a suit brought against him by some shop-keepers who live in Bahraich. The applicant defendant had visited the plaintiff's shop in Bahraich and selected some cloth and ordered it to be sent to his home in Utraula, Gonda District, where he promised to purchase such pieces as should be selected by the Rani. Some of the cloth was selected and the remainder was returned to Bahraich with a payment of Rs. 350. Subsequently other consignments of cloth were either sent by parcel post by the plaintiff to Utraula, or taken there in person. Eventually the plaintiff had to sue for the balance of the money due, and he filed a suit in Bahraich. The objection has been taken that the contract was made in Utraula and that the suit could only lie in the Gonda District. This objection was decided against the applicant by the learned Subordinate Judge. I have no doubt that, that decision is correct. It may be that the contract between the parties was not complete until the Rani had selected the cloth in Utraula. The cause of action, however, did not arise until the contract was broken, and that did not happen until there was a failure to pay. The learned Subordinate Judge has found that there was actually an express promise to make payment in Bahraich. Even if there was no express promise there was certainly an implied contract to make payment at Bahraich. The payments were not cash payments but credit payments (with the exception of the first one) and it certainly could not have been the intention of the parties that the plaintiff, who keeps his shop in Bahraich, should have to go all the way to Utraula for his money. In *Suraj Kumar* v. *Gokal Chand* (1) it was held that where no place of payment is specified either expressly or by implication the debtor must follow his creditor and pay where his creditor is. The applicant has here not been able to show either an express or implied contract to make payment at Utraula. There is, therefore, no force whatever in the application, which is dismissed with costs.

Application dismissed.

G. H.
N. H.

(1) 11 O. C. 191.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1394 OF 1921.
April 22, 1924.

Present :—Mr. Justice Madhavan Nair.

SUNKER PEDDAPPA—PLAINTIFF—APPELLANT

versus

VENKATAPPA AND OTHERS—DEFENDANTS NOS. 2 TO 6—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 100—Suit for specific performance or damages—Damages, award of—Suit whether of small cause nature—Second appeal.

In deciding the question whether a suit is of a small cause nature or not, attention has to be paid to the nature of the suit as it was presented in the First Court and not to the subsequent shape that it may have taken as a result of the findings of the lower Courts. [p. 124, col. 1.]

A suit for specific performance of a contract relating to immoveable property or in the alternative for damages was decreed by awarding of Rs. 160 as damages, but was dismissed in appeal.

Held, that the suit was not one of a small cause nature within the meaning of section 100 of Civil Procedure Code and a second appeal, therefore, lay to the High Court against the decree. [*ibid.*]

Second appeal against the decree of the Court of the Subordinate Judge, Anantapur, in A. S. No. 183 of 1920, preferred against a decree of the Court of the District Munsif, Penukonda, in O. S. No. 890 of 1918.

Mr. *A. Venkatarayaliah*, for the Appellant.

Mr. *V. C. Seshachariar*, for the Respondents.

JUDGMENT.—Plaintiff is the appellant. Plaintiff's suit was for the enforcement of an agreement to sell and in consequence for the establishment of his right to four-ninths share in the *zamin* described in the schedule or in the alternative for damages. The

learned Munsif gave him a decree for damages, but on appeal that has been set aside by the Subordinate Judge. This second appeal is against the decree dismissing the plaintiff's suit and is valued at Rs. 160; the damages disallowed by the lower Appellate Court.

Mr. Seshachariar, the respondents' Vakil, raised a preliminary objection that there is no second appeal in this case as the suit is one of a small cause nature for a sum below Rs. 500. In deciding the question whether a suit is a small cause nature or not, attention has to be paid to the nature of the suit as it was presented in the First Court and not to the subsequent shape that it may have taken as a result of the findings of the lower Courts. The suit in this case was clearly for the specific performance of a contract or in the alternative for damages.

Such a suit is not of a small cause nature. See *Lakshmanan Das* v. *Anna* (1), *Kustomji Ardeshir* v. *Vinayak Gangadhar Bhat* (2). I overrule the preliminary objection. Going to the merits the first question for consideration is whether the agreement of November, 1915, has been proved by the plaintiff. The facts relevant for the decision of the question may be thus shortly stated. The deceased brother of the 1st defendant, Thimmayya by name, agreed to convey the property to the plaintiff and the plaintiff is alleged to have given him the consideration for the transaction. The first defendant afterwards executed the agreement Exhibit B. He died in the course of the suit and after his death the other defendants Nos. 2 to 4, his children, have been brought on record as his legal representatives. Evidence has been given by the plaintiff as P. W. No. 1 in support of the facts of his case, and P. W. No. 2 proves Exhibit B. These witnesses have not been cross-examined by the defendants. All the same the learned Judge came to the conclusion that the contract has not been proved by the plaintiff. The fact that the witnesses have not been cross-examined by the defendants cannot in any way affect the truth of the plaintiff's case. The question is whether from the plaintiff's evidence it becomes clear that there was an agreement as alleged by him in his plaint. The learned Judge says; "I cannot uphold the arguments of respondents' Vakil to the contrary as there is an utter absence of proved cogent circumstances upon which the question of first defendant having been a party to Exhibit B in a representative capacity cannot be decided." I believe what he means to say in this sentence is that there may be evidence given by the plaintiff's witnesses in support of his case but he is not prepared to act upon that evidence. The plaintiff is an interested witness speaking about facts which are in his favour and the Subordinate Judge has selected not to believe him though he had specifically stated so in his judgment. In hearing second appeal I am precluded from weighing the evidence which has not been believed by the lower Appellate Court. I have, therefore, to dismiss the second appeal with costs.

V. N. V. *Appeal dismissed.*

(1) 30 B. 356.
(2) 7 Ind. Cas. 955; 35 B. 29 at p. 32; 12 Bom. L. R. 723.

BOMBAY HIGH COURT.

CIVIL EXTRAORDINARY APPLICATION No. 414 OF 1922.
September 4, 1923.
Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Crump.

MOTILAL RATANCHAND MARWADI —DEFENDANT—APPLICANT
versus
NANDRAM DALPATRAM MARWADI —OPPONENT.

Civil Procedure Code (Act V of 1908), O. V, r. 1

MOTILAL RATANCHAND *v.* NANDRAM DALPATRAM.

(b), *O. IX, r. 13, O. XVII, rr. 2, 3—Decree passed in absence of defendant but presence of his Pleader, whether* ex parte—*Application to set aside decree, whether maintainable.*

If the Pleader for an absent defendant is not duly instructed, and takes no part in the conduct of the case on the date of the hearing, the hearing of the case is *ex parte* even though the Pleader is present in Court, and an application to set aside the decree is maintainable. But if the defendant appears properly as required by O. V, r. 1 of the Civil Procedure Code, that is, by a Pleader duly instructed and able to answer all material questions relating to the suit, the hearing is not *ex parte*, and the application would not be maintainable. [p. 125, col. 2.]

Civil Extraordinary Application against the order passed by the District Judge, Nasik, in Miscellaneous Appeal No. 16 of 1922, summarily rejecting an appeal against the order passed by the Subordinate Judge at Pimpalgaon, in Application No. 65 of 1922.

Mr. *G. S. Rao*, for Mr. *B. G. Rao*, for the Applicant.

Mr. *G. S. Mulgaokar*, for the Opponent.

JUDGMENT.—The facts which have given rise to this application are these. In Suit No. 468 of 1921 filed by the plaintiff, the defendant was represented by a Pleader, a written statement was filed, and the case was adjourned from time to time when the defendant was absent. The case was ultimately fixed for hearing on September 7, 1921, when the Pleader was present in the Court. The defendant was absent. At that time the Pleader did not ask the Court to adjourn the case, nor did he state to the Court whether he had any instructions to go on with the case but in fact he took no part in the conduct of the suit. The result was that when the plaintiff's evidence was recorded, the Court proceeded to give judgment and passed a decree on that day. It is stated in the judgment that the defendant does not appear to contest the suit.

Thereafter the defendant made an application to the Trial Court on the basis that it was an *ex parte* decree and prayed that it should be set aside as he was absent for sufficient cause. He alleged that he was not represented because his Pleader had no proper instructions. In other words, he contended that he did not appear on the date of hearing by a Pleader duly instructed and able to answer all material questions relating to the suit within the meaning of clause (*b*) of rule 1 of Order V of the Civil Procedure Code. The Trial Court rejected this application holding that the case was not decided *ex parte* because the defendant's Pleader was present in the Court at the hearing. The learned Judge further observed:—

"He never said he had no instructions to conduct the case. After framing the issues the case was fixed for evidence. On that date the defendant's Pleader was present but he did not say that he was not going to conduct the case. Under the circumstances I do not think it was an *ex parte* hearing. I need not go on with the merits of the case as I am dismissing the application summarily."

From this order the defendant appealed to the District Court, but that appeal was dismissed under O. XLI, r. 11. Apparently the defendant appealed from the decree also, and that appeal which was heard on the same day, was also dismissed under O. XLI, r. 11.

The defendant has now applied to this Court for having the order of the Trial Court set aside, and to have his application heard and decided on the merits. He has also preferred a second appeal to this Court, which is at present pending. The judgment given on September 7, does not in terms indicate whether the learned Judge purported to act under r. 2 or r. 3 of O. XVII. The judgment in term states that the defendant does not appear to contest the suit, and the defendant's allegation is that his Pleader was not properly instructed. It is clear that if the defendant is able to make good his allegation that the Pleader was not duly instructed, the hearing of the case would be *ex parte*, even though the Pleader was present in Court. If, however, the defendant appeared properly as required by r. 1 of O. V, that is, by a Pleader duly instructed and able to answer all material questions relating to the suit, the hearing would not be *ex parte*. This question has not

been adverted to in the judgments of either of the lower Courts. It seems to us that unless it is determined that the defendant appeared by a Pleader duly instructed, the disposal of the suit would be *ex parte*, and in that case it would be competent to the defendant to make an application with a view to show that there was sufficient cause for his not appearing on the date of the disposal. If, however, the defendant is unable to prove that the Pleader was not duly instructed and able to answer all material questions relating to the suit, the hearing would not be *ex parte*, and in that case his application to set aside the decree, on the basis that it is an *ex parte* decree, could not be entertained.

As the Trial Court has not considered this question on the merits, we must send back the case to that Court for disposal according to law. We accordingly make the Rule absolute, set aside the orders of the lower Courts and send back the application for disposal according to law. Costs of this application and of the lower Appellate Court to be costs in the application.

N. H. *Rule made absolute.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 13 OF 1924.
July 22, 1924.
Present:—Mr. Baker, J. C.
Musammat KESARBAI AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
JAMADAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Occupancy rights, acquisition of, by proprietor—Proprietary rights, acquisition of, by occupancy tenant—Effect of such acquisitions—C. P. Tenancy Act (XI of 1898), s. 46 (5)—Document transferring occupancy rights cannot be registered—Registration illegal even with regard to transferable property—Estoppel on point of law—Transfer invalid—Duty of Court.

The acquisition by a proprietor of occupancy rights or the acquisition by an occupancy tenant of proprietary rights amounts to the same thing, as in either case the occupancy and proprietary rights are, after the transfer, combined in the same person. A co-sharer who purchases the holding of an absolute occupancy tenant becomes himself an absolute occupancy tenant. That is to say, when the rights of a co-sharer and an occupancy or absolute occupancy tenant coalesce in the same person, he is an occupancy or absolute occupancy tenant, according to the nature of the tenancy. [p. 128, col. 1.]

If an occupancy tenant purchases the land under his occupancy, his occupancy rights are not extinguished and he does not become an absolute owner or the land his *khudkasht*, unless he becomes the sole proprietor of the *patti* of the village in which the occupancy tenancy land is situated. [p. 127, col. 2.]

A Registration Officer has no power to register a mortgage-deed purporting to mortgage occupancy rights which cannot be mortgaged, but if such a document is registered, it is to be regarded as not registered at all. And even if the deed includes some transferable property, besides the occupancy rights, its registration is illegal and must be ignored *in toto*. [p. 127, col. 1.]

Daji Vithol Dhok v. *Moreshwar Venkatesh Gharpurey*, 1 N. L. R. 112 and *Nilkant* v. *Ghulya*, 42 Ind. Cas. 384; 13 N. L. R. 165, referred to.

The rule that the grantor cannot derogate from his grant, does not operate in a case where the transaction is expressly forbidden by Statute. [p. 127, col. 2.]

There is no estoppel on a point of law. [*ibid.*]

Govind v. *Chandrabhaga*, 34 Ind. Cas. 675; 12 N. L. R. 100 and *Bai Parvati* v. *Dayabai Manchharam*, 58 Ind. Cas. 266; 44 B. 488 at p. 492; 22 Bom. L. R. 704, referred to.

There is no rule of law which can prevent a party from asking the Court to hold that a particular transaction which, as a matter of fact, is invalid should be held to be invalid. In fact, it is the duty of the Court as soon as the invalidity of a transaction is pointed out, if it is satisfied that there is such an invalidity, to set aside the transaction. [*ibid.*]

Bai Parvati v. *Dayabhai Manchharam*, 53 Ind. Cas. 266; 44 B. 488 at p. 492; 22 Bom. L. R. 704, relied upon.

Appeal against the decree of the Sub-Judge, Bhandara, dated the 10th October 1923, in Civil Suit No. 29 of 1923.

Sir *B. K. Bose*, for the Appellants.
Mr. *D. T. Mangalmoorti*, for the Respondents.

JUDGMENT.—The plaintiffs sued to recover Rs 8,200 odd due on a registered mortgage deed executed by defendants Nos. 1 and 2 in favour of the plaintiffs' firm on 11th May, 1912, and for foreclosure of the property mortgaged. The defendant No. 3 is the second son

of defendant No. 1 and was joined as having an interest in the mortgaged property. The consideration of the mortgage was Rs. 2,000 of which Rs. 1,600 were borrowed for payment of part of the price of a village share purchased the same day and Rs. 400 for household expenses. The village share purchased was in *Mauza* Sarsoli. The property mortgaged includes the share so purchased with 22·81 acres of land, which was formerly held by the mortgagors as occupancy tenants but which is now said to have become the *khudkasht* land of the defendants by virtue of the purchase of the share. It is this occupancy land which gave rise to the difficulty in the present suit.

The First Court, the Subordinate Judge, Bhandara, held that the land after the purchase remained the occupancy land of the defendants and could not be mortgaged under the law, and as the mortgage deed purported to transfer occupancy rights which could not be mortgaged, under section 46 (5) of the C. P. Tenancy Act of 1898 the Registering Officer was not empowered to admit the mortgage to registration and the result was that the document must be regarded as not registered at all as held in *Daji Vithol Dhok* v. *Moreshwar Venkatesh Gharpurey* (1). He further held that no decree could be passed for the rest of the mortgaged property, after excluding the occupancy holding the inclusion of which made the registration illegal, following *Nilkant* v. *Ghulya* (2) in which it was held that a registration which had been effected in direct contravention of any provisions of law must be ignored *in toto*. He, therefore, held that the plaintiffs' mortgage-deed was wholly inoperative and dismissed the plaintiffs' suit.

The question, therefore, on which this appeal depends is as to the nature of the occupancy land after it had been purchased by the occupancy tenant from the original proprietor. There would be little difficulty in dealing with it were it not for the fact that the occupancy tenant did not become the sole proprietor. If the defendants Nos. 1 and 2 had become the sole proprietors of the *patti* of the village in which the occupancy tenancy land was situated, there could not be any doubt that their tenancy rights would have merged in their proprietary rights and they would have become absolute owners and the land would have become their *khudkasht* the occupancy rights being extinguished: *cf. Sakharam Sonar* v. *Madho Rao* (3) where it was held that if an occupancy tenant purchases the entire proprietary rights in a village there can be no question but that the occupancy rights are extinguished. The present case is complicated by the fact that the original proprietor of the *patti*, Vithoba, sold half of it to the defendants and half to one Antu Patel on the same day and thus Antu and the defendants became co-sharers in the *mahal*.

It is contended that the mortgagors described the property as *khudkasht* in the mortgage deed and the plaintiffs accepted the description. No question of estoppel, however, arises as the misrepresentation, if any, is of law and there can be no estoppel on the point of law. I need not quote any authority on this point; this Court's ruling is *Govind* v. *Chandrabhaga* (4).

It has been contended that the grantor cannot derogate from his grant. But I do not think that this rule can operate in a case where the transaction is expressly forbidden by Statute. In *Bai Parvati* v. *Dayabhai Mancharam* (5) it was held that there is no rule of law which can prevent a party from asking the Court to hold that a particular transaction which, as a matter of fact, is invalid, should be held to be invalid. The same case lays down that there can be no estoppel on a point of law, and that it is the duty of the Court as soon as the invalidity of a transfer is pointed out, if it is satisfied that there is such an invalidity, to set aside the document. There is, therefore, nothing in law to prevent the defendant from contending

(1) 1 N. L. R. 112.
(2) 42 Ind. Cas. 324; 13 N. L. R. 165.
(3) 2 N. L. R. 29 at p. 30.
(4) 34 Ind. Cas. 675; 12 N. L. R. 100.
(5) 58 Ind. Cas. 266; 44 B. 488 at p. 492; 22 Bom L. R. 701.

that the mortgage was invalid because the land could not be alienated.

It is clear that the acquisition by a proprietor of occupancy rights or the acquisition by an occupancy tenant of proprietary rights amounts to the same thing, as in either case the occupancy and proprietary rights are, after the transfer, combined in the same person. In the present case after the purchase the defendants became possessed of the rights of a co-sharer along with Antu, while retaining their occupancy rights Their position, therefore, is precisely that defined in *Jairam* v. *Balaji* (6) which lays down that a co-sharer who purchases the holding of an absolute occupancy tenant becomes himself an absolute occupancy tenant. That is to say, when the rights of a co-sharer and an occupancy or absolute occupancy tenant coalesce in the same person he is an occupancy or absolute occupancy tenant, according to the nature of the tenancy. The case of *Ramdayal* v. *Gulabia Bai* (7) lays down what course may be adopted by the other co-sharers in such a case. We are not, however, concerned with this in the present case because the mortgage-deed and sale-deed were admittedly executed the same day and, therefore, nothing had happened to change the nature of the holding. Therefore, at the date of the mortgage the holding was occupancy and would so remain until the co-sharers (in this case defendants and Antu) come to some agreement that it should be treated otherwise. In this case there was no agreement at the date of the sale and mortgage. Consequently the land at the date of the mortgage was occupancy land and could not be mortgaged and the view of the lower Court is correct.

The appeal is consequently dismissed with costs.

S. D. *Appeal dismissed.*

(6) 14 C. P. L. R. 9.
(7) 4 N. L. R. 120.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS JUDICIAL CASE No. 18 OF 1923.

September 27, 1923.

Present:—Mr. Hallifax, A. J. C.

MRS. AGNES AND ANOTHER—APPLICANTS

versus

JAMES WILLIAM AND ANOTHER—NON-APPLICANTS.

Court Fees Act (VII of 1870), s. 19-I, applicability of—Provident Fund—Probate duty—Exemption.

Provident Fund money is exempt from Probate or Administration duty, as it passes to a nominee, and even in the absence of an Administrator it does not form an asset of the estate of the deceased.

Mr. *Erakshah*, for the Applicants.

ORDER.—Mr. Erakshah appears for the petitioners. The Collector of Nagpur reports that the furniture is worth Rs. 340 and this valuation is accepted. It appears that the matter of the liability to duty of a sum standing at the credit of a deceased person in the Eastern Bengal Railways Provident Fund was referred by the Board of Revenue of Bengal to the Advocate-General, and the Board held with him that Provident Fund money is exempt from duty and that this Administration has nothing whatever to do with the fund which passes to the nominee even if there is no administrator. It does not form an asset of the estate. In this I concur but Mr. Erakshah states that the Railway Company perhaps *pro majore cautela*, ordinarily refuses to pay this money without Letters of Administration. The amount will, therefore, be mentioned among the assets but no Court-fee will be payable in respect of it. The total assets for that purpose will be

		Rs.
Gold chain	...	100
Gold ring	...	100
Furniture	...	340
Total	...	540

Letters of Administration will issue as prayed.

G. R. D. *Petition allowed.*

MAM CHAND *v.* EMPEROR.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 54 OF 1924.

May 8, 1924.

Present:—Mr. Justice Scott-Smith and Mr. Justice Fforde.

MAM CHAND—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), s. 157—Criminal Procedure Code (Act V of 1898), s. 288—Statement before Committing Magistrate transferred to Sessions record, value of—Statement, whether "testimony"—Statement before Police whether can be used in corroboration.

The statement of a witness recorded by the Committing Magistrate and transferred under section 288 of the Criminal Procedure Code to the Sessions record is the "testimony" of a witness within the meaning of section 157 of the Evidence Act, and, therefore, a statement made by the witness before the Police is admissible to corroborate the statement made in Court. [p. 130, col. 2.]

Velliah Kone v. *Emperor*, 72 Ind. Cas. 529; 16 L. W. 239; 43 M. L. J. 222; (1922) M. W. N. 506; 31 M. L. T. 175; 45 M. 766; (1923) A. I. R. (M.) 20; 24 Cr. L. J. 417, followed.

Queen-Empress v. *Jadub Das*, 27 C. 295; 4 C. W. N. 129; 14 Ind. Dec. (N. S.) 194, referred to.

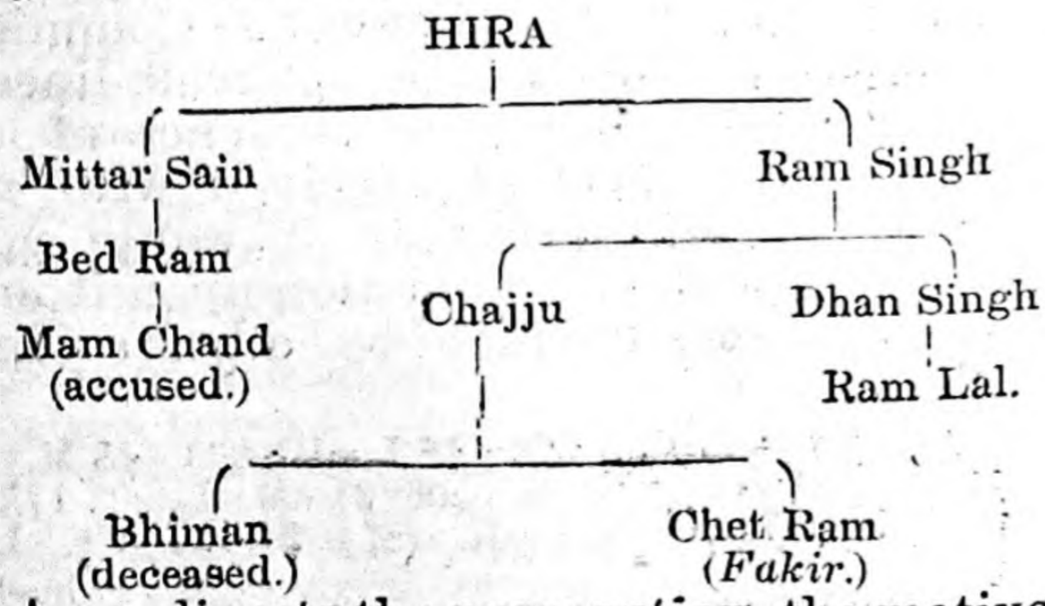
Appeal from an order of the Sessions Judge, Hissar, dated the 14th December 1923.

Mr. *Nanwa Mal*, for the Appellant.

The Public Prosecutor, for the Respondent.

JUDGMENT.

Scott-Smith, J.—Mam Chand, appellant, has been convicted by the Sessions Judge of Hissar of the murder of Bhiman, his cousin, on or about the night of the 13th February, 1922, and has been sentenced to death. The pedigree-table from which the relationship of the appellant to the deceased will appear is as follows:—



According to the prosecution, the motive for the murder was to get possession of Ram Lal's land which was in the possession of Bhiman. Ram Lal shortly before his death made a gift of 7½ *bighas* of land to Mam Chand, but died before mutation was attested. Bhiman appeared and claimed the land as Ram Lal's heir and mutation was effected in his favour. According to the evidence Mam Chand did not contest the mutation in Bhiman's favour and the two of them lived quite happily together in Mam Chand's house. I, therefore, agree with the learned Sessions Judge that there is no clear evidence in this case of any motive for the murder on the part of Mam Chand. It appears from the evidence of Ram Chandar, *lambardar* (P. W. No. 5), that when Bhiman did not appear in the village for 2 or 3 days, he asked Mam Chand where Bhiman had gone to. Mam Chand said that he had gone to Delhi to see the *jalsa* there. A few days later people returned from the *jalsa*, but Bhiman did not come back. The witness again asked Mam Chand who replied that Bhiman might have gone to see his brother Chet Ram who is a *bairagi* and lives in Jasana. No trace of him was found there, and shortly afterwards Mam Chand disappeared from the village. The *lambardar* then on the 28th February, reported the disappearance of Bhiman at the Police Station. On the 1st March, the Sub-Inspector came to the village and was told by *Musammat* Nihali (P. W. No. 2), the wife of Mam Chand, that her husband had killed Bhiman and buried him inside the *kotha*. The Sub-Inspector sent information of this to the Sub-Divisional Magistrate of Palwal, and on the 3rd March, the latter together with the Civil Surgeon came to the village, and the place pointed out by *Musammat* Nihali was dug up and the corpse of Bhiman was discovered buried there. There were numerous wounds on the body which indicated that he had been killed with blows of a sharp-edged weapon. A search was made for Mam Chand who could not be found, and he was not arrested until the 9th September, 1923, on which day he presented a complaint (Exhibit P. S.) (page 8 of the paper-book) in the Court of the District Magistrate, Gurgaon, in which he accused

Ram Chandar and others of the murder of Bhiman.

The chief witness for the prosecution is *Musammat* Nihali. In her statement (Exhibit P. N.) (page 9 of the paper-book) made before the Committing Magistrate, she at first said that she did not know anything about the death of Bhiman, though she admitted that his corpse was recovered from the corner of his house. When further questioned she admitted that her husband had killed Bhiman with a *gandasa* and had then buried the body in the *kotha*. She resiled from this statement at the trial, and the statement made by her before the Committing Magistrate was put in evidence under the provisions of section 288 of the Criminal Procedure Code. In order to corroborate this statement, a statement made by her before the Police (Exhibit P. F.) (printed on pages 4 and 5 of the parper-book) was proved and put in evidence. A preliminary question arises whether it was admssible to prove the statement (Exhibit P. F.) in order to corroborate that made by the witness before the Committing Magistrate and transferred under the provisions of section 288 of the Criminal Procedure Code. Section 157 of the Indian Evidence Act says that in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved. Now, it is not denied that the statement (Exhibit P. F.) might be proved in order to corroborate the testimony of *Musammat* Nihali, but the question is whether the statement of *Musammat* Nihali transferred under section 288 of the Criminal Procedure Code is the "testimony" of a witness within the meaning of section 157 of the Evidence Act. Section 288, Criminal Procedure Code, lays down that the evidence of a witness duly taken in the presence of the accused before the Committing Magistrate may, in the discretion of the Presiding Judge, if such witness is produced and examined be treated as evidence in the case. It was held by a Division Bench of the Madras High Court in the case of *Velliah Kone* v. *Emperor* (1), that the object and effect of section 288 of the Criminal Procedure Code is to place the deposition in the committal enquiry on exactly the same footing as the deposition in the Sessions Court, and that such a deposition is "testimony" within the meaning of section 157 of the Evidence Act, which a prior statement by the witness is admissible in evidence to corrobrate. I agree fully with the decision in that case and would hold that the evidence of the witness *Musammat* Nihali recorded before the Committing Magistrate is, by the operation of section 288 of the Criminal Procedure Code, just as much evidence in the case as that recorded at the trial in the Sessions Court and is, therefore, "testimony" within the meaning of section 157 of the Indian Evidence Act. A Division Bench of the Calcutta High Court in the case of *Queen-Empress* v. *Jadub Das* (2), said that it had been long settled by the decisions of that Court that unless there was something to show the truth of the former statement it should not be preferred to the statement made subsequently in the Sessions Court, that is to say, there should be something to corroborate that statement on some material point. I do not see in what better way the statement made by *Musammat* Nihali in the Committing Magistrate's Court can be shown to be correct than by the proof of a former statement made by her to the same effect. The part of the statement (Exhibit P. F.) on page 5, lines 31 to 49 of the paper-book, corrobortates the statement made by her before the Committing Magistrate, printed at page 9, lines 26 to 40. No doubt the evidence of such a witness must be received with great caution, and probably it would not be safe to base a conviction upon it unless it were corroborated by other evidence.

(1) 72 Ind. Cas. 529; 16 L. W. 239; 43 M. L. J. 222; (1922) M. W. N. 506; 31 M. L. T. 175; 45 M. 766; (1923) A. I. R. (M.) 20; 24 Cr. L. J. 417.

(2) 27 C. 295; 4 C. W. N. 129; 14 Ind. Dec. (N. S.) 194.

It is clear from the evidence of the doctor that there was blood on the walls of Mam Chand's house in which the body was found buried. It is also proved that Mam Chand falsely stated that Bhiman had gone away to Delhi. It is further proved that a few days later Mam Chand absconded from the village and was not seen again for more than 18 months. He and Bhiman were living together in the house where Bhiman's dead body was found buried, and it cannot be believed that Bhiman could have been murdered and his body buried there without Mam Chand being privy to it.

I, therefore, consider that there is ample evidence in this case on which to base the conviction of Mam Chand for the murder of Bhiman, and I would accordingly dismiss the appeal and confirm the sentence of death.

Fforde, J.—I agree.

K. S. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 197 OF 1924.

April 16, 1924.

Present :—Mr. Justice Greaves and Mr. Justice Duval.

DWARKADAS HARIDAS—PETITIONER

versus

MR. AMBALAL GANPATRAM—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 54, 60, 61, 171, scope of—Magistrate demanding bail from accused on Police request to appear before another Court—Order, propriety of—Criminal breach of trust—Offence where triable.

The precautions laid down in sections 54, 60 and 61 of the Criminal Procedure Code seem to be designed to secure that within not more than 24 hours of the arrest of an accused person, some Magistrate shall have seisin of what is going on and some knowledge of the nature of the charges against the accused, however, incomplete the information may be. [p. 133, col. 1.]

The Secretary of a limited Company carrying on business at Ahmedabad presented a petition of complaint before the Deputy Inspector-General of Police of the Poona Criminal Investigation Department against one *D.*, alleging that *D.* as commission agent of the Company in Calcutta committed criminal breach of trust in respect of sale proceeds of the goods belonging to the Company. The C. I. D. Officer appointed to investigate into the matter obtained a search warrant from a First Class Magistrate at Ahmedabad for the books and documents, came to Calcutta and in execution thereof took charge of the books, etc. from the house and office of *D* after making a search list. Having arrested *D* under the provisions of section 54 of the Criminal Procedure Code, he produced him before the Chief Presidency Magistrate, Calcutta, asking that *D* might be forwarded under proper escort to the First Class Magistrate, Ahmedabad. On *D* applying for bail the Chief Presidency Magistrate granted bail for Rs. 50,000 "to appear before the First Class Magistrate, Ahmedabad" on the date specified. *D* thereupon moved the High Court:

Held, (1) that the charge was triable only in Calcutta where the offence alleged under section 409, Penal Code, was committed; [p. 133, col. 1.]

(2) that the Chief Presidency Magistrate ought to have refused to act on the mere statement of the investigating Police Officer but should have required him to produce a warrant from Ahmedabad, releasing *D* in the meantime on bail to appear when called on before himself. [p. 133, col. 2.]

Rule against an order of the Chief Presidency Magistrate, Calcutta, dated the 6th March 1924.

Mr. *Jackson*, Babus *Narendra Kumar Bose* and *Satindra Nath Mukerjee*, for the Petitioner.

Mr. *B. L. Mitter*, for the Crown.

Babus *Tarak Nath Sadhu* and *Bibhuti Bhusan Saha*, for the Opposite Party.

JUDGMENT.

Greaves, J.—One Shantilal Lajjashankar, the Secretary of a limited Company carrying on business at Ahmedabad in the Bombay Presidency, presented a petition of complaint in, I think, February or March last before the Deputy Inspector-General of Police of the Poona Criminal Investigation Department of the Bombay Presidency against Dwarkadas Haridas of Calcutta. Ambalal Ganpatram, an Inspector of Police, the C. I. D., Poona, was directed by the Deputy Inspector-General of Police, C. I. D., Poona, to get the case registered at Ahmedabad and to investigate into the matter. Ambalal Ganpatram had the complaint recorded in the Police Station of Kalupur in Ahmedabad City and took up the investigation. The complaint was filed by the complainant as representative of the limited Company and on its behalf. The complaint alleged that Dwarkadas had been acting since 1920 as commission agent of the limited Com-

pany and that as such he was entrusted with yarn and cloth bales belonging to the Company for sale at Calcutta, that he was responsible for the value of the goods sent and that it was his duty to remit the money representing the value of the goods sold and to retain the unsold balance of the goods. It further alleged that Dwarkadas in July 1922 professed with the sanction of the mill's agent (who was one Lalbhai Tricumlal) to have made a contract for the sale of 601 bales at certain rates which he intimated to the Company by a letter of the 24th July 1922 and that in pursuance of the intimation the Company despatched 595 bales between the 1st August 1922 and the 23rd November 1922 and that Dwarkadas submitted stock-sheets from time to time acknowledging receipt of the 595 bales in pursuance of the contract.

It further alleges that the accused was responsible for Rs. 2,97,292-15-6, the value of the bales but that with the intention of causing wrongful loss to the Company and wrongful gain to himself the accused represented to the Company that the person who had contracted to purchase the bales was unwilling to take delivery and that thereupon it was agreed that the contract rates were to be charged for 300 bales and for the balance the revised rates but that the accused refused to give the name of the contracting party, that the accused later represented that the contracting party refused to take delivery and that he must sell by public auction or private contract and that he subsequently reported having effected private sales of 313 bales and public auction of 5 bales, that the accused according to his acounts had received Rs. 2,53,314-2-0 for the 595 bales and had remitted Rs. 1,86,296-4-9 only, that on the 13th February 1923, the accused sent what purported to be a copy of the original contract signed by one Ram Chandra Baijnath. The complaint further alleged that in July 1922, there was no such firm in Calcutta and that it was a fictitious name and that the accused had put forward a bogus contracting party and thereby induced the Company to revise and reduce its rates. The complaint then charges dishonest and fraudulent misappropriation by the accused of a sum of Rs. 67,017-13-3 admitted by the accused in his accounts to have been received and charges him with an offence under section 409 of the Indian Penal Code and with such other offences as might be disclosed in the evidence and asks for seizure of the books of account relating to the sales and of other books and documents bearing on the case, for the arrest of the accused in respect of an offence under section 409, Indian Penal Code, and that a Police Officer may be deputed to Calcutta for the purpose.

Ambalal Ganpatram states that in the course of the investigation he examined the complainant, Lalbhai Tricumlal and other witnesses at Ahmedabad and the correspondence and accounts. On the 1st March, he obtained a search warrant from a First Class Magistrate at Ahmedabad for the books, documents, etc., and came to Calcutta and in execution thereof took charge of the books, etc., from the house and office of Dwarkadas after making a search list and arrested Dwarkadas under the provisions of section 54, Criminal Procedure Code, on the 5th March and produced him on the 6th before the Chief Presidency Magistrate asking that he might be forwarded under proper escort to the First Class Magistrate, Ahmedabad.

In making the application Ambalal Ganpatram produced a letter in the following terms:—

To

The Chief Presidency Magistrate,
Calcutta.

Sir,

I have the honour to report that the accused Dwarkadas Haridas who is wanted in the marginally noted* case of Kalupur Police Station in Ahmedabad City was arrested by me at Nos. 167 and 168

*Emperor v. Dwarkadas Haridas. Charge—Criminal breach of trust as an agent in respect of Rs. 73,313-13-3. Section 409, Indian Penal Code. Case No. 30 of 1924 of P. S. Kalupur forwarded.
(Sd.). L. N. BIRD,
Dy. Com., D. D.,
6th March 1924.

Lower Chitpur Road last night at 9-36 P.M. I, therefore, produce the accused before your honour and pray that he may be forwarded to the First Class Magistrate of Ahmedabad under proper escort.

I have the honour to be,
Sir,
Your most obedient servant,
(Sd.) AMBALAL GANPATRAM,
Inspector, C. I. D. Poona,
6th March 1924.

Dwarkadas applied for bail to the Chief Presidency Magistrate who made the following order on the 6th March.

"Accused Dwarkadas Haridas. Petition for bail filed. Grant bail Rs. 50,000 to appear before the First Class Magistrate, Ahmedabad on 16th March 1924. Section 409, Criminal Procedure Code."

I do no not think that the Chief Presidency Magistrate was right in making this order. There is no doubt that under section 54 of the Criminal Procedure Code a Police Officer may arrest without warrant in the case of a cognizable offence but under section 60 he is bound without unnecessary delay to take or send the person arrested before the Magistrate and under section 61 this must be done within 24 hours. The precautions laid down in these sections seem to me designed to secure that within not more than 24 hours some Magistrate shall have seisin of what is going on and some knowledge of the nature of the charges against the accused, however, incomplete the information may be. The order of the Chief Presidency Magistrate has given the go-by to any such safeguards. Ambalal Ganpatram, the investigating Police Officer is the only person so far (if we except the Deputy Inspector-General of Police, C. I. D., Poona) who knows anything about the matter and it does not seem to me right or in consonance with the provisions of the Criminal Procedure Code that on his mere *ipsi dixit* Dwarkadas should be hailed from Calcutta to Ahmedabad to answer a charge under section 409, Indian Penal Code, which upon the facts before us in accordance with the decisions of this Court is triable only in Calcutta where the offence alleged under section 409, Indian Penal Code, was committed.

I think, as I have already said, that the order of the Chief Presidency Magistrate was wrong and I think that he should have refused to act upon the mere statement of the investigating Police Officer but required him to produce a warrant from Ahmedabad, releasing Dwarkadas in the meantime on bail to appear when called on before himself. If this course had been adopted it is accompanied by various safeguards, for the Police Officer would have had to satisfy the Court issuing the warrant of the nature of the offence charged and that it could be enquired into and tried in Ahmedabad. The Court would have to so decide bearing in mind the provisions of section 177, Criminal Procedure Code which provide that every offence shall ordinarily be enquired into and tried by a Court within the local limits of whose jurisdiction it was committed.

Various other questions were raised before us—notably that the facts show that the whole matter was really a civil dispute and not of a criminal nature. I think there is considerable force in this contention having regard to the previous dealings between the Company and Dwarkadas and between Dwarkadas and Lalbhai and the Company. It is too noticeable that for the purpose of these proceedings the complainant accepts Dwarkadas' accounts as correct and it would appear from the letter of the 24th July 1922 from Dwarkadas to the Company which is exhibited to the complainant's affidavit that the contracts referred to in the complaint were made when Lalbhai, the Company's agent, was in Calcutta and presumably with his knowledge and assent. This appears to give the go-by to a good deal of the complaint and to do away with any question of cheating. These matters certainly raise an apprehension that these proceedings are being used to put pressure on Dwarkadas and that the Criminal Courts are being invoked in respect of matters which should have been litigated in a civil suit on the Original Side of this Court.

In the view we take it is not necessary for us to decide this question and I feel some doubt as to our jurisdiction to do

so in these proceedings. One other matter I should refer to, namely, that it is said the facts disclose a case of cheating which under the circumstances would be triable at Ahmedabad. This we need not pursue as all along the offence charged in the complaint specifically and upon the facts has not been one of cheating but of criminal breach of trust; moreover it looks, if the letter of the 24th July 1922 is accurate that no question of cheating arises. For the reasons already stated I think the order of the Chief Presidency Magistrate is wrong and that it cannot stand and should be set aside and the bail bond cancelled.

Duval, J.—I agree.

K. S. D. *Rule made absolute.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 258 OF 1923.

May 9, 1923.

Present:—Mr. Justice Daniels.

EMPEROR—PROSECUTOR

versus

ABDUS SAMAD KHAN—OPPOSIT PARTY.

Workman's Breach of Contract Act (XIII of 1859), s. 2 B—Frivolous or vexatious complaint—Compensation—Notice to show cause.

An order under section 2B of the Workman's Breach of Contract Act directing compensation to be paid in respect of a frivolous or vexatious complaint cannot be legally made without calling on the complainant to show cause against the order.

Reference made by the Sessions Judge, Benares.

REFERRING ORDER.—This is an application for revision of an order passed by Babu Shri Krishan Kumar Sahib, Magistrate, First Class, in a case under Act XIII of 1859, as amended by Act XII of 1920. The applicant made a complaint against Ram Nandan under section 2 of that Act on the ground that Ram Nandan had received an advance of Rs. 70 and had abandoned his work without re-paying the advance. The learned Magistrate held that the contract was that Rs. 4-5-0 of the advance of Rs. 70 should be paid to Ram Nandan, and that the balance should be paid to Narotam Sahu to whom Ram Nandan, already owed Rs. 65-11-0. No money was paid to Narotam Sahu, and accordingly Ram Nandan ceased to work for the applicant. On these facts the learned Magistrate found that the charge made was vexatious and accordingly ordered that the applicant should pay Rs. 20 as compensation.

The facts as found by the learned Magistrate are not in dispute before me. It is, however, urged that the provisions of section 2B of the Act have not been complied with. This section provides that in cases where the Magistrate considers the complaint to have been frivolous or vexatious, he should call upon the complainant to show cause why an order for compensation should not be passed against him. If after having considered such explanation he considers that compensation should be awarded to the defendant the Magistrate is to make an order awarding compensation, and to give his reasons therefor.

In the present case it is clear that this procedure has not been followed. The order for compensation is an integral part of the judgment, and it seems clear from the record that the first intimation which the complainant had was the order directing that compensation should be paid. Nor are any definite reasons given for making this order, although it is true that a perusal of the judgment as a whole clearly shows the reasons which must have led the learned Magistrate to his decision. It is clear that the order complained against, being made without the complainant having had an opportunity of objecting, and not being accompanied by a clear statement of the reasons which induced the Magistrate to make the order, is illegal. Accordingly under section 438 of the Code of Criminal Procedure, I send the record to the Hon'ble High Court for orders, with a recommendation that the order directing the payment of Rs. 20 compensation be quashed.

ORDER.—This is a Reference by the learned Sessions Judge of Benares in a case under the Workman's Breach of Cantract Act, 1859, as amended by Act

XII of 1920. It is admitted that the Magistrate omitted, before ordering the complainant to pay compensation under section 2B of the Act, to call on him to show cause. I accordingly set aside the order of compensation passed and direct the Magistrate to do now what he should have done in the first instance, namely, to call upon the complainant to show cause why he should not be ordered to pay compensation. The Magistrate will then pass final orders after considering any cause that may have been shown. The amount of compensation, if already deposited, will remain in deposit pending the decision of the case.

K. S. D. *Revision allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEALS NOS. 63 AND 64 OF 1924.

March 17, 1924.

Present:—Mr. Neave, A. J. C., and Mr. Kendall., A. J. C.

PARMESHWAR AND ANOTHER—ACCUSED—APPELLANTS

versus

EMPEROR—COMPLAINANT—RESPONDENT.

Approver, evidence of—Retracted confession of co-accused—Conviction for murder—Independent corroboration, necessity of.

It is unsafe to convict an accused for murder on the testimony of an approver and the retracted confession of a co-accused, especially when they are in conflict with each other and there is no independent corroboration. [p. 137, col. 1.]

Appeals against an order of the First Additional Sessions Judge at Bara Banki, dated the 12th January 1924.

Messrs. *St. G. Jackson* and *R. F. Bahadurji*, for the Appellants.

The Government Pleader, for the Crown.

JUDGMENT.—Debi Din Ahir and Parmeshwar Pasi have been convicted by First Additional Sessions Judge of Lucknow under section 302, Indian Penal Code, and sentenced to death. They appeal and the record is also before us for confirmation of the sentence.

The case for the prosecution was that these two men along with Ram Bakhsh Pasi and Kallu Julaha had murdered one Lachman Pasi. The motive for the crime was alleged to be that Parmeshwar had been carrying on an intrigue with *Musammat* Jasoda who had for some years been living with Lachman as his wife. Lachman discovered their relations and forbade Jasoda to meet Parmeshwar any more. The latter determined to get rid of Lachman and persuaded the others to join in making away with him. The crime was committed on the night of the 8th of September but was not discovered till the 12th when a corpse was found floating in a well at Seongi Purwa and was identified as Lachman's by his brother Bhagwant. The body was too decomposed for certain recognition and Bhagwant was only able to state that he believed it to be that of Lachman but was not sure. Later on in Court he became more positive and declared that he had recognised it with certainty. When found the body was wrapped in a sack and was clothed in a *dhoti* and *angaucha*. These have been identified as Lachman's by *Musammat* Jasoda who claimed to recognise the former by some holes which she said had been caused by burning and the latter by a patch which she had herself sewn on to it. The learned Counsel for the appellants has questioned the identification of the corpse but we do not think that there is any sufficient reason to doubt that it is that of the missing man. The first clue obtained by the Police was from the witness Sohan Lal who informed the Sub-Inspector that he had seen Parmeshwar and Debi going towards the well where the body was afterwards found at 6 *gharis* after dark on the night of the 8th September. Parmeshwar and Debi were arrested on the 15th September. On the following day Debi made a statement which was recorded under section 164, Criminal Procedure Code, by a Magistrate who afterwards committed the accused for trial. He named three other men Ram Bakhsh, Puttu and Kallu as having taken part in the crime and stated that Ram Bakhsh, who is the

father of Parmeshwar, was sent to fetch Lachman from his house on the pretext of wanting him to join in committing a theft. It may be mentioned here that Lachman and Parmeshwar were both registered Pasis and all the accused are men of more or less notoriously bad character. In consequence of Debi's confession the other men named by him were arrested and all five were sent up by the Police for trial. After the first witness's statement had been recorded by the Committing Magistrate Puttu announced that if he was given a pardon he would disclose the real facts of the case. A pardon was tendered to him and he was made an approver. Before the Committing Magistrate Debi retracted the statement which he had previously made, and in the Sessions Court he denied that he had never made it. He pleaded that he had been suffering from boils on the foot at the time when the murder was committed and that he had been implicated owing to the enmity of Kunwar Bahadur Singh with his employer Lalta Bakhsh. The Sub-Inspector arrested him at the instigation of Kunwar Bahadur and the latter made him drunk just before he was taken to the Magistrate's house. As has been remarked by the learned Sessions Judge the case hinges on the value to be placed on the evidence of Puttu and the retracted confession of Debi. The only corroboration of these consists in the evidence of Sohan Lal, of *Musammat* Jasoda and of one Thakur Prasad who deposes to having seen Debi, Parmeshwar and Lachman going together towards the south from the direction of *Mauza* Gaura 3 or 4 *gharis* after night-fall. The learned Judge has considered that this is sufficient to bring the crime home to Parmeshwar and Debi but has acquitted the other two. We are unable to agree with this view. The learned Judge himself admits that the confession of Debi has little value for the prosecution. It differs in one important particular from the statement of Puttu in that Debi asserts that it was Ram Bakhsh who fetched Lachman from his house while according to Puttu this was done by Parmeshwar and Debi. This assertion is in conflict with the statement of Thakur Prasad that he saw Debi, Parmeshwar and Lachman going along together. Further another very suspicious circumstance referred to by the learned Judge is that Debi volunteered the information that while he and Parmeshwar were going towards the scene of the murder they met Sohan Lal. It will be remembered that it was from Sohan Lal's statement that he had seen Parmeshwar and Debi together that night that the Police obtained their first clue. In their account of the murder Puttu and Debi agree very closely. They say that Parmeshwar struck at Lachman's neck from behind with a *banka*, that Lachman stood up, that the rest of them at once flung themselves upon him and that Parmeshwar then struck him a second blow on the neck. According to Debi, however, this was sufficient to kill Lachman, though Parmeshwar after adding in his first deposition the detail that "the neck almost left the trunk" goes on to say "we threw him down and pressed him till he died."

Both statements agree in this that only two blows were struck with the *banka*. The medical evidence, however, shows that there was one wound on the tip of the right shoulder and a second long one across the front and the upper part of the neck which in the opinion of the Civil Surgeon was probably the result of two cuts. From this it would seem that actually three blows must have been dealt though no doubt to the lay eye only two would have been apparent. This would seem to indicate that Debi and Puttu were not describing what they had actually seen, but what they might have been expected to see. Again in cross-examination in the Sessions Court Puttu said "Lachman's neck was half cut through by the first blow"; but as we have seen the first blow must have been that which fell on the tip of the shoulder. Further on Puttu definitely stated "Lachman was not hit except with the *banka* twice." There are one or two curious variations in the two statements made by Puttu. Before the Committing Magistrate he said that the first proposal that he should join in a murder was made to him at noon by

Parmeshwar and Debi and that the crime was committed that very same night. In the Sessions Court he said in examination-in-chief that the first suggestion was made the day before the murder and that he at first refused to take part in it. In cross-examination he stated that it was in afternoon 8 days before the murder that he was first approached, and denied that he then refused. Three days later they had another meeting in a lane and discussed the plan for the murder. *Musammat* Jasoda's evidence has been relied on to prove the liaison which has been put forward as a motive for the murder but in the Sessions Court she denied that such a liaison had ever existed. No doubt this change of front may be due, as suggested by the learned Judge, to a desire to shield Parmeshwar, but it has the effect of considerably diminishing the value of her evidence. The inherent improbability of the story that Parmeshwar should have been selected to persuade Lachman to join in an imaginary theft only a short time after Lachman had detected Parmeshwar's intrigue with his wife has been commented on by the learned Judge. One very curious fact about the confession of Debi may be mentioned. This is that though it was recorded by the Magistrate who afterwards committed the case that officer evidently attached so little importance to it that he did not even question Debi about it when recording his statement in Court and the prosecution ignored it altogether. The confession was only discovered as the Juge says, "during the trial more or less by chance." Another detail in Puttu's statement which points to a desire to secure the corroboration of Sohan Lal is his story that when they were all on their way to the place where the murder was committed Parmeshwar and Debi went round by *haura chauki*. Puttu himself admitted that he did not know why they should have done this and the only possible explanation is that it was to give them an opportunity of falling in with Sohan Lal. We feel grave doubts as to the statements of both Debi and Puttu and we do not consider that the corroboration forthcoming is all adequte. We, accordingly, allow the appeals of Debi and Parmeshwar, set aside their convictions and sentences and direct that they be set at liberty.

K. S. D. *Appeals allowed.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 132 OF 1924.
April 15, 1924.
Present:—Mr. Justice Greaves and Mr. Justice Duval,
VARAJ LALL—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Motor Vehicles Act (VIII of 1914), s. 11, rules framed under—Calcutta Rules, Part II, rr. 3, 16—Driving lorry at excessive speed—Owner of lorry whether liable.

Where a particular intent or state of mind is not of the essence of an offence, a master can be made criminally liable for his servant's acts, if an act is expressly prohibited, but not otherwise, and he cannot be so made liable if the act provides for liability for permitting and causing a certain thing, unless it can be shown that the act was done with the master's knowledge and assent, express or implied. [p. 139, col. 1.]

The owner of a motor lorry was prosecuted on the ground that he allowed the driver of the lorry to drive at an excessive speed. It appeared that he was not in the motor lorry at the time of the alleged offence and had cautioned the driver not to exceed the regulation speed and to drive with due care and caution:

Held, that in the circumstances of the case, having regard to the terms of rule 3 of Part II of the Rules regulating Motor Vehicles in Calcutta, made under section 11 of the Motor Vehicles Act, the owner was not liable. [p. 139, col. 1.]

Edward Thornton v. *Emperor*, 9 Ind. Cas. 480; 38 C. 415; 15 C. W. N. 390; 13 C. L. J. 335; 12 Cr. L. J. 89, dissented from.

Rule against the order of the Additional Presidency Magistrate, Calcutta, dated the 12th February 1924.

Mr. *P. C. Mitter* and Babu *Kshitish Chandra Chakrabutty*, for the Petitioner.

JUDGMENT.

Greaves, J.—The petitioner is the owner of motor lorry No. 630. He was prosecuted on the ground that he allowed the driver of the motor lorry to drive it at an excessive speed at 5-30 in the evening of the 23rd October last on

Lower Circular Road and thereby committed an offence under r. 16 of Part II of the Rules regulating the use of motor vehicles in Calcutta framed under section 11 of Act VIII of 1914, the Indian Motor Vehicles Act, 1914.

The petitioner was not in the motor lorry at the time of the alleged offence and had cautioned the driver not to exceed the regulation speed and to drive with due care and caution.

The petitioner was convicted on the 17th January last by the Additional Presidency Magistrate and fined Rs. 15, the driver of the motor lorry admitting that he drove at an excessive speed.

The Magistrate in his explanation relies on the provisions of r. 3 of Part II and refers to *Thornton* v. *Emperor* (1).

The Rule was granted on the ground that the petitioner was not liable under the circumstances.

Rule 3 of Part II is, so far as material, as follows:—

"No person shall drive or have charge of, or cause or permit to be used, any motor vehicle or trailer which does not in all respects conform to these rules, or which is so driven or used as to contravene any of these rules."

Rule 16 of Part II is, so far as material, as follows:—"No motor vehicle shall be driven at a greater speed than ten miles an hour, if a heavy motor car, and 8 miles an hour, if the axle weight of any axle of the heavy motor car exceeds six tons, or if it draws a trailer."

In the case of *Thornton* v. *Emperor* (1) upon which the Magistrate relies the conviction was in respect of an offence under rule 20 of the Rules then in force framed under Bengal Act III of 1903 which is almost identical with rule 19 of the present rules which is as follows:—

"No motor vehicle shall be driven recklessly or negligently, or at any speed or in any manner which is likely to endanger human life or to cause hurt or injury to any person or animal or damage to any goods carried in any vehicle or by any person, or which would be otherwise than reasonable or proper with due regard to all the circumstances of the case, including the nature, condition and use of the street or public place and the amount of traffic which is actually on it at the time or which may reasonably be expected to be on it."

Rule 4 of those rules was identical with rule 3 of the present rules.

Rule 16 by itself, I think, would only make the driver liable as it only contains a prohibition against driving at a greater speed than that stated in the rule. Rule 3, it is true, prohibits the causing or permitting a motor vehicle to be driven in contravention of rule 16 but apart from authority I do not think that under the circumstances of this case the petitioner can be said to have caused or permitted the motor lorry to be driven in contravention of rule 16. He was not in the lorry at the time and he had cautioned his driver to observe the rules.

The general principles of law applicable in cases of this nature are stated in Volume IX of Halsbury's Laws of England, page 235.

"The condition of mind of a servant or agent is not imputed to the master or principal so as to make him criminally liable. A master is not criminally liable merely because his servant or agent commits a negligent or malicious or fraudulent act. But in cases where a particular intent or state of mind is not of the essence of the offence, the acts or defaults of a servant or agent in the ordinary course of his employment may make the master or principal criminally liable, although he was not aware of such acts or defaults, and even where they were against his orders."

The principle of what I may call vicarious criminality has been applied in England in cases under the Sale of Food and Drugs Act, 1875 and in cases under the Licensing Acts; see *Commissioners of Police* v. *Cartman* (2) referred to in *Thornton* v. *Emperor* (1). In that case

(1) 9 Ind. Cas. 480; 38 C. 415; 15 C. W. N. 390; 13 C. L. J. 335; 12 Cr. L. J. 89.

(2) (1896) 1 Q. B. 655; 74 L. T. 726; 44 W R 637; 18 Cox. C. C. 341; 60 J. P. 357.

the licensee was absent when the offence was committed, but there was an express prohibition of the sale of intoxicating liquor to any drunken person and the word "permitting" was not used in the section as regards this particular offence. Similarly in the Sale of Food and Drugs Act, 1875, the prohibition against particular sales is absolute and the word "permitting" does not occur. In *Somerset* v. *Hart* (3), a case under section 17 of the Licensing Act, 1872 [also cited in *Thornton* v. *Emperor* (1)] there was no conviction of the licensee in whose absence gaming took place on the ground that unless he knew and connived he could not be said to have suffered gaming to go on; the word "suffer" appears in the section in question. In *Somerset* v. *Wade*(4) [also cited in *Thornton* v. *Emperor* (1)], a case under section 13 of the Licensing Act, 1872, there was no conviction on the ground that there could be no permission if there was no knowledge.

The principle I should adduce from the cases is that where a particular intent or state of mind is not of the essence of an offence a master can be made criminally liable for his servant's acts if an act is expressly prohibited but not otherwise and that he cannot be so made liable if the act provides for liability for permitting and causing a certain thing unless it can be shown that the act was done with the master's knowledge and assent, express or implied.

In this view of the law I think the petitioner was not liable in the circumstances of this case, having regard to the terms of rule 3 and I think the conviction and sentence should be set aside and the fine be refunded.

It may be said that we are differing from the view expressed in *Thornton* v. *Emperor* (1) and this may be so, but having regard to the fact that that decision was given in respect of the breach of a different rule framed under a different Act we do not think it necessary to refer the matter to a Full Bench.

Duval, J.—I concur.

K. S. D. *Rule made absolute.*

N. H.

(3) 12 Q. B. D. 360; 53 L. J. M. C. 77; 48 J. P. 327.
(4) (1894) 1 Q. B. 574; 63 L. J. M. C. 126; 10 R. 105; 70 L. T. 452; 42 W. R. 399; 58 J. P. 231.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 265 of 1923.

May 21, 1923.

Present :—Mr. Justice Walsh.

EMPEROR—PROSECUTOR

versus

JWALA PRASAD—OPPOSITE PARTY.

U. P. Excise Act (IV of 1910), s. 64 (c)—Sale by one partner out of prescribed hours—Other partner, liability of.

For purposes of agency two partners stand to one another in the same relation as master and servant.

Where, therefore, one of the partners in a liquor shop commits a wilful breach of the license and sells liquor after prescribed hours, he does so as agent for the other partner who is therefore equally liable.

Queen-Empress v. *Tyab Ali*, 24 B. 423; 2 Bom. L. R. 52; 12 Ind. Dec. (N. S.) 815, *Babu Lal* v. *Emperor*, 14 Ind. Cas. 666; 34 A. 319; 9 A. L. J. 283; 13 Cr. L. J. 282, referred to.

Reference made by the District Magistrate, Agra.

REFERRING ORDER.—Two excise licensees, who are partners in a country liquor shop license, have been convicted under section 64 (*c*) of the U. P. Excise Act, 1910, of committing a breach of the conditions of the license by selling liquor out of the prescribed hours and also by selling adulterated liquor. One of the partners, Tika Ram, was present at the shop when these offences were detected. It is admitted that Jwala Prasad, the other licensee, was not present and there is no suggestion that he knew anything about the irregular sales. The Deputy Magistrate has convicted Jwala Prasad on the strength of the ruling of the Hon'ble High Court in *Babu Lal* v. *Emperor* (1). It has been argued before me that that ruling establishes only the liability of a master for the act of his servant, and that it does not follow

(1) 14 Ind. Cas. 666; 34 A. 319; 9 A. L. J. 288; 13 Cr. L. J. 282.

that one partner is liable for the acts of the other partner. I do not accept this contention. It seems to me that one partner must he held to be liable for the acts of the other partner. The second point, however, urged before me in revision appears to be valid. The important point in the ruling quoted, which followed the case of *Queen-Empress* v. *Tyab Ali* (2), was that in order to establish the offence under the section of the Opium Act it was not necessary to prove intention, *mens rea* or knowledge and that the mere act constituted the offence. In the present case, section 64 (*c*) of the U. P. Excise Act makes it an offence if any one, being the holder of a licence, wilfully does or omits to do anything in breach of any of the conditions of the license. The use of the word "wilfully" appears to me to make it clear that in order to establish this offence it is necessary to prove intention or knowledge, and on the facts found by the Deputy Magistrate there is no such proof against Jwala Prasad. I, therefore, forward the record for the orders of the Hon'ble High Court with the recommendation that the conviction of Jwala Prasad be set aside.

ORDER.—I do not agree with the District Magistrate. *Mens rea* has nothing to do with it. It is quite true that the section requires a wilful breach of the condition. A man may accidentally commit a breach. For example, if a man's watch was five minutes slow and he sold liquor at two minutes to eight by his own time, and it turned out to be two minutes past eight by the right time, that would not be a wilful breach. But a sale is a sale, and I have not the slightest doubt that the servant intended to sell the liquor and to take the money for it, and if he pocketed the money and refused to hand it over to his master and said that it was an accidental sale and not a wilful sale, and, therefore, the money did not belong to the master but to the servant, the master would have been very angry. The real test, so far as agency is concerned, is not the nature of the act but the nature of the business. The nature of the act is the test which decides the criminality. If the sale is wilful or the breach of the license is wilful, then the servant has committed an offense. But the question still remains whether his master is liable, and in all these *quasi* civil transactions, which are really questions of contract, the view has always been held that the Legislature intended that the maxim making the superior answerable should apply to sales which are carried through in breach of the conditions of the license by a man whom the master has put in the shop for the purpose of selling on his behalf and for his profit, and, therefore, if the man who actually took the money and transferred the liquor to the purchaser had been a servant, Jwala would have been answerable as his master. The law of partnership is merely a branch of the law of agency, just like the law of master and servant, and for this purpose two partners stand to one another in the same relation as master and servant. This was a wilful breach of the license. It was committed by Tika Ram as agent for Jwala, the other partner, and in my opinion that makes Jwala equally liable, and the Magistrate was right. I see no reason to interfere and I direct the record to be returned to the District Magistrate. I may add that I agree with both the cases which have been cited, namely *Queen-Empress* v. *Tyab Ali* (2) and *Babu Lal* v. *Emperor* (1). It is hard on Jwala if he was on bad terms with Tika Ram and objected to this class of illicit dealing; but if he can prove that, he can press for the recovery of his fine from Tika Ram, I think, in the taking of the partnership accounts. Let the record be returned.

K. S. D. *Record returned.*

(2) 24 B. 423; 2 Bom. L. R. 52; 12 Ind. Dec. (N. S.) 815.

EDIGA THIMMIAH, *In re.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 890 OF 1923 (CRIMINAL REVISION PETITION No. 711 OF 1923.)

April 10, 1924.

Present:—Mr. Justice Spencer.

In re EDIGA THIMMIAH AND OTHERS —ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), s. 423 —Court Fees Act (VII of 1870), s. 31—Direction to accused to pay complainant's Court-fees—Enhancement of sentence.

Section 31 of the Court Fees Act provides that all fees ordered to be re-paid under the section shall be recoverable "as if they were fines", but does not thereby make them part of the sentence.

The making of an order by an Appellate Criminal Court, under section 31 of the Court Fees Act, does not ordinarily amount to an enhancement of sentence within the meaning of section 423 of the Criminal Procedure Code but it may be made as an incidental order to bring the judgment into conformity with the law.

In re Vemuri Seshanna, 26 M. 421; 2 Weir 488, followed.

Queen-Empress v. *Thangavelu Chetty*, 22 M 153; 1 Weir 724, distinguished.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate, Penukonda, in Criminal Appeal No. 26 of 1923, preferred against the judgment of the Court of the Sheristadar, Third Class, Magistrate, Madakasira, in C. C. No. 124 of 1923.

Mr. *D. Audinarayaniah* for Mr. *V. S. Narasimhachar*, for the Petitioners.

The Public Prosecutor, for the Crown.

ORDER.—This criminal revision has been admitted on the question of the validity of the Appellate Court's order to pay the complainant's Court-fees under section 31 of the Court Fees Act.

At the hearing an objection has been raised that the Appellate Court's judgment is defective under section 367 of the Code of Criminal Procedure because the Joint Magistrate did not discuss the bearing of the evidence of each prosecution witness on the guilt of each accused. This is not one of the grounds stated in the revision petition and I do not find any substance in it.

The order to collect Court-fees from the accused passed by the Appellate Court is not an enhancement of the sentence under the authority of *In re Vemuri Seshanna* (1). The case in *Queen-Empress* v. *Thagnavelu Chetty* (2) was decided by a Single Judge in September 1898. The head-note to the report indicates that it was a decision under the Code of 1882 which had not the same provision under section 423 (*d*) for passing incidental or consequential orders in appeal that was introduced by the Act V of 1898. I hold that the making of an order under section 31 of the Court Fees Act does not ordinarily amount to an enhancement of sentence but may be made as an incidental order to bring the judgment into conformity with the law. Section 31 of the Court Fees Act provides that all fees ordered to be re-paid under this section shall be recoverable "as if they were fines", but does not thereby make them part of the sentence. In *Queen-Empress* v. *Thangavelu Chetty* (2) the Assistant Magistrate who tried the case made an order for a part of the Court-fees claimed by the complainant to be re-paid out of the fine collected as sentence, and it was for this reason that Justice Moore was compelled to treat the Assistant Magistrate's order to pay the fee as an integral part of the sentence, and to regard the Deputy Magistrate's order to pay an increased amount as an enhancement of the sentence I do not find any such objection to exist in the present case to the Joint Magistrate's order.

The criminal revision is, therefore, dismissed.

V. N. V. *Petition dismissed.*

(1) 26 M. 421; 2 Weir 488.
(2) 22 M. 153; 1 Weir 724.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 59 OF 1924.
June 21, 1924.
Present:—Mr. Kinkhede, A. J. C.
SOOSALAL BANIA—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Evidence Act (I of 1872), ss. 8, 157—Penal Code (Act XLV of 1860), s. 376—Rape, offence of—Woman crying and weeping—Statement to persons, admissibility of—Explanation of conduct—Corroboration—Ravished woman, evidence of, value of—Punishment, measure of.

A statement by a girl, alleging that she was raped, made immediately after the rape, to witnesses who saw her crying and asked her the reason thereof, is admissible, as an explanation of her act of crying, under section 8 of the Evidence Act, as also under section 157 of the said Act by way of corroboration. [p. 144, col. 1.]

In the case of the rape of an innocent girl of tender age, the evidence of the ravished girl is of great value and where she makes a statement by way of disclosure immediately after the occasion, it is a strong piece of evidence corroborating her credibility and proving the consistence of her conduct and also as negativing consent on her part. [*ibid.*]

Rex v. *William Osborne*, (1905) 1 K. B. 551; 74 L. J. K. B. 311; 69 J. P. 189; 53 W. R. 494; 92 L. T. 393; 21 T. L. R. 288 and *Reg* v. *Lillyman*, (1896) 2 Q. B. 167; 65 L. J. M. C. 195; 60 J. P. 536; 44 W. R. 654; 74 L. T. 730, followed.

In a case of rape the punishment should be proportioned to the greater or less atrocity of the crime, to the conduct of the criminal and to the defenceless and unprotected state of the injured female, whether she is a low native or a high European. [p. 144, col. 2.]

Queen v. *Jhantah Noshyo*, 6 W. R. 59 Cr., followed.

Appeal against an order of the Sub-Divisional Magistrate, Saugor, in Criminal Case No. 4 of 1924, dated the 4th February 1924.

Messrs. *S. K. Barlinge* and *V. N. Herlekar*, for the Appellant.

Mr. *P. Lobo*, for the Crown.

JUDGMENT.—This is an appeal by Soosa Lal who has been convicted under section 376 of the Indian Penal Code for having ravished one Tulsia, P. W. No. 3, a girl of about 11 years of age, on 27th December 1923 at about 8 A. M. when he found her all alone in his own house. She and her mother Putria, P. W. No. 2, have been staying in a room of the house of the accused for sometime past. Putria used to supply water to Soosa Lal for domestic purposes. After having supplied water that day she went out for supplying water to some one else, and asked her daughter Tulsia, P. W. No. 3, to plaster the kitchen of the accused in the mean time till her return. It is necessary to state here that Soosa Lal had sent away his wife and mother to Laskar and was all alone in the house. After the girl had plastered the kitchen, the prosecution story goes, Soosa Lal asked her to take a cradle upstairs. The girl not suspecting anything went upstairs with the cradle and placed it there as desired. In the meantime, the accused, who followed her there closed the doors, caught her by the hand and threw her on the ground, but finding that she was crying for help he thrust her wrapper into her mouth, and in spite of the resistance she offered by tossing her legs, which he held fast on the ground, committed rape on her with the result that the hymen was ruptured and, her private parts became inflamed and tender to touch, and the labia stained with blood. There was a profuse discharge of blood from her vagina. The evidence of the Assistant Surgeon (P. W. No. 8) shows the deplorable condition in which he found her when he medically examined her even two days after on the 29th December 1923. He also examined her *ghangaria* (Exhibit A) and found considerable portions of it saturated with blood. P. W. No. 3, Tulsia, also describes her own condition from the witness-box and I think her evidence derives ample support in this respect from the medical evidence of the Assistant Surgeon. Soon after she was ravished she issued out crying from the house, in order to go to her mother. She met Bhujbal (P. W. No. 4) Pyarelal (P. W. No. 5) on her way, and on being questioned happened to narrate the occurrence to them and while she was repeating what took place to her mother at the well, one Lalli (P. W. No. 6) also heard it. Putria (P. W. No. 2) at once took her to the Police Station between 10 and 11 A. M. and reported the matter, and also at the suggestion of the Head Constable put in a written report (Exhibit P-1). The

ghangaria of the girl which had blood-stains on it was seized as per seizure memo (Exhibit P-2) dated the same day. The investigation was immediately started. The *dhoti* which the accused had on, when he ravished the girl was also seized the same day as per Exhibit P-3. The investigating officer went to the house of the accused and inspected the spot where the offence was committed and found that the accused had managed to plaster the blood-stained spot with ashes but the blood was "too thick to be blotted out of existence" as the Trying Magistrate puts it. He accordingly removed the blood-stained earth and mentioned that fact in his seizure memo (Exhibit P-3) Putria (P. W. No. 2) has deposed that when her daughter came crying to her she noticed a lot of blood on the *ghangaria* (Exhibit A) and also on the legs, and that it was with great difficulty that Tulsia was able to walk. Bhujbal (P. W. No. 4) happened to pass by the house of the accused when Tulsia was just opening the door and coming out of it crying aloud. Her cries naturally led him to question her as to their cause. He says he then noticed that her *ghangaria* was blood stained. While passing she told him that Soosa Lal, whom she addressed as *Soosa Lal Mama* had ravished her. As the girl was crying and proceeding towards the *bazar* evidently to meet her mother, this witness could render no help to her or investigate the matter with a view to verify her statement or to find out the culprit. Witness No. 5, Pyarelal, whom Tulsia met next, was somewhat dull as from what he heard from the girl, he does not appear to have formed any idea that she was ravished. His indifference was, therefore, excusable. Udaichand (P. W. No. 7) was present at the inspection of the scene of the offence pointed out by the girl. He says that the spot was blood-stained. The blood-stained earth was dug out and picked up and similarly Soosa Lal's *dhoti*, which was half-dry. was also seized in the presence of Soosa Lal. No doubt this witness (P. W. No. 7 has written the report (Exhibit P-1) at the Police Station but that ought not to detract from the value to be attached to his testimony as an eye-witness to the seizure of the *dhoti* and the blood-stained earth made for the house and in the presence of the accused. The Assistant Surgeon's evidence as also his report (Exhibit P-4) are relied on as showing that the stains on the *dhoti* could not be made out as being blood-stains, but the fact that the *dhoti* was half dry at the time it was seized and that the accused had washed it while bathing, as P. W. No. 7 deposes, sufficiently account for this state of things. I have no hesitation in holding that the taking of the bath and the washing of the *dhoti* were evidently resorted to by the accused for causing the evidence of his crime to disappear; and thus making it difficult for the prosecution to connect him with the crime.

It was argued before me by the learned Pleaders for the appellant that the absence of blood-stains on his *dhoti* establishes his innocence. They, therefore, urge that somehow or other the guilt was being sought to be fastened on the accused either because the Police had a grudge against him, or because Putria (P. W. No. 2) was turned out by him, and she wanted to take revenge on him, or because Tulsia (P. W. No. 3) having herself committed mischief from a wicked impulse, with somebody else and being afraid of the serious consequences, which resulted thereform, invented a story whereby she threw the whole blame on him. I am not at all impressed by this argument nor by the argument that the accused was called away to the Police Station and sometime before the spot inspection was made the Police managed to throw blood on the floor in order to make the story more plausible and thus to connect the accused with the crime. These pieces of highly imaginative arguments do credit to nobody. The story told by Tulsia, corroborated as it is in material particulars, has a ring of truth about it; it does not sound to me as an invention as the appellant is attempting to suggest. From her deposition and the straight manner in which she gave it, she appears to be a guileless, innocent girl of tender age, who has had no experience of the man ever before, and

it is too much to ascribe such an inventive brain to her as would enable her to connect, in a moment's time, a false story involving the very person, under whose roof she and her mother had been staying. The First Information Report (Exhibit P. 1) was lodged within a short time of the occurrence and very soon after the girl had complained of it to her mother. These facts negative the possibility of the story being invented by the girl.

The next ground of attack is in connection with the evidence of witnesses P. W. Nos. 4, 5 and 6. An objection is taken to it on the ground of its being inadmissible under law, as the witnesses were not eye-witnesees but have repeated what they say they had heard from Tulsia shortly after the occurrence. In my opinion every one of these witnesses had seen Tulsia crying and this must naturally have made them inquisitive, and led at least two of them to question her, and the latter to disclose the incident to them in order to explain her act of crying. Her statement is, therefore, admissible as an explanation of her act under section 8 of the Indian Evidence Act. It is also admissible under section 157 of the said Act by way of corroboration.

It is next urged that the conviction is virtually based upon the testimony of only the girl who is the real prosecutrix, and that it is very unsafe to convict a person on such interested testimony. This may be so in other cases, but the peculiar nature of the offence with which we are concerned here makes the evidence of the ravished girl of great value and her statement by way of disclosure immediately after the occasion is a strong piece of evidence corroborating her credibility and proving the consistence of her conduct: *Rex* v. *William Osborne* (1) and also as negativing consent on her part: *Reg* v. *Lillyman* (2).

On the whole after a careful consideration of the entire evidence on record and the probabilities of the case I see no reason to differ from the conclusions of the Trying Magistrate. I agree with him in holding that it has been satisfactorily proved that the accused did commit the crime with which he was charged and that he has been rightly convicted for the same.

As regards the sentence it is urged that it is unduly severe, looking to the social positions of the accused or of the party injured. I am asked to reduce the sentence in consideration of the fact that the accused is a young man of 25 with a family, and the girl is a daughter of a day labourer, *i. e.*, of a low station in life. In *Queen* v. *Jhantah Noshyo* (3) where a similar remark was made by the Magistrate himself, it was held that the nature of punishment should be proportioned to the greater or less atrocity of the crime, to the conduct of the criminal, and to the defenceless and unprotected state of the injured female, whether that female were a low native or a high European. The evidence on record and particularly the medical evidence clearly shows the crime to be atrocious. The girl was a helpless victim and if one were to look to her cross-examination it is no wonder if she almost became unconscious while she was ravished by the accused. I do not think, under these circumstances, the accused could be said to have been sentenced to an unduly severe or long term of imprisonment. The sentence passed by the Trying Magistrate rather leans the other way, but I do not wish to disturb it.

I confirm the conviction and sentence passed in the case and dismiss the appeal

G. R. D. *Appeal dismissed.*

(1) (1905) 1 K. B. 551; 74 L. J. K. B. 311; 69 J. P. 189; 53 W. R. 494; 92 L. T. 393; 21 T. L. R. 288.

(2) (1896) 2 Q. B. 167; 65 L. J. M. C. 195; 60 J. P. 536; 44 W. R. 654; 74 L. T. 730.

(3) 6 W. R. 59 Cr.

EMPEROR *v.* SAGARMAL.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 12 OF 1924.
May 29, 1924.

Present:—Mr. Justice Newbould and Mr. Justice B. B. Ghose.

EMPEROR—PROSECUTOR

versus

SAGARMAL AGARWALLA—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 307—Reference by Sessions Judge—High Court, duty of—Unanimous verdict, when can be reversed—Punishment—Penal Code (Act XLV of 1860), ss. 465, 467, 471—Forgery—Offence, nature of.

Section 307 of the Criminal Procedure Code requires the High Court to give due weight to the opinion of the Sessions Judge and of the Jury after considering the entire evidence and then to convict or acquit the accused. It does not require the High Court to reconstruct the verdict of the Jury. [p. 149, col. 1.]

In giving due weight to the opinion of the Jury the High Court should always hesitate to reverse a unanimous verdict unless it holds it to be unreasonable. [*ibid.*]

The nature of the offence of forgery does not depend on the use to which the document is put. If it is used fraudulently or dishonestly and if it purported to be a valuable security, the punishment provided by section 467 and not that provided by section 465, Penal Code, would be that to which the accused would be liable under section 471. [*ibid.*]

Reference made by the Sessions Judge, Assam Valley Districts.

Messrs. *B. C. Chatterjee, N. K. Nag,* Babus *Satindra Nath Mukherjee* and *Prafulla Chandra Ghose*, for the Accused.

Babus *Kshitish Chandra Chakrabutty* and *Monmotha Nath Roy* (II), for the Complainant.

Mr. *P. C. Mitter*, for the Crown.

JUDGMENT.—The accused Sagarmal was tried before the Sessions Judge of the Assam Valley Districts on two charges, firstly, with having forged an *ekrarnama*, Exhibit 2, a valuable security purporting to have been executed by Kanai Lal on 21st January, 1905, and secondly, with having fraudulently and dishonestly used as genuine by filing in the Court of the Extra-Assistant Commissioner, Mr. S. Goswami, in a section 145, Criminal Procedure Code, proceeding in 1922 the *ekrarnama* Exhibit 2 purporting to have been executed by Kanai Lal on 21st January, 1905, which he knew or had reason to believe at the time of filing to be a forged document. The Jury returned a unanimous verdict of not guilty. The learned Sessions Judge disagreeing with the Jury's verdict on the second charge has thought it necessary to refer this case to this Court under the provisions of section 307 of the Code of Criminal Procedure.

The main facts of the case are as follows:—On the 21st November, 1904, Kanai Lal purchased a piece of land from Ram Chandra Brahmin for Rs. 1,000. On the 9th March, 1905, Kanai Lal died leaving a widow *Musammat* Gigi. Kanai Lal left several debts and Gigi executed a deed of sale in respect of this land to one Joy Narain. It appears that though the document executed was a valid deed of sale there was some contemporaneous verbal arrangement between the widow and Joy Narain that Joy Narain should hold the property as trustee for Kanai Lal's creditors and after paying off Kanai Lal's debts out of the profits from the property should restore it to the widow. Effect was given to this arrangement and on the 24th April, 1917, Joy Narain re-transferred the land to her. The land was in three plots occupied by different tenants. On one of those plots the tenant Ghanesyam had erected a mill. On the 18th August, 1920, the accused Sagarmal purchased the mill and Ghanesyam's interest in this plot. On the 1st March, 1921, Sagarmal sold to Nagarmal, the complainant, the property purchased from Ghanesyam. Nagarmal was given possession of the mill and it was arranged that possession of some other buildings in the property should not be delivered for three months. Sagarmal failed to keep his promise and on the 10th June, 1921, Nagarmal instituted a suit against Sagarmal for possession. On the 30th July, 1921, Sagarmal dispossessed Nagarmal from the mill by locking it up. Nagarmal then instituted proceedings under section 145, Criminal Procedure Code, and got possession of the mill and the other houses in this plot of land through the Court. Then on the 6th July, 1922, Sagarmal instituted fresh proceedings under section 145, Cri-

minal Procedure Code, in respect of the land on which the mill stood and in the course of these proceedings on the 18th October, 1922, he filed a document, Exhibit 2, which is the document alleged to be forged on which the present prosecution is based.

This document is an *ekrarnama* which purports to be executed by Kanai Lal on the 21st January, 1905. In it Kanai Lal acknowledges that Sagarmal had bought the land *benami* in his name and that it would be returned to Sagarmal after 20 years and during that period Kanai Lal would enjoy the land but would have no right to transfer the same by sale or otherwise. It also provides for re-entry by Sagarmal in the case of transfer. In the meantime Nagarmal had brought two civil suits against Sagarmal, one on the 10th June, 1921, which was decreed in Nagarmal's favour on the 10th May, 1922, after reference to arbitration. Then on the 15th November, 1922, he brought a second suit on the basis of a lease which he had obtained from the widow Gigi and that suit was decreed *ex parte* on the 4th January, 1923. When the document, Exhibit 2, was filed in the section 145 case, a few days later on the 24th October, 1922, a petition was filed on behalf of Sagarmal stating that there were good grounds for believing the *ekrarnama* to be a forgery and asking the Court to put its signature on both its sheets and to note the letters appearing in the water-mark of the cartridge paper of the second sheet.

The case for the prosecution rests on evidence which can be classified under three heads. The first is the direct evidence that the signatures on the document purporting to be those of Kanai Lal are not Kanai Lal's signatures. The second class of evidence relates to circumstances which make it improbable that the document was executed by Kanai Lal. The third class of evidence is evidence that from the water-mark on the second sheet of Exhibit 2, it appears that that piece of paper could not have been in existence in 1905.

As regards the first class of evidence we think that the learned Sessions Judge did not direct the Jury properly. Three witnesses have definitely deposed that they were acquainted with the signature of Kanai Lal and that the two signatures on Exhibit 2 which purported to be his are not in his handwriting. The first of these is Nagarmal, the complainant, who deposed that Kanai Lal was his uncle and that he often received letters from him and knows his signature and that the two signatures marked "2 (1) and 2 (2)" are neither of them his signatures. The second of these witnesses is Bholaram who deposed that Kanai Lal was his sister's husband and that he was his *gomastha* for 17 or 18 years. He has also deposed that neither of these signatures 2 (1) and 2 (2) were Kanai Lal's signatures. The third of the witnesses is Ram Protap who had business dealings with Kanai Lal and has deposed that he knows the signature of Kanai Lal and that Exhibits 2 (1) and 2 (2) are not his signatures. In dealing with this evidence the learned Sessions Judge has only referred to that of Bholaram's and has said to the Jury: "In any case I do not suppose that you will regard this part of the evidence as conclusive." It has been argued before us that this means that both the learned Sessions Judge and the Jury have rejected the evidence entirely. This is certainly not the correct interpretation of the learned Sessions Judge's remarks giving them their ordinary meaning. We think, it would have been better if he had told the Jury that they should consider this evidence and attach such weight to it as they thought fit and not suggested to them that it was not of much importance. In our opinion it is of considerable importance, though we agree to this extent with the Sessions Judge that a conviction of forgery could seldom be based solely on non-resemblance of handwriting. But when this evidence is considered with the other evidence in the case it strongly supports the case for the prosecution. In connection with this evidence there is also the evidence to prove the only specimen of Kanai Lal's handwriting which has been produced on either

side, Exhibit 15 (1), that is an entry in the *khata* produced by Ram Protap, and although on behalf of the defence it has been attacked as a spurious entry, we see no sufficient ground for doubting its genuineness. Our attention has been drawn to certain facts which are said to be suspicious, such as the fact that Kanai Lal did not add his caste Agarwalla to his signature, that the ink of the entry of which the signature is part is different to that of the entry of the account in the *khata*, that the stamp appears to have been regummed and that other persons had signed acknowledgments in the *khata* by signing right across the page. In our opinion, none of these are sufficient reasons for rejecting this evidence, when there appears no other sufficient reason for doubting the genuineness of the account book in which the entry is made. Explanations have been given as regards the form of the signature and the difference of the inks which to us appear satisfactory and the other objections seem to us trivial. We hold, therefore, that there is very strong evidence on the record that the signatures on this document are not those of Kanai Lal.

As regards the circumstances of the case the document in itself is one which it seems highly imporbable that Kanai Lal should have executed. We have never in our experience known a case of *benami* sale in which the *benamidar* was allowed to be in possession of the land to which he had no right for a period of 20 years. The property was of considerable value being situated in the town of Gauhati and no satisfactory reason has been given why Kanai Lal should have been allowed the benefit of this land for 20 years. It is suggested that the consideration was that he was to improve the land and induct tenants. But this, having regard to the nature of the land, would not be a sufficient consideration for the benefit to be enjoyed. Further it was not proved that the accused at that time was in such pecuniary difficulty that it was necessary for him to resort to *benami* transactions. The facts show that Kanai Lal himself was in difficulties and this makes it extremely improable that the accused should have chosen him as his *benamidar* at that time. It is further urged on behalf of the prosecution that had this document been genuine the accused could have asserted his right to possession at the time of the transfer to Joy Narain. We think there is some force in the contention on behalf of the accused that if this document were genuine it is possible that the accused might have been a consenting party to the arrangement with Joy Narain and, therefore, took no action in the matter. But this does not remove the initial improbability that such a document would have been executed. Another suspicious point is the conduct of the accused in allowing the second case instituted by Nagarmal to be decreed against him *ex parte* after he had taken adjournments for the purpose of filing a written statement. Had he really believed this document to be genuine, he would surely have defended that suit.

We now come to the evidence as to the water-mark in the second page of the document. This sheet of paper is what is known as cartridge paper which is sold by Government to the public. There is evidence that the water-mark letters A, Z were not in existence at the time in 1905 when the document is alleged to have been executed. The case for the prosecution is that since 1907 secret marks have been introduced in the water-marks on this paper and they have been varied from time to time so that the officers of the Controller of Stationery can say from an examination of the document the period when the paper of the document was issued. It has been proved by Mr. Coster, Deputy Controller of Stationery, that mark Z was first used in 1920. In support of this statement also the letter of the Controller, dated 19th December, 1919, to the paper manufacturers directing the use of this letter on water-marked papers manufactured during the year 1920 has been proved. The evidence of Mr. Coster has been attacked on two grounds, firstly, on the ground that he

has made contradictory statements, and secondly that a good deal of his evidence is irrelevant as he is not speaking from personal knowledge. We have been taken through the whole of Mr. Coster's evidence and we think that the attitude he adopted in the witness-box was unfortunate. He seems at first to have insisted on claiming privilege of not replying to questions and was not willing to give the assistance to the Court which he should have done. But his attitude was certninly not one which was unfavourable to the defence and we can see nothing that would justify us in thinking that he was not telling the truth in the definite statement which he did make.

As regards the second point it would appear that it is difficult to bring within the provisions of the Evidence Act certain portions of his evidence. But so far as the introduction of the letter Z from the commencement of 1920 is concerned the letter of the Controller to which we have referred is sufficient to establish the fact. Then Mr. Coster has definitely stated that secret marks were first introduced in 1907. That statement, he says, is based on a presumption from the letter, Exhibit 33, which was produced in original. In that letter the Controller asked the manufacturers of the paper to make arrangement that each sheet of paper shall bear a secret mark that the mark for preference should be a letter and the letter should be changed at intervals of six months and his office informed confidentially. It is urged that as this letter is one accepting tender of the manufacturers it does not necessarily follow that secret marks had not been in use beforehand. But the inference drawn by Mr. Coster is supported by other evidence on the record. The cartridge papers that were used for other documents in 1906 and 1907 were proved Exhibits 18 and 17 and on these no letter was found in water-marks. These were taken out at random from a large number of records produced from the Sessions Judge's record room and it has not been shown that on any cartridge paper used before 1907 was there any letter or other secret mark in the water-mark whereas in papers filed in 1908 a letter water-mark appears, it having been the letter B in that year. It would have been easy for the accused to have shown that a letter-mark if it had been in existence previously was to be found in some of these documents. But no attempt was made to do this. We hold on the evidence of Mr. Coster which is admissible that there can be no reasonable doubt that the second sheet of Exhibit 2 was not in existence in 1905.

We think the Jury were probably confused and did not properly appreciate the cumulative effect of the different classes of evidence. After taking their verdict the learned Sessions Judge asked them a further question as he intended to refer this case. He asked them to give their reasons for their doubt and their reply was: "To our mind the only part of the evidence that seems to bear on the question is the circumstantial part of it and that does not seem conclusive." It would appear, therefore, that the Jury entirely overlooked the direct evidence to which we have already referred.

On behalf of the accused considerable reliance was placed on the fact that the endorsement on the back of the stamp which constitutes the first sheet of Exhibit 2 indicates that the stamp was sold to Kanai Lal. It seems very doubtful whether this entry is any evidence of that fact. But it is unnecessary to discuss this point as it appears at the trial not to have been disputed that this stamp may have been actually sold to Kanai Lal. What is pointed out by the prosecution is that the stamp of five rupees is not the proper stamp for the *ekrarnama* written on it. It is further suggested that such a stamp might have been among Kanai Lal's papers unused and that the accused had access to those papers. This appears to have been so having regard to the contention that the accused was a party to the arrangement with Joy Narain and there is direct evidence that the accused's brother actually took some interest in the widow's affairs. We think that it is extremely probable that this stamp was found by the accused and the finding of this stamp had suggested to him the idea of forging this document.

It is further contended that there is no evidence that the accused used the document knowing it to be forged. It was not to be expected that the prosecution should give direct evidence on this point. But it is impossible to conceive that the accused could have received this document acknowledging a *benami* transaction in his favour believing it to be genuine if in fact there never had been such a *benami* transaction. It is also contended that if we hold that the accused used the document we should hold that he is liable for the offence punishable under section 471 read with section 465 and not for an offence punishable under section 471 read with section 467. It is said that he did not use the documents relying on it as a valuable security. Whether he did so or not the nature of the offence does not depend on the use to which the document was put. If it was used fraudulently or dishonestly and if it purported to be a valuable security the punishment provided by section 467 and not that provided by section 465 would be that to which the accused would be liable under section 471.

It is further contended that having regard to the unanimous verdict of the Jury and to the fact that we have held that there has been some mis-direction by the learned Sessions Judge, we should put ourselves in the place of the Jury and find as to what their verdict would have been if they had been rightly directed. This argument is based on a mis-conception of the provisions of section 307, Criminal Procedure Code. That section requires us to give due weight to the opinion of the Sessions Judge and of the Jury after considering the entire evidence and then to acquit or convict the accused. It does not require us to attempt to reconstruct the verdict of the Jury. In giving due weight to the opinion of the Jury we should always hesitate to reverse a unanimous verdict unless we hold it to be unreasonable. In the present case we hold that that verdict having regard to the cumulative effect of the evidence is not a reasonable one and that there cannot be any doubt as to the accused's guilt.

We accordingly accept this reference. The accused Sagarmal is acquitted of the first charge that of having committed the offence of forging the *ekrarnama*, Exhibit 2, punishable under section 467, Indian Penal Code. We convict him of the offence of fraudulently and dishonestly using as genuine the *ekrarnama*, Exhibit 2, knowing or having reason to believe it to be a forged document, and under section 471 read with section 467, Indian Penal Code, we sentence him to four years' rigorous imprisonment.

The accused must surrender to his bail and serve out this sentence.

K. S. D. *Reference accepted.*

MADRAS HIGH COURT.

CRIMINAL REVISION No. 900 OF 1923.
(CRIMINAL REVISION PETITION No. 719 OF 1923.)
April 15, 1924.
Present:—Mr. Justice Spencer.
In re NARAYANA AND OTHERS—ACCUSED—PETITIONERS.

Penal Code (Act XLV of 1860), s. 448—House trespass—Criminal intent—Bona fides.

The offence of house trespass is not complete unless there is an intent to commit an offence or to intimidate, insult or annoy some one in possession of property. It is not enough that the accused should know that his act is likely to have such an effect. [p. 150, col. 2.]

When the action of an accused is open to two constructions, one criminal and the other honest, the Court should not assume that it was criminal. [p. 150, col. 2; p. 151, col. 1.]

On information that the complainant had a pot of toddy in his house in excess of the quantity which one individual may possess without license, the accused, a village *taliari*, went inside the house, brought out the pot and placed it on the verandah and remained guarding it, till the Police, to whom he sent a message about the commission of the offence, arrived. On revision against conviction for house trespass :

Held, that although the accused as a *taliari* had no authority to seize and detain liquor which he believed was liable to confiscation under the Abkari Act, his conduct in entering the house was *bona fide* and without any criminal intent, and his conviction could not stand. [p. 150, col. 1.]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898,

praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Kurnool, in Criminal Appeal No. 27 of 1923, preferred against the judgment of the Court of the Stationary Sub-Magistrate, Kurnool, in C. C. No. 61 of 1923.

Mr. *S. Venkatesa Iyengar*, for the Petitioner.

The Public Prosecutor, for the Crown.

ORDER.—The facts of this case are not disputed. They are that a pot of toddy in excess of the quantity which one individual may possess without license was brought by a woman named Hanumakka to the house of the complainant K. Lakshmiah. The three petitioners and one man who has been discharged came to the complainant's house. The first petitioner who, according to the Revenue Inspector, was an acting *taliari*, went inside the house and brought out the pot and placed it in the verandah, and all three petitioners remained guarding it until the Police, to whom they sent a message about the commission of an Abkari offence, arrived. When the Sub-Inspector of the Police arrived, he completely turned the tables on the petitioners and prosecuted them for house trespass. They were convicted, and when they appealed to the Sub-Divisional Magistrate, their appeal was dismissed. Now a private individual has no authority to seize and detain liquor which he believes to be liable to confiscation under the Abkari Act (Madras Act I of 1886). Only officers of a certain rank of the Revenue, Police and Abkari Department are empowered to enter places where liquor is illicitly sold or stored. Technically it does not signify that the first petitioner was acting as substitute for an absent *taliari* or that the third petitioner's appointment as *taliari* had ceased two days before the case. Even if they had been permanent *taliaris* of the village, they would have had no legal right to do what the first petitioner is said to have done, *viz.*, gone inside a private house without the permission of its owner and fetched out a pot of toddy.

But the facts (1) that an offence under the Abkari Law was apparently committed by the complainant, (2) that the petitioners may have thought that it was a *taliari's* duty to stop illicit transport and possession of liquor and (3) that they sat and watched the pot till the Police came, throw a flood of light on the question whether they acted with *bona fides* or with a criminal intention.

According to the decision of the majority of the Full Bench in *Vullappa* v. *Bheema Row* (1) the offence of trespass is not complete unless there is an intent to commit an offence or to intimidate, insult or annoy some one in possession of property. It is not enough that the accused should know that his act is likely to have such an effect. The complainant deposed that the petitioners intended to annoy him because he was a witness in a case against one Narasimhayya who according to him is their friend, but he contradicted himself on the point whether he had already deposed against Narasimhayya or whether he was about to do so. His statement that the accused announced that they had taken the toddy because he had given evidence against Hanumayya. is improbable and is not corroborated by the woman who brought the toddy, or by the complainant's son, whose version is that the accused offered to return the pot of toddy if complainant did not give evidence against Narasimhayya. The complainant's statement (Exhibit III) that the petitioners objected to the pot being taken away till the toddy was measured shows that their real object was to see that the Abkari offence which they had detected was not hushed up.

The Stationary Sub-Magistrate has not recorded a finding as to the intention of the accused. The Sub-Divisional Magistrate observed that there was no necessity for the accused to stop at the complainant's house with the toddy till the Police came if it were not to annoy him. I entirely disagree. I think their remaining there indicated their good faith. When the action of the accused was open to two constructions, one criminal and the other honest, I think that the Appellate Court

(1) 43 Ind. Cas. 578; 41 M. 156; 6 L. W. 794; 33 M. L. J. 729; (1918) M. W. N. 81; 19 Cr. L. J. 162 (F. B.).

should not have assumed that it was criminal.

I, therefore, set aside the convictions and direct the fines imposed on the accused to be refunded.

V. N. V. *Conviction set aside.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 14 OF 1924.

February 18, 1924.

Present :—Mr. Kennedy, A. J. C., and Mr. Rupchand Bilaram, A. J. C.

TILLIBAI—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 25—Excise Officers, whether Police Officers.

Excise Officers are not Police Officers within the scope of section 25 of the Evidence Act.

Ah Foong v. *Emperor*, 48 Ind. Cas. 504; 46 C. 411 at p. 419; 22 C. W. N. 834; 28 C. L. J. 105; 20 Cr. L. J. 24, followed.

Application to revise the order of the First Class Magistrate, Guni, dated the 14th November, 1923.

Mr. *Thawerdas Rahoomal*, for the Accused.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.—This is a revisional application and all that we have to see is whether on the facts found by the learned Magistrate the conviction is proper.

The facts found by the learned Magistrate are that there was found in the open compound of accused Tillibai a large jar containing excisable articles. Accused does not seem to have denied that they were excisable articles, therefore, any technical deficiency of proof that they were excisable article is not of very much importance.

Now there is a presumption that a person who is found in possession of excisable articles is so in possession in circumstances in which it is possible to convict him under section 43 (1) (*a*). The consequence, therefore, is that the question as to whether the accused was actually in possession of the jar was a vital element in the case. The learned Magistrate relied especially on the conduct of the accused when the search began. So far as this question we have nothing to say except that the conduct of the accused is certainly consistent with her being in possession of this pot. Further he relied upon the statement made to the Investigating Officer and *Mashirs* at the time when the search was made, in consequence of which search this property was found. Now, it appears certain that if the investigating persons had been Police Officers, that evidence would not have been admissible under section 25 of the Indian Evidence Act. But it appears that the Investgating Officers were as a matter of fact, the Abkri Inspector and peon and the *Mashirs* and nothing has been pointed out which extends the operation of section 25 to an Abkari Inspector and Abkari peons. On the contrary there is a case in *Ah Foong* v. *Emperor* (1), see remarks at page 419,* which is authority for the proposition that Abkari peons and officers are not to be considered as Police Officers for the purposes of section 25 of the Evidence Act. There is also nothing to show that any undue pressure was put upon the woman and in that case, the learned Magistrate was quite right in taking into consideration the statement made by this woman Tillibai at the time when the goods were found in her courtyard. And if that statement be believed she claimed ownership though of course innocent onwership over the contents of the jar. She does not demonstrate that the ownership was innocent. Thus we cannot say that there was no legal evidence sufficient on which to base finding that Tillibai was in criminal possession of excisable articles and consequently we must hold for the purposes of this application that the learned Magistrate was right in his finding that she had committed the offence under section 43 (1) (*a*) of the Bombay Abkari Act, 1878.

We, therefore, reject this application.

P. B. A. *Application rejected.*

(1) 48 Ind. Cas. 504; 46 C. 411 at p. 419; 22 C. W. N. 834; 28 C. L. J. 105; 20 Cr. L. J. 24.

* Page of 46 C.—[*Ed.*]

EMPEROR v. NAIPAL.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 13 OF 1924.
May 13, 1924.
Present:—Mr. Wazir Hasan, J. C.
EMPEROR—COMPLAINANT
versus
NAIPAL—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 191, 476—Magistrate instituting proceedings—Jurisdiction to try case—Omission to inform accused of privilege of transfer.

Where a Magistrate instituting proceedings under section 476, Criminal Procedure Code, takes cognisance of the offence himself without informing the accused under section 191 of the Code that he is entitled to have his case tried by another Court, the omission is more than a mere irregularity and vitiates the whole trial.

Emperor v. *Chhedi*, 28 A. 212; A. W. N. (1905) 258; 2 A. L. J. 745; 2 Cr. L. J. 809, relied upon.

Case reported by the Sessions Judge, Fyzabad, under section 438 of the Criminal Procedure Code.

ORDER.—This is a Reference under section 438 of the Code of Criminal Procedure by the Sessions Judge of Fyzabad. Naipal was convicted under section 171 (*f*) of the Indian Elections Offences and Inquiries Act (XXXIX of 1920) and sentenced to pay a fine of Rs. 35 or in default to undergo one month's rigorous imprisonment.

The learned Judge is of opinion that the trial of Naipal and consequently his conviction by the Joint Magistrate, Mr. A. J. Hopkinson, was illegal for the reason that the Magistrate had himself instituted the criminal proceedings against Naipal under section 476 of the Code of Criminal Procedure and, therefore, he was debarred from trying the accused under section 191 of the same Code unless and until he had informed the accused before taking any evidence that he was entitled to have his case tried by another Court. It is admitted that no such information was given to Naipal. According to the decision in the case of *Emperor* v. *Chhedi* (1) this omission is more than an irregularity and vitiates the whole trial.

I, therefore, accept the recommendation of the learned Judge, set aside the conviction of Naipal and direct that the fine, if paid, will be refunded to him. The District Magistrate may, however, be informed that if he desires to take any further proceedings against Naipal he may do so according to law.

G. H. *Conviction set aside.*

(1) 28 A. 212; A. W. N. (1905) 258; 2 A. L. J. 745; 2 Cr. L. J. 809.

DARYALAL v. EMPEROR.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEALS NOS. 194 & 198 OF 1923.
December 11, 1923.
Present:—Mr. Kennedy, A. J. C.
DARYALAL AND ANOTHER—ACCUSED—APPELLANTS
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 562, applicability of—Court, what must consider.

Before applying section 562 of the Criminal Procedure Code, the Court must consider whether there is a good case for its application or not, and must guard against two things, *viz.*:—one, danger to the public and the other, danger to the accused himself, which may result from the applicability of the section. [p. 153, col. 1.]

Where a juvenile offender has shown criminality rather than mere thoughtlessness and a general character of craft and deceit, section 562 of the Criminal Procedure Code should not be applied. [p. 153, col. 2.]

Appeal against the judgment of the City Magistrate, Karachi, dated the 29th October, 1923.

Mr. *Motiram Idanmal*, for the Appellants.

Mr. *Partabrai D. Punwani*, 2nd Assistant Public Prosecutor, for the Crown.

ORDER.—In this case one Dhanbai, widow of Khimji, was in possession of considerable property which she kept in a safe which was originally in her house. About three years ago she lost one set of keys of this safe. She, therefore, removed the safe to the shop of a friend which shop was generally occupied by the friend or his relation. Unfortunately both the friend and the relation were

away for some days recently and in that time the shop was broken open and the safe was unlocked and several thousand rupees worth of property was removed. A portion of this property was ultimately traced to the house of Gangaram where it was found concealed in some bedding. Gangaram is the father of the appellant, Daryalal, who is a boy of about 17 years of age. Daryalal eventually pleaded guilty; he has not made a very truthful statement but on his own admission it appears that he under the influence of the appellant No. 1 Khatoo, having accidentally come into possession of these keys stole this property from the safe and concealed part of it in the bedding. As regards the guilt of Daryalal, therefore, inasmuch as he has pleaded guilty there can be no doubt, and his appeal is only as to the sentence.

Before dealing with that question of sentence, I must dispose of the appeal of Khatoo as it would certainly seem that the evidence against him is not sufficient. No part of the property was found with him and the direct evidence of his connection with the crime is only the evidence of his co-accused Daryalal. There is in fact no corroborative evidence and I do not think that the evidence of Daryalal in itself justifies the conviction of Khatoo. As far as Khatoo is concerned, his appeal must, therefore, be admitted and the conviction and sentence set aside and he must be acquitted and discharged.

As regards the offence of Daraylal he has been sentenced to one year, and the sentence is to be served in Dharwar, and I am urged in appeal to apply the provisions of section 562. I daresay section 562 may be a very valuable section if properly applied; and it may very aften happen that a juvenile offender who is sentenced to Jail for a short period of imprisonment for a trivial offence may be practically ruined for life, whereas he would be saved by the due application of section 562. But in passing a sentence at least two things are necessary, to guard against, *viz.*, one danger to the public and the other danger to the accused himself. The public must not be led to suppose that all juvenile offenders may commit any crimes that they like without any fear of punishement because that of course would be an incentive to criminal parents to initiate their children into a life of crime. And even children themselves being immune from the fear of punishment might be tempted to go astray from the unpleasant paths of virtue into paths of crime. It is obvious, therefore, that before applying section 562 one must consider whether there is a good case for its application or not. In the present case there can be no doubt that the dictum of *malitia supplet ætatem* applies becuse the crime committed by Daryalal is by no means a simple crime such as is committed by children out of mere thoughtlessness rather than criminality, but it shows a singular combination of design and ingratitude, and a general character of craft and deceit, which in the case of an adult would surely call for a very severe punishment indeed. If an offence of this kind is not to be punished it is difficult to say how any juvenile offender could ever be punished for any offence short of murder. That is as far as the public is concerned. As regards Daryalal himself, I am by no means certain that his home influences are at all good. His father Gangaram has apparently been guilty of doubtful, if not criminal, behaviour in respect of property belonging to other members of the family and on his own admission Drayalal has made a friend of a recidivist convict in Khatoo who is under this order in appeal free to consort with him. On the whole it looks very doubtful whether Daryalal will be free from danger without being removed from the temptations of Karachi for as long a period as possible. I, therefore, dismiss his appeal.

P. B. A. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 166 OF 1924

April 3, 1924.

Present:—Mr. Wazir Hasan, J.C.

JANKI—COMPLAINANT—APPLICANT

versus

Thakur SHEO NARAIN SINGH AND OTHERS—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Complainant or his Pleader disallowed to examine witnesses—Court examining witnesses itself—Reasonable apprehension—Transfer of case.

Generally, it is not the province of the Court to examine witnesses, and as a rule the Court should leave the witnesses to the Pleaders, to be dealt with as is provided for in section 138 of the Evidence Act or in section 495, sub-section (3), of the Code of Criminal Procedure.

Where a Magistrate does not permit the complainant or his Pleader to examine his witnesses but proceeds to examine them himself, the procedure adopted by him is one that is likely to raise a reasonable apprehension in the mind of the complainant that he will not obtain a fair trial in his Court and constitutes a sufficient ground for transfer of the case to some other Court.

Application for transfer of a case from the Court of a Magistrate.

Mr. *H. C. Dutt*, for the Applicant.

JUDGMENT.—This is an application under section 526 of the Code of Criminal Procedure asking for the transfer of a criminal proceeding instituted by the applicant against four persons under sections 295 and 355 of the Indian Penal Code and section 106 of the Code of Criminal Procedure. The Sub-Divisional Magistrate, in whose Court the complaint was filed, instituted proceedings under section 202 of the Code of Criminal Procedure. For the purposes of that section the case was taken up at the first instance on the 5th February 1924. On that date the applicant appeared before the Sub-Divisional Magistrate accompanied by a legal practitioner. His witnesses, whom he wanted to produce in support of the complaint, were not permitted to be examined by him or his Pleader. The Court took the witnesses into its own hands and proceeded with their examination. The case was again heard on the 4th March, 1924, and the procedure in respect of examination of the complainant's witnesses adopted on the preceding hearing was repeated on this date. Generally it is not the province of the Court to examine witnesses and as a rule the Court should leave the witnesses to the Pleaders to be dealt with as is provided for in section 138 of the Indian Evidence Act. Section 495, sub-section (3), of the Code of Criminal Procedure also tends in the same direction. The procedure adopted by the learned Magistrate in this case has given rise to a reasonable apprehension in the mind of the complainant, that he will not obtain a fair trial of his case in the Court in which it is now pending. Notice of this application was issued to the District Magistrate and to the Government Pleader of this Court. No appearance is made on their behalf at the hearing of this application.

I, therefore, order that the case be transferred from the Court in which it is now pending to some other Court sitting in Lucknow and competent to try it. The District Magistrate will name the said Court.

G. H. *Application allowed.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REPORT No. 7 OF 1924.

February 18, 1924.

Present:—Mr. Kennedy, A. J. C., and Mr. Rupchand Bilaram, A. J. C.

EMPEROR—PROSECUTOR

versus

MANU *walad* ISMAIL—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 112, 118—Prevention of offences—Sureties, production of—Imposition of fresh conditions—Good faith of sureties—Court, jurisdiction of.

The object of Chapter VIII of the Criminal Procedure Code is not the punishment of a suspect for past unproved crimes but to prevent him from committing offences and to afford him an opportunity of reforming himself. [p. 155, col. 2.]

When once a Magistrate has, while passing orders under section 112, Criminal Procedure Code, imposed conditions as to the nature of sureties and the amount of their liability, he

EMPEROR *v.* MANU.

cannot, when making the order absolute under section 118 of the Code, vary his previous order and impose fresh conditions, and he cannot reject as unfit sureties who comply with conditions originally laid down and are not personally unfit. [*ibid.*]

Muhammad Ibrahim v. *Emperor*, 27 Ind. Cas. 148; 8 S. L. R. 173; 16 Cr. L. J. 100, relied upon.

Sureties are not unfit because it is alleged that the suspect cannot be controlled by them, nor can it be made a condition precedent for acceptance of sureties that they should show their good faith and influence over the suspect, *e.g.*, by producing his father who is absconding. [p. 155, col. 1.]

Report under section 438, Criminal Procedure Code, by the Sessions Judge, Hyderabad (Sind), dated the 7th January, 1923, against the order of the District Magistrate, Hyderabad, confirming the order of the Sub-Divisional Magistrate, Tando.

Mr. *T. G. Elphinston*, Public Prosecutor, for the Crown.

JUDGMENT.—In this case the Sub-Divisional Magistrate, Tando, rejected the sureties tendered by the suspect Manu, firstly, on the ground that the suspect was a notorious thief and the control of the sureties over him will, therefore, not likely be effective or give protection to the public, and secondly, that the father of Manu who was one of the leaders of the gang had absconded and unless the sureties showed their good faith and the influence they could exert by producing the father, he declined to release the son and allow him to remain under their control. In appeal the second ground found favour with the District Magistrate, Hyderabad, and he confirmed the action of the Sub-Divisional Magistrate. This matter has come before us on a reference made by the Sessions Judge of Hyderabad.

In the order issued by the Sub-Divisional Magistrate under section 112 of the Criminal Procedure Code, which was subsequently made absolute the suspect was required to find two sureties in the sum of Rs. 500 each, the sureties to be men of position and respectability, living in the neighbourhood and belonging to the land holding class. It is admitted that the sureties offered by the suspect comply with this somewhat high standard imposed by the learned Sub-Divisional Magistrate.

In the case of *Muhammad Ibrahim* v. *Emperor* (1) it was pointed out by this Court that if the sureties offered come fairly within the terms of the order under section 112 they can only be rejected on this ground that they are personally unfit, and that it is obviously unfair to a suspect to call on him to produce sureties of a certain class and standard and then to reject the persons offered on certain arbitrary grounds. It is not alleged that the sureties offered in this case are *badmashes* themselves or are personally unfit to be accepted as such. Nor is there any allegation that they have been terrorized by the suspect and are offering themselves as sureties under threats of coercion. It has been often laid down and it seems desirable to repeat once again, that the primary object of Chapter VIII of the Criminal Procedure Code is not the punishment of a suspect for past unproved crimes but to prevent him from committing offences and to afford him an opportunity of reforming himself. Section 112 requires the Magistrate to impose reasonable conditions as to the nature of the sureties and the amount of their liability. Section 118 bars the right of the Magistrate to impose fresh conditions at the time of making his order absolute. *Ipso facto* it follows that it is not open to the Magistrate to reject sureties as unfit because they do not comply with certain arbitrary conditions which were not included in the order under section 112. A somewhat high standard was fixed in this case by the learned Magistrate on account of the notorious character of the suspect. It is not open to him to say arbitrarily that though the sureties answer the conditions imposed by him, they are unfit as the suspect cannot be controlled by them. This is tantamount to saying that as the suspect is a notorious scoundrel, he must be consigned to Jail and denied the opportunity of reforming.

(1) 27 Ind. Cas 148; 8 S L R. 173; 16 Cr. L. J. 100.

The second ground is more arbitrary than the first. In making it a condition precedent to the accepting of the sureties that they should show their good faith and influence over the suspect by poducing his hoary headed father who was absconding, is again tantamount to punishing the son for the sins of his father and to introducing in Criminal Procedure Code supplimentary provisions for securing the apprehension of absconding offenders.

We are of the opinion that the learned Sub-Divisional Magistrate has failed to exercise the discretionary power vested in him in a proper and reasonable manner and we accordingly make this Rule absolute and set aside his order rejecting the sureties and order that the said sureties be accepted.

P. B. A. *Rule made absolute.*

PATNA HIGH COGRT.

DEATH REFERENCE No. 6 OF 1923
WITH
CRIMINAL APPEAL No. 20 OF 1923
AND
DEATH REFERENCE No. 7 OF 1923
WITH
CRIMINAL APPEALS Nos. 21 AND 22 OF 1923.
March 12, 1923.

Present:—Justice Sir B. K. Mullick, Kt., and Mr. Justice Adami.

IN DEATH REFERENCE No. 6 OF 1923
WITH
CR. A. No. 20 OF 1923.
LALJI SINGH AND OTHERS—ACCUSED—APPELLANTS
versus
EMPEROR—RESPONDENT.
IN DEATH REFERENCE No. 7 OF 1923
WITH
CR. A. Nos. 21 AND 22 OF 1923.
NARESHI SINGH AND OTHERS—ACCUSED—APPELLANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 97, 105, 147, 148, 149, 302—Unlawful assemoly—Common object—Murder—Right of private defence.

Several heads of cattle belonging to the party of the complainant trespassed into a maize field belonging to the party of the accused. The members of the latter party captured the cattle and began to drive them towards the cattle pound, whereupon the members of the opposite party, armed with *lathis*, etc., set upon them and rescued the cattle. Upon this there was a serious fight which resulted in the death of several men on both sides. The fight took place in a field belonging to the party of the accused:

Held, (1) that as the rescue of the cattle amounted to theft under the Penal Code, apart from an offence under the Cattle Trespass Act, the right of private defence was available to the party of the accused; [p. 162, col. 1.]

(2) that if the men of the party of the complainant entered upon the field, belonging to the party of the accused, with the object of committing an assault, they were guilty of the offence of criminal trespass and the members of the party of the accused had the right to eject them by such force as was necessary; [*ibid.*]

(3) that there was nothing wrong on the part of the party of the accused in awaiting the coming of their antagonists and in maintaining their possession of the cattle which they had lawfully seized; [p. 161, col. 2.]

(4) that it was not the duty of the party of the accused to release the cattle and complain to the authorities. [*ibid.*]

Where possession is undisputed or where there is no time to seek the aid of the authorities, there is no obligation upon a person entitled to exercise the right of private defence and to defend his person or his property, to retire from the field merely because his assailant threatens him with violence. [p. 161, col. 2.]

Kabir-ud-din v. *Emperor*, 35 C. 368; 7 C. L. J. 359; 12 C. W. N. 384; 7 Cr. L. J. 256; 3 M. L. T. 385, distinguished.

A man acting under an apprehension of death cannot be expected to judge too nicely the force of his own blow. He is not bound to modulate his defence step by step according to the attack, before there is reason to believe that the attack is over; he is not obliged to retreat but may pursue his adversary till he finds himself out of danger, and if in a conflict between them, he happens to kill, such killing is unjustifiable. [p. 162, col. 2.]

If the members of an assembly act with the common object of exceeding the right of private defence, then they are not only all generally guilty of rioting but also of the particular offence constituted by such excess of user. [*ibid.*]

An assault is a crime except under certain special circumstances. But in one sense criminal force is a continuing wrong and there is a limit where the plea of justification ceases to operate and the liability to punishment revives; if one member in prosecution of the common object of an assembly exceeds that limit every other member shares with him the guilt of his act. [p. 162, col. 2; p. 163, col. 1.]

LALJI SINGH *v.* EMPEROR.

Death reference with criminal appeal from a decision of the Sessions Judge, Saran, dated the 3rd February, 1923.

CR. A. No. 20 OF 1923.

Messrs. *Hasan Imam*, *Naimatullah*, and *Jafar Imam*, for the Appellants.

The Government Advocate and Assistant Government Advocate, for the Crown.

CR. A. NOS. 21 AND 22 OF 1923.

Messrs. *Manuk*, *G. C. Pal*, *H. P. Sinha* and *Nageshwar Prasad*, for the Appellants.

The Government Advocate and Assistant Government Advocate, for the Crown.

JUDGMENT.

DEATH REFERENCE NO. 6 OF 1923
WITH
CR. A. NO. 20 OF 1923.

Mullick, J.—About 8 A. M. on the 11th August, 1922, a serious fight took place between the inhabitants of *Mauza* Gopalpur on the one hand and *Mauzas* Chainpurwa and Naraon on the other resulting in the death of five men, namely, Doman Ahir, Mahabir Ahir, Sheogulam Ahir, Jangi Ahir and Bhirgu Mahto on the Gopalpur side and three men, namely, Deonandan Singh, Kamla Singh and Deepan Singh on the other side. Among the wounded were also Mukhram Singh, Kamla Singh, Prem Narain Singh, Pokhan Ahir and Ambica Ahir on the Gopalpur side and Narayan Singh and Sheobaran Singh on the Chainpurwa and Naraon side.

Gopalpur, Chainpurwa and Naraon are all villages within the jurisdiction of Police Station Garka, which is six miles from Gopalpur, but instead of going to their own Police Station Mukhram Singh of Gopalpur and Ram Andeshi Singh of Chainpurwa went by train to Chapra and appeared at the Police Station there at 1-15 P.M. and lodged First Informations giving their respective versions of the occurrence.

Mukhram Singh's information was to the effect that nine buffaloes and cows belonging to Birchi Singh of Chainpurwa and Lalji Singh of Naraon had trespassed into his maize and *raher* field and that while he accompanied by his co-villagers, Bhirgu Mahto, Prem Singh and Narsing was driving them towards the pound at Santa, 60 to 70 men of the opposite party armed with *lathis*, spears, *garasas* and *pherasas*, set upon them and rescued the cattle, and in the course of the attack caused injuries to the persons mentioned above.

Ram Andeshi Singh's account was that owing to long standing enmity some Ahirs of Gopalpur were cutting Deonandan Singh's paddy, that Deonandan Singh and his son Kamla succeeded in catching an Ahir named Binda, that thereupon 100 to 150 men from Gopalpur came up and attacked Deonandan and Kamla, who were re-inforced by a number of Chainpurwa and Naraon men and that a fight resulted in the course of which Deonandan and others of his side received serious injuries and Binda was rescued. Deonandan's paddy field in question is about 300 steps from the Local Board Road to Santa which runs north and south and separates Naraon from Gopalpur. Mukhram's maize field is a little to the south of the road; to the west of it is the paddy field of one Chamru and to the west of it again is the orchard of Mukha Singh; north of this orchard are the fields of Jangi Ahir, Chirkut Ahir and Pokhan Ahir.

The Police on arrival in the village on the night of the 11th August found copious marks of blood in the orchard and in the *parti* fields of Chirkut and Pokhan. It was conclusively proved at the trial that the fighting took place in these fields and that the casualties occurred there. On the other side of the road in the field of one Rambhajan the Police found marks of the trampling of many feet and north-west of this field is the orchard of Pertap Singh, where, according to the Gopalpur men, their assailants halted after the fight.

On the Gopalpur side Doman, Mahabir and Sheogulam are alleged to have died on the spot where they fell. As for Bhirgu and Jangi they were taken by train to Chapra by Mukhram and some others and their dying declarations were recorded in hospital at 2-25 and 2-40 P.M. respectively and they died there later in the day.

By the same train went Ram Andeshi with Deonandan's body and with Kamla and Sheobaran, two of the injured men. Kamla's dying declaration was recorded in Chapra hospital at 2-35 P. M. and he also died a few hours later. Sheobaran also made a dying declaration but he recovered and is one of the Chainpurwa accused.

It appears that the train got into Chapra some time between 11 and 12 and that Mukhram went straightway to two *Mukhtars*, named Sukhdeo Narain and Ram Lal. The former prepared a draft complaint which the latter copied out and presented before the Deputy Magistrate of Chapra. The other side did not file any complaint, but both parties appeared at 1-15 P.M. at the Police Station and lodged formal First Informations. Maulvi Zahiruddin, the Sub-Inspector of Garkha, who happened to be at that time at the Chapra Police Station on some business, recorded the statement of Mukhram Singh while the Sub-Inspector of Chapra recorded the statement of Ram Andeshi, and a number of accused on either side were arrested by the Police immediately after these First Informations were recorded.

After recording the First Information, Zahiruddin appears to have gone by motor car to Santa and to have found at the Railway Station the dead body of Deepan Singh one of the Chainpurwa men which the Chainpurwa men were just taking to Chapra. From the Railway Station he went by boat to Gopalpur and found every house in the village deserted by the male occupants with the exception of the *chaukidars*.

The result of the Police investigation was that the Sub-Inspector found that Mukhram Singh's information was substantially true and on the 6th September, 1922, he sent up for trial 22 men from Chainpurwa and Naraon for offences under sections 147, 148 and 302 read with 149, Indian Penal Code, but his superior officers being of opinion that the accused in the counter-case should also be sent up for trial he on the 18th October, sent up 19 of the Gopalpur men for trial for similar offences.

The Sessions Judge began the trial of the former case on the 3rd January, 1923, and concluded the hearing on the 16th January. He began the other case on the 23rd January and concluded the hearing on the 31st January. On the 3rd February, 1923, he delivered judgment in both cases. Out of the 20 men on the Chainpurwa and Naraon side, who were committed for trial, the Sessions Judge acquitted five and sentenced the remainder under section 302 read with section 149, Indian Penal Code as follows: Narayan Singh and Lalji Singh to death; and Ram Andeshi Singh, Birchi Singh, Rambaran Singh, Suraj Singh, Sheobaran Singh, Hazari Singh, Sheonandan Singh, Khuba Ahir, Naresh Singh, Sahdeo Singh, Chanderdeo Tewari and Jwala Singh to transportation for life. Out of the 18 men in the counter-case the learned Judge acquitted nine and sentenced the remainder under section 302 read with section 149, Indian Penal Code, as follows: Nareshi Singh to death, and Kamla Singh and Mukhram Singh, Narsingh Singh, Prem Narain Singh, Subhag Singh, Pokhan Ahir, Ambika Ahir and Jamuna Singh to transportation for life.

The accused in the former case have preferred Appeal No. 20 (Death Reference No. 6) and those in the latter have preferred Appeals Nos. 21 and 22 of 1923 (Death Reference No. 7 of 1923).

Before proceeding to deal with each appeal separately, it is necessary to observe that neither the Public Prosecutor nor the learned Judge nor in one case the Assessors seem to have believed the respective accounts of either party regarding the origin of the fight. The Police were inclined to believe the "*cherai*" (grazing) story but in the Sessions Court the Public Prosecutor appears to have boldly told the Court that he would not support either that story or the paddy cutting story and he set up altogether a new theory, namely, that both sides by agreement had fought a pitched battle. The learned Judge has accepted that view with the result that a situation of some difficulty has arisen before us.

In the case against the Chainpurwa and Naraon men, the accused cross

examined the prosecution witnesses in order to show that their story as to the grazing and the capture of cattle was false, but they did not call any evidence to show that their own account as to the paddy cutting was true. Some of them, however, went to considerable trouble to call evidence to prove *alibis*.

In the counter-case, the Gopalpur men took the same course and one of the Assessors was inclined to believe the story of paddy cutting set up by Ram Andeshi.

Before us the learned Counsel for the appellants in both appeals have had a somewhat easy task in overthrowing the finding of the learned Judge that there was a premeditated and preconcerted fight, for the simple reason that there is no evidence whatsoever upon which such a finding can be based. The learned Judge in the case against the Chainpurwa men relies on the evidence of prosecution witness Sukan Ahir, but that evidence, in my opinion, proves very little. It merely shows that the two sides were at enmity with each other and that a fight did take place. It altogether fails to show how the fight originated and it cannot warrant the inference that the parties turned out by agreement to have a fight merely for the sake of fighting.

Mr. Hasan Imam on behalf of the Chainpurwa and Naraon men and Mr. Manuk on behalf of the Gopalpur men, therefore, both contend that as the learned Judge's finding cannot be supported and as he himself has disbelieved the prosecution story in both cases the convictions cannot possibly be maintained.

The learned Gevernment Advocate, however, takes up the following position. He agrees with the Police in accepting the *cherai* theory and contends that the conviction of the Chainpurwa and Naraon men is correct on the ground that they formed an unlawful assembly with the common object of assaulting the opposite party who had lawfully seized their cattle.

With regard to the counter-case, the learned Government Advocate admits that the allegation of paddy cutting is false, but he does not accept Mr. Manuk's contention that the Gopalpur men acted in the exercise of the right of private defence of person and property. The learned Government Advocate contends that in this case the right of private defence did not arise and that the Gopalpur men went to the assistance of Mukhram Singh not for the purpose of defending him but for the purpose of having a trial of strength with their enemies. It is obvious, therefore, that the Crown has an easier task in Appeal No. 20 of 1923 than in Appeals Nos. 21 and 22.

I propose now to discuss the evidence in Appeal No. 20 and the connected Death Reference No. 6 of 1923.

[After discussing the evidence His Lordship concluded :]

In these circumstances I agree with the Police in accepting the story told by the Gopalpur men as to the origin of the riot.

The evidence in the case conclusively shows that there was enmity between Askirit Singh of Gopalpur and Ganesh Singh of Naraon and generally between the residents of the two villages and the nature of the injuries found by the Civil Surgeon upon the eight men killed in the fight clearly shows the deadly nature of the contest. Death in every case was due to injury in a vital part such as the chest, or the stomach or the head and caused by a weapon such as a spear or an axe and there can be no doubt that the offences of murder under section 302, Indian Penal Code, and rioting accompanied with murder under section 302 read with section 149, Indian Penal Code have been committed.

It remains to consider which, if any, of the appellants were members of the riot, and it is necessary, therefore, to examine the evidence against each of the accused.

[After examining evidence against each accused and finding which of them were members of the riot His Lordship proceeded as follows:—]

It now remains to consider the sentences. The learned Judge has sentenced Lalji and Narain Singh to death

on the ground that they were the leaders. Now there is nothing to show that Narain took any active part. Mukhram and Prem Narain state that he was armed with a *garasa* and Bhirgu mentions him in his dying declaration; but he certainly cannot be placed in the same category as Lalji Singh who appears to have taken a leading part in the attack. In my opinion, Narain Singh does not deserve a sentence of death any more than many of his co-appellants who have been sentenced to transportation for life. The sentence of death passed upon him must, therefore, in my opinion, be set aside and altered to one of transportation for life.

With regard to Lalji, he certainly was a leader but Naresh and Sheodani Singh appear to have been just as active in using their weapons and if it could be quite certain that the witnesses were in a position to state what part the various appellants took in the attack it might have been possible to confirm the sentence of death passed upon Lalji; but it is extremely doubtful whether in a mob of 60 to 70 men the prosecution witnesses even as regards their own injuries can be trusted as to the specific acts ascribed to the various accused and I think it would be safer to put all in the same category and to sentence them to transportation for life. The sentence of death passed upon Lalji will, therefore, be set aside and altered to one of transportation for life.

There can be no doubt that the injuries caused were such that the offence was one within section 302, Indian Penal Code, and no other sentence but that of transportation for life can be passed in this case.

The result is that the appeal of Jwala is allowed and we direct that he be acquitted and set at liberty.

The sentences on Lalji and Narain are modified as indicated above to transportation for life.

The appeals of the remaining appellants Khuba Raut, Ram Andeshi, Sheobaran, Birchi, Suraj, Rambaran, Hazari, Sheonandan Singh, Sahadeo Singh, Naresh, Sheodeni and Chanderdeo Tewari are dismissed.

DEATH REFERENCE No. 7 OF 1923
WITH
CR. A. NOS. 21 AND 22 OF 1923.

In this case out of 17 men from Gopalpur whom the Police sent up for trial under the orders of the Superintendent of Police and against their own judgment, only ten were convicted. Out of these ten men the appellant Ram Nareshi *alias* Nareshi has been sentenced to death and the remainder have been sentenced to transportation for life, under section 302 read with section 149, Indian Penal Code.

The learned Judge states that he is not in a position to find which of the accused caused the deaths of Deonandan Singh, Kamla Singh and Deepan Singh, but he finds that one or more members of the unlawful assembly committed murder by killing these men in prosecution of the common object of the unlawful assembly.

As in the counter-case the learned Judge has declined to accept the story that Deonandan and Kamla caught a number of Ahirs of Gopalpur cutting their paddy. The Gopalpur men, who were the accused in this case, have given no substantive evidence in proof of their allegation that the riot originated out of a seizure of cattle by Mukhram Singh, but fortunately for them the prosecution have put upon the record the evidence given by the appellants in the counter-case when they were prosecution witnesses. It is clear from that evidence and from the reasoning of the learned Judge that the account given by the Gopalpur men as to the origin of the riot is substantially correct.

There is no evidence in support of the theory put forward by the learned Judge that the Naraon and the Chainpurwa men came to remonstrate with the Gopalpur men as to the cattle grazing of the previous day and of previous acts of aggression and that a quarrel broke out in which both parties joined and engaged in something in the nature of a pitched battle.

LALJI SINGH *v.* EMPEROR.

The learned Government Advocate, however, contends that accepting that the riot originated as alleged by the Gopalpur men in the seizure of cattle by Mukhram Singh yet this is a case in which no right of private defence can be claimed by the Gopalpur men. He contends that in taking the cattle to the orchard of Mukha Singh and collecting re-inforcements and in awaiting the attack of the Chainpurwa and Naraon men the appellants in this case were clearly members of an unlawful assembly, and he relies strongly upon *Kabir-ud-din* v. *King-Emperor* (1). In that case the learned Judges appear to have approved of the following statement of the law as given in the Sessions Judge's charge to the Jury: "In laying down the law I rely first, on the clear language of section 141 (4), which refers to an actual right as well as a supposed one, and then on a long series of rulings which begin with *Queen* v. *Jeolall* (2) and end with *Anant Pandit* v. *Madhusudan Mandal* (3). There can, I tell you, be no right of private defence, either on one side or on the other, where both parties are evidently aware of what is likely to happen and turn out in force. The right of private defence cannot be pleaded by persons who expecting to be attacked go out of their way to court an attack. When the parties of the complainant and accused are prepared to fight, it is immaterial who was the first to attack, unless it be shown that the accused were acting in the exercise of the right of private defence. If the accused—it was held by the Judges at Allahabad not many years ago, see *Queen-Empress* v. *Prag Dat* (4)—were determined to vindicate their supposed rights and engaged in a fight with men equally determined to vindicate them no question of private defence can arise. It comes to this simply, that our law does not permit rival claimants to enter in cold blood into battle to settle a dispute which can be settled in a lawful manner." And the learned Judges of the Calcutta High Court draw attention to the words of Holloway, J., in *Madras High Court Proceedings, 8th January 1873, No. 59* (5) where that learned Judge observes as follows: "The natural tendency of the law of all civilised States is to restrict within constantly narrowing limits the right of self-help, and it is certain that no other principle can be safely applied to a country like this."

It is clear, however, that the decision in *Kabiruddin's Case* (1) was founded on the fact that the question of possession was in dispute and that the appellants before their Lordships were members of an unlawful assembly, *firstly*, because they were attempting to enforce a right or a supposed right by violence, and, *secondly*, because there was sufficient time to inform the authorities. Where, however, possession is undisputed or where there is no time to seek the assistance of the authorities, I cannot agree that there is any obligation upon a person entitled to exercise the right of private defence and to defend his person or his property to retire from the field merely because his assailant threatens him with violence. I see nothing wrong on the part of the Gopalpur men in awaiting the coming of their antagonists and in maintaining their possession of the cattle which they had lawfully seized. The law did not require them to retire as soon as Deonandan and Lalji went away to fetch re-inforcements. The learned Government Advocate seems to suggest that it was their duty to release the cattle and to complain to the authorities, but I entirely disagree with him. He next contends that it was not their intention to impound the cattle at all; and that their object was merely to fight for fighting's sake; and he relies on the circumstance that they remained

(1) 35 C. 368; 7 C. L. J. 359; 12 C. W. N. 384; 7 Cr. L. J. 256; 3 M. L. T. 385.
(2) 7 W. R. 34 Cr.
(3) 26 C. 574; 13 Ind. Dec. (N. S.) 969.
(4) 20 A. 459; A. W. N. (1898) 117; 9 Ind. Dec. (N. S.) 654.
(5) 7 M. H. C. R. App. xxxv (35); 1 Weir 58.

in Mukha Singh's orchard for an hour before the fight began. There is, however, no clear evidence in support of the theory that the common object of the Gopalpur men was not to resist aggression but to resort to the ordeal of battle. The facts are equally consistent with their allegation that they did intend to take the cattle by the Local Board Road and that as it passes Chainpurwa it was necessary for them to collect men in order to resist a possible attack. Something might perhaps have been said for the learned Government Advocate's theory if they had let the cattle go and had then assembled on Mukha Singh's orchard and given a challenge to the other side to come there and fight; but the evidence does not disclose any such conduct and as the rescue of the cattle amounted to theft under the Indian Penal Code, apart from an offence under the Cattle Trespass Act, the right of private defence of property was, in my opinion, clearly available to them. As a matter of fact the cattle escaped in the course of the fight and, in my opinion, it is established that the Gopalpur men did intend to maintain their possession of them.

Again, if the Chainpurwa and Naraon men entered upon Mukha Singh's plot without the consent of the Gopalpur men and with the object of committing an assault then they were guilty of the offence of criminal trespass and the Gopalpur men had the right to eject them by such force as was necessary. It would have been otherwise if the entry was made in answer to a challenge to fight, but of this there is no evidence.

I think then that the appellants are entitled to plead section 97 of the Indian Penal Code and the only question is whether the force used was excessive.

Having regard to the savage nature of the attack and to the fact that no less than five of their men were killed I cannot say that the right of private defence was exceeded by the appellants. As was observed by Jenkins, C. J., in *Bhut Nath Dome* v. *Emperor* (6) a man acting under an apprehension of death cannot be expected to judge too nicely the force of his own blow; and the Common Law of England which is substantially also our law on this topic says that he is not bound to modulate his defence step by step according to the attack before there is reason to believe that the attack is over; he is not obliged to retreat but may pursue his adversary till he finds himself out of danger and if in a conflict between them he happens to kill such killing is justifiable.

The evidence is that the attack was commenced by the Chainpurwa and Naraon men and in my opinion the Gopalpur men did not use unnecessary force in repelling it.

The learned Counsel for the appellants in one part of his argument seemed to suggest that once the right of private defence is conceded there can be no conviction under section 302 read with section 149, Indian Penal Code. He contended that individuals might perhaps be convicted of exceeding the right of private defence but there could be no conviction of the other members or the assembly of that excess by implication, and he relied on *Kunja Bhuniya* v. *Emperor* (7). I do not, however, understand that case to lay down any such general proposition. In my opinion the law is that if the members of an assembly act with the common object of exceeding the right of private defence, then they are not only all generally guilty of rioting but also of the particular offence constituted by such excess of user.

Under our law an assault is a crime except under certain special circumstances. But in one sense criminal force is a continuing wrong and there is a limit where the plea of justification ceases to operate and the liability to punishment revives; if one member in prosecution of the common object of an assembly exceeds that limit every

(6) 3 Ind. Cas. 867; 13 C. W. N. 1180; 10 Cr. L. J. 391.

(7) 15 Ind. Cas. 481; 39 C. 896; 16 C. W. N. 1053; 13 Cr. L. J. 481.

other member shares with him the guilt of his act.

In the present case, however, the right of private defence not having been exceeded the question does not arise.

The result is that the conviction and sentences must be set aside, and, acquitting the appellants, we direct that they be set at liberty.

Adami, J.—I agree.

S. D. *Convictions and Sentences set aside.*

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 555 OF 1923.
March 3, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Panton.

KSHITISH CHANDRA DEB ROY—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 406—Criminal breach of trust—Sale of goods taken on approval with condition to pay cash—Title of buyer of such goods—Criminal Procedure Code (Act V of 1898), ss. 517, 590—Contract Act (IX of 1872), s. 78—Passing of property in goods.

Where goods are taken on approval under the arrangement that property in them will pass to the person, who has taken them, only

(*i*) when he exercises his approval and

(*ii*) pays cash for the goods,

the trust continues and the property in the goods does not pass to him until both the conditions are fulfilled. [p. 165, col. 1.]

A buyer of the goods from such aperson, before the property in them has passed to their seller, acquires no title to them and is not entitled, therefore, on the conviction of the latter for criminal breach of trust, to get the goods from the Court. [p. 165, col. 1.]

Criminal appeal against an order of the Third Presidency Magistrate, Calcutta, dated the 7th September, 1923.

Babus *Narendra Kumar Bose* and *Bibhuti Bhusan Saha*, for the Appellant.

Babus *Mritunjoy Chatterjee*, *Sarat Chandra Chatterjee* and *Biraj Mohon Roy*, for the Complainant.

Mr. *Khondkar*, Officiating Deputy Legal Remembrancer, for the Crown.

JUDGMENT.

Greaves, J.—The appellant has been convicted by a Presidency Magistrate of an offence under section 406 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a term of two years. Section 406 under which the appellant was convicted relates to criminal breach of trust and criminal breach of trust as defined in section 405 means dishonest misappropriation or conversion by some one of property entrusted to him or over which he has been given dominion.

The facts of the present case are as follow:—On the 31st of May last year the appellant called at Messrs. Boseck and Co. a jeweller in Chowringee Road and represented that he was a relation of the Raja of Naldanga and stated that he wanted to buy some jewellery for his daughter's wedding and that he wanted the goods for approval as his daughter could not come out. According to the prosecution story the appellant selected some articles of jewellery and signed a receipt for them in the inspection book and took them away. He subsequently returned on the 1st of June, brought back two of the articles taken by him on the 31st May of which he did not approve and selected some further articles of jewellery which he took away also on approval. On the 4th June, the accused came again to the shop and took some further articles which he put on his person. It subsequently transpired that on the 2nd June, he had sold the articles taken away by him on the 31st May and the 1st June, as to the articles taken away on the 1st June at prices about a third of those at which they were priced by Messrs. Boseck & Co. Under these circumstances the appellant has been convicted and it is now contended on his behalf that he was wrongfully convicted of criminal breach of trust under the provisions of section 406 of the Indian Penal Code and reliance is placed on the provisions of section 78 of the Indian Contract Act and Illustration (*b*) thereto. It is said that when a person is given articles of jewellery, as in the present case, for approval, nothing being agreed or said

as to the terms of payment, the property in the goods passes to the person entrusted with the goods, whenever he exercises his approval and elects to take the goods and, it is said, that thereupon the trust ceases and the property becomes the absolute property of the person to whom the goods have been handed over and reliance is further placed on two cases that were cited to us in the argument, namely, *Ex parte Wingfield in re Florence* (1) and *Krikham* v. *Attenborough* (2). Both those cases are cited as authorities for the proposition that where property has been handed over on approval the property passes to the person to whom it is entrusted as soon as he has elected to approve of the property and that in these circumstances no case of criminal breach of trust arises. As against this we have been referred by the Deputy Legal Remembrancer to the case of *Weiner* v. *Gill* (3) which, it is said, closely resembles the facts of this case. It is necessary under the circumstances to see on what terms the goods were entrusted or handed over to the appellant on the 31st of May and the 1st of June of the last year. The first prosecution witness Mr. Ball, who is a partner or Director of Messrs. Boseck and Co., states that he saw the appellant on the 31st May and that the arrangement was that the goods approved of were to be paid for in cash. Mr. Ball states with regard to the goods taken away on the 1st June that the appellant stated that he would pay for these goods together with those previously taken away. In cross-examination he stated that there was no writing that the payment was to be in cash and with regard to the visit on the 1st June he states that the cashier was ordered to make out cash bills as the accused was ready to pay and he denied that there was any talk of payment by instalments. I should say that in the events which have happened certain small sums were paid by the accused on account, but I do not think that this really affects the matter. What one has got to see is what was the arrangement arrived at between the parties on the 31st May and the 1st June. The evidence of prosecution witness No 5, the cashier of Messrs. Boseck and Co., is also material. He stated that on the 4th of June he made out two bills at the request of the appellant and that the appellant handed him a note for a thousand rupees and asked him to debit 800 rupees to one bill and 200 rupees to the other. It appears that the handing of the note for one thousand rupees took place after the first visit of the appellant to Messrs. Boseck and Co's shop on the 4th June. On the first occasion he fumbled in his pockets and pretended that he had left his money behind by mistake and asked Messrs. Boseck and Co. to send an assistant with him to his house ostensibly to fetch the money. Then, as I have already said, when he came back, instead of paying the whole amount of the bills that were made out he tendered the note for thousand rupees making a request for its division between the two bills in the manner, I have already indicated. The cashier states that he thereupon took the two bills to Mr. Ball for his signature and that Mr. Ball said that this was not the arrangement, the arrangement made on the 1st June being that the goods taken away on that day were to be paid for in cash on the spot and that with regard to the other goods taken on the 31st May half was to be paid in cash on approval and the other half subsequently.

After reading the evidence and considering the documents the conclusion I have come to is that nothing was said about the payment of cash as against the acceptance of the goods on the 31st May. But I accept, as the learned Magistrate has done Mr. Ball's account of what happened on the 1st of June, because, I think that this is borne out by two things which subsequently happened, that is to say, by the conduct of the accused, to which I have already referred on the 4th June when he purported to be ready

(1) (1879) 10 Ch. D. 591; 40 L. T. 15; 27 W. R. 346.

(2) (1897) 1 Q. B. 201; 66 L. J. Q. B. 149; 75 L. T. 543; 45 W. R. 213.

(3) (1906) 2 K. B. 574; 75 L. J. K. B. 916; 95 L T. 438; 22 T. L. R. 699; 11 Com. Cas. 240.

to make a cash payment for the bills of the whole amount, and also the part payment in respect of the other articles and I think it is further corroborated by what the accused himself surreptitiously wrote on the Exhibits 4 and 5. If there had been no arrangement for payment in cash either on the 31st May or on the 1st June there would have been no need to write as the accused did on Exhibit 4, "payment of Rs. 200 a month," and further to write "instalment payments" on Exhibit 5. Under these circumstances it seems to me that the arrangement of the 1st June, was that the property in the goods was only to pass if the appellant exercised his option to take the goods and paid cash in respect of the goods, that is to say, a payment in full in respect of the goods taken on the 1st June, and a payment as to half the amount in cash for the goods which he took on the 31st May. In this view of the case the trust continued until the option to take the goods was exercised and the cash payment was made and the property in the goods did not pass from Messrs. Boseck and Co. to the accused until both these conditions were fulfilled. This being so we think that the offence under section 406 of which the accused was convicted has been established and that the only course open to us is to dismiss the appeal. We, however, under the circumstances of the case, reduce the sentence to 18 months.

With regard to the two applications made by the purchasers for the return to them of the goods which they have purchased from the accused the only course open to us is to dismiss these applications having regard to our finding in the appeal that the property in the goods remained in Messrs. Boseck and Co., and has never passed to the accused. This being so the accused could give no title to the purchasers and the two applications are accordingly dismissed.

Panton, J.—I agree.

S. D. *Sentence reduced.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 356 OF 1924.
July 4, 1924.
Present:—Mr. Justice Kulwant Sahay.
JAGARNATH SINGH—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 367, 421—Appeal—Summary dismissal—Judgment—Appellate Court, duty of—Penal Code (Act XLV of 1860), ss. 186, 189—Arrest—Obstruction—Threat of violence—Offence.

An Appellate Court is not required by law to write a judgment when dismissing an appeal summarily, but it is necessary that it should give reasons for dismissing the same. [p. 166, col. 1.]

Gurubari Behara v. *Emperor*, 43 Ind. Cas. 439; 2 P. L. J. 695; 4 P. L. W. 153; 19 Cr. L. J. 151, followed.

Where a person arrested in execution of a decree refuses to follow the peon who arrests him, and threatens to use violence, the whole occurrence amounts to one offence under section 189, Penal Code, and a conviction for two offences under sections 186 and 189, Penal Code, is not justified. [p. 166, col. 2.]

Criminal revision from an order of the District and Sessions Judge, Monghyr, refusing to interfere with an order of the District Magistrate, dated the 22nd May 1924, by which he dismissed an appeal against an order of the Deputy Magistrate, Jamui, dated the 20th of May 1924.

Mr. *Janak Kishor*, for the Petitioner.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The petitioner has been convicted by the Deputy Magistrate of Jamui under sections 186 and 189 of the Indian Penal Code. He has been sentenced to simple imprisonment for fifteen days and to pay a fine of Rs. 50 under section 186; and simple imprisonment for six weeks and to pay a fine of Rs. 50 under section 189, Indian Penal Code. His appeal has been summarily dismissed under section 421 of the Code of Criminal Procedure by the learned District Magistrate and an application for revision has also been dismissed by the learned Sessions Judge.

The facts are shortly these. It appears that one Mr. Christian obtained a decree for money against the petitioner. He took out execution of the

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decree and applied for the arrest of the petitioner in execution of the decree. The warrant of arrest was issued by the Munsif and made over to the peon Ajodhya Singh. Ajodhya Singh reported that he went to the place of the accused, showed him the warrant, arrested him and demanded the payment of the decretal amount and failing payment, he directed him to follow him. The accused, however, refused the Court's order to pay the amount and cried out "Go out, I do not obey the Court's order [illegible] the amount". The peon became [illegible] tened and left the place. The Munsif thereupon lodged a complaint under sections 186 and 189 of the Indian Penal Code, and the accused was placed on his trial and convicted and sentenced as stated above. The finding of the the Trying Magistrate is that the peon was obstructed in the discharge of his duty and he was also threatened and deterred from discharging his duty as a public servant.

The first point taken by the learned Vakil for the petitioner is that the District Magistrate was wrong in dismissing the appeal summarily without writing out a judgment. Now, section 421 of the Code of Criminal Procedure empowered the District Magistrate to dismiss the appeal summarily and it is not necessary that in dismissing an appeal under section 421 the Magistrate should write out a judgment as required by section 367 of the Code. The learned Vakil relies upon the case of *Gurubari Behara* v. *Emperor* (1). That case is a clear authority for the proposition that an Appellate Court is not required by law to write a judgment when dismissing an appeal summarily. It is, no doubt, necessary that in dismissing the appeal summarily the Appellate Court should give reasons for dismissing the same. A mere order to the effect that the appeal is summarily dismissed, without giving any reason whatsoever would be, according to the authorities, bad in law. In the present case the Magistrate gives his reasons for dismissing the appeal summarily; and, having regard to the fact that the issue for decision in the case was a very simple issue of facts and there were no complications in the case, I am not prepared to say that the dismissal of the appeal under section 421 was in the present case bad in law.

The second point taken by the learned Vakil is that upon the finding arrived at, the utmost that can be said is that [illegible] ble. In my opinion, this contention is sound. What has been found is that the petitioner refused to follow the peon when he arrested him and threatened to use violence towards him. In my opinion, the whole occurrence amounts to one offence under section 189, Indian Penal Code, and two separate convictions under sections 186 and 189 are bad in law. I would, therefore, set aside the conviction and sentence under section 186, Indian Penal Code.

As regards the conviction under section 189, it has been contended that the facts found do not amount to an offence under section 189. I am, however, of opinion that the Trying Magistrate was right in his finding that the facts do amount to an offence under section 189. As regards the sentence, however, the learned Trying Magistrate has observed that he would have let off the accused with a punishment of fine only; but, having regard to the fact that the accused was an elderly man and has lived to an age to know that laws are to be obeyed and debts to be honoured, he thought that a severe sentence was required. I am of opinion that the fact of his being an elderly man does not aggravate the nature of the offence. I am informed that the petitioner has already undergone imprisonment for more than three weeks.

Having regard to the circumstances of the case I am of opinion that the sentence already undergone is sufficient to meet the ends of justice, I, therefore, reduce the sentence of imprisonment under section 189, Indian Penal

(1) 43 Ind. Cas. 439; 2 P. L. J. 695; 4 P. L. W 153; 19 Cr. L. J. 151.

Code, to the period already undergone. The sentence of fine under section 189 will stand. The fine imposed under section 186, Indian Penal Code, if paid, will be refunded.

S. D. *Sentence reduced.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 276 OF 1924.

June 18, 1924.

Present:—Sir Cecil Henry Walsh, Actg. Chief Justice, and Mr. Justice Ryves.

KASHI RAM AND OTHERS—APPLICANTS

versus

EMPEROR THROUGH MIYAN JAN—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 182, 210—"False report" and "false charge," distinction between—Intention.

If the complainant confines himself to reporting what he knows of the facts, stating his suspicions, and leaving the matter to be further investigated by the Police, or leaving the Police to take such course as they think right in the performance of their duty, he may be making a report, but he is not making a charge. But if he takes the further step, without waiting for any official investigation, of definitely alleging his belief in the guilt of a specified person, and his desire that the specified person be proceeded against in Court, that act of his, whether verbal or written, if made to an officer of the law authorised to initiate proceedings based upon the complainant's statement, whether amounting to an expression of the complainant's belief in the guilt of the specified person, or his desire that Court proceedings be taken against him, amounts to making a charge. [p. 168, col. 2.]

Mathura Prasad v. *Emperor*, 42 Ind. Cas. 761; 15 A. L. J. 767; 18 Cr. L. P. 1017; 39 A 715, approved.

Emperor v. *Hardwar*, 16 Ind. Cas. 510; 31 A 522; 10 A. L. J. 61; 13 Cr. L. J. 702, dissented from.

Criminal reference made by the Sessions Judge, Saharanpur, dated the 24th April 1924.

Mr. *Nehal Chand*, for the Applicants.

Mr. *Mushtaq Ahmad*, for the Opposite Party.

JUDGMENT.—This is, (if it were not for the referring order of Mr. Justice Boys in which he seems rightly, in our opinion, to think that further consideration is required of one authority to which we will refer in a moment), a matter of no importance to anybody except the parties, none of whom seem to be very attractive porsons, or to be worth the time which has been already spent upon them by a large number of judicial authorities. Somehow or other Kashi Ram, the present applicant, got it into his head that he had been robbed by two prostitutes and their brother, or one or other of them. Ultimately criminal proceedings were taken against these persons, or rather against the two women, their brother being omitted from the charge. The two women were acquitted, and now the brother, who was only verbally charged and never put upon his trial, wants to vindicate the law and clear himself by taking proceedings against Kashi Ram and his associates who made the charge. The Magistrate, who was originally seized with the matter in Sahranpur, rightly, according to our view, held that the offence committed by Kashi Ram and his two associates was an offence under section 211 and no preliminary sanction was necessary. In revision the matter came before the Sessions Judge who held the contrary and referred to the authority which we have already mentioned, namely, *Emperor* v. *Hardwar Pal* (1). He then, in the ordinary course, referred the matter to the High Court, thinking the Magistrate was wrong and also submitted the matter to the Magistrate again for his explanation. The Magistrate was converted by the authority which the Sessions Judge quoted and being bound by a two Judge decision of this Court, naturally came to the conclusion that his previous opinion was wrong, saying that he was not aware of the authority when he decided the case. The matter thereupon came before Mr. Justice Boys on a reference from the Sessions Judge, and Mr. Justice Boys, not agreeing with the view laid down in the case in *Emperor* v. *Hardwar Pal* (1), referred the matter to a Bench, and it now comes before us with a view to clear the ground, if possible. In our view there is a fallacy underlying the decision in *Emperor* v. *Hardwar Pal* (1) which Mr. Justice Boys has rightly pointed out. The

(1) 16 Ind. Cas. 510; 31 A 522; 10 A. L. J. 61; 13 Cr. L. J. 702.

mere fact that subsequent proceedings in Court are taken either against the person originally charged, or against somebody else, cannot effect what was done when the original charge was made, if it was a charge. In *Emperor* v. *Hardwar Pal* (1) a charge was made against several people including one *S*, but *S* was never charged in Court. *S* was not put upon his trial and no proceedings were taken against him. The other people were, and the *ratio decidendi* in *Emperor* v. *Hardwar Pal* (1) is that the charge against *S* amounted to a charge in Court because Court proceedings were taken against somebody else. In this respect we are unable to agree with *Emperor* v. *Hardwar Pal* (1). It so happens as regards the question, what amounts to a charge under section 211 and what is a mere report which comes within section 182, that I myself, on a previous occasion sitting alone, happen to have been compelled to express my opinion. Possibly an English lawyer is tempted to take a broader view, inasmuch as in England the meaning of "charge" is clearly defined, and the step involved in making a charge is identified, because every Station Officer has a charge-sheet, and if the complainant makes a report desiring that criminal proceedings shall be brought, he is asked if he is prepared to sign the charge-sheet and if he does so, he identifies himself as the person making the charge. If he says no, it is left to the Station Officer to decide whether he, as Station Officer, will continue the matter by making the charge himself. But, in substance there ought not to be any real difficulty in deciding the question where a report stops and charge begins, and my brother and I, agreeing in substance with the view which I took in the case which I decided, reported as *Mathura Prasad* v. *Emperor* (2) have agreed upon the following formula which in our view, in substance, not necessarily in every term or expression, correctly states the dividing line between the two classes of acts :—

"If the complainant confines himself to reporting what he knows of the facts, stating his suspicions, and leaving the matter to be further investigated by the Police, or leaving the Police to take such course as they think right in the performance of their duty, he may be making a report, but he is not making a charge. But if he takes the further step, without waiting for any official investigation, of definitely alleging his belief in the guilt of a specified person, and his desire that the specified person be proceeded against in Court, that act of his, whether verbal or written, if made to an officer of the law authorised to initiate proceedings based upon the complainant's statement, whether amounting to an expression of the complainant's belief in the guilt of the specified person, or his desire that Court proceedings be taken against him, amounts to making a charge".

Applying that to the facts of this case, what happened was, that these three people, having apparently reason to suspect the other three of theft, approached the Police and desired that a search be made. Up to that time they had made no charge. Search was made in their presence, and an attractive article of clothing was identified by Kashi Ram as being unlawfully in the box of Miyan Jan, the present complainant. He identified it and indicated to the Police Officer that Miyan Jan was guilty either of having stolen, or wrongfully received it knowing it to have been stolen. That, in our view amounted to a charge. The Magistrate was right, on the complaint of Miyan Jan, in formulating a charge against Kashi Ram of having made that charge, assuming it to have been false to Kashi Ram's knowledge. With regard to the other two persons, Shikri Prasad and Dip Chand, all that we know about them is that they were present, and may fairly be presumed to have demonstrated a sympathetic approval of the conduct of Kashi Ram. Whether this amounts, as a matter of special pleading, to aiding and abetting Kashi Ram in making the charge, is a matter of no importance. We think that justice will be done by sending back the record with a direction to the Magistrate to proceed with the case against

(2) 42 Ind. Cas. 761; 15 A. L. J. 767; 18 Cr. L. J. 1017; 39 A 715.

Kashi Ram. The charge against the other two persons is not pressed, and, therefore, the case against them must not be proceeded with. It should be added that the precise question of formal sanction is no longer relevant because of the amendment of the Criminal Procedure Code, and that under section 195 (1) (*b*) of the Code of Criminal Procedure a complaint by the Court was not necessary because the charge was not in a Court.

K. S. D. *Reference answered accordingly.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 998 OF 1923.
January 7, 1924.
Present :—Mr. Justice Martineau.
HUSSAIN *alias* UMAR—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 403—Penal Code (Act XLV of 1860), ss. 120B, 121A—Conspiracy to overawe Government by killing Europeans—Conviction for conspiracy to overawe Government—Subsequent trial for conspiracy to kill Europeans, maintainability of.

A person, who has already been convicted of an offence under section 121A, Penal Code, for a conspiracy to overawe the Government of India by means of criminal force, to wit, by causing bombs to be thrown at British officers, cannot, on the same facts, be subsequently convicted under section 120B, Penal Code, for a conspiracy to kill the Europeans, having regard to section 403 of the Criminal Procedure Code, for in such a case there are not two conspiracies, one to overawe the Government of India and another to kill the Europeans; but the conspiracy is one, the killing of Europeans being the means to be employed for carrying out the object of overawing the Government of India.

Appeal from an order of the Special Magistrate with section 30 powers, Gujranwala, dated the 10th May 1923.

Babu *S. C. Chatterji*, for the Government Advocate, for the Respondent.

JUDGMENT. — The appellant Hussain *alias* Umar has been convicted of two offences, one under sections 302/120B of the Indian Penal Code for having entered into a criminal conspiracy with the Mujahidins in Asmas, Chamarkand, and British India to kill European British subjects in the Punjab, and the other under section 20 of the Indian Arms Act for having imported bombs, rifles, and ammunition into the Punjab and concealed them at Kot Kazi in the Gujranwala District. He has been sentenced to seven years' imprisonment and a fine of Rs. 500 for the former offence and to seven years' imprisonment for the latter.

The appellant was tried by a Magistrate exercising powers under section 30 of the Criminal Procedure Code, and his first contention is that the Magistrate was not competent to try him for an offence under sections 302/120B of the Indian Penal Code. This contention is wrong. Murder was not committed in pursuance of the conspiracy, so that the offence was not punishable with death and the Magistrate was competent to try it.

But the appellant's second contention that section 403, Criminal Procedure Code, is a bar to the trial for the offence under sections 302/120B by reason of his having already been convicted by the Additional Sessions Judge of Peshawar on the same facts of an offence under section 121A of the Indian Penal Code appears to be correct. The charge on which he was convicted in the case tried at Peshawar was that he had at Chamarkand conspired to overawe the Government of India by means of criminal force to wit by causing bombs to be thrown at British officers. Although the charge in that case was for an offence falling under a different section of the Indian Penal Code from that under which the offence falls of which he has been convicted in the present case there is no practical distinction between the two offences. There were not two distinct conspiracies, one to overawe the Government of India and another to kill the Europeans; but the conspiracy was one, killing of Europeans being the means which was to be employed for carrying out the object of overawing and waging war against the Government of India. At any rate the facts constituting the two offences were exactly the same and the appellant could have been convicted in the former case of the offence for which he has now been tried if the Additional Sessions Judge of Peshawar was competent to try it. The Magistrate thinks that the offence was not committed in the Punjab and that, therefore, the Additional Sessions Judge of Peshawar could not

have tried it but he appears to be confusing the acts committed in pursuance of the conspiracy with the conspiracy itself. The conspiracy to commit murder was entered into at Chamarkand beyond the limits of British India, and the Additional Sessions Judge of Peshawar was competent to try the appellant for that offence under the provisions of section 188 of the Criminal Procedure Code. I, hold, therefore, that section 403 of the Criminal Procedure Code is a bar to the trial for the offence under sections 302/120B of the Indian Penal Code.

There is, however, no such bar to the trial for the offence under the Arms Act, and I think the conviction for that offence is justified. Bombs, rifles, and ammunition were found buried in a house at Kot Kazi in the Gujranwala District. The evidence of the approver Obedullah shows that four bombs were brought to that house by the present appellant and his evidence is sufficiently corroborated by the appellant's confession recorded by a Magistrate on the 3rd September 1921, the day of his arrest, in which the appellant said he had brought bombs to Kot Kazi from Chamarkand. That Magistrate has been examined with regard to the confession and no reason has been shown for doubting that the confession was voluntarily made. I accordingly uphold the conviction and sentence for the offence under section 20 of the Indian Arms Act, for the reason given I set aside the conviction and sentence for the offence under sections 302/120B of the Indian Penal Code.

N. H.

Conviction for one offence set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 239 OF 1924.

June 4, 1924.

Present:—Mr. Justice Boys.

Musammat RAM SRI—ACCUSED—APPLICANT

versus

SRI KISHUN AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 146—"Competent Court," meaning of—Mutation order—Person entitled to possession, whether determined.

The words "competent Court" in section 146 of the Criminal Procedure Code are not confined to mean only a "competent Civil Court." [p. 171, col. 2.]

An order of a Revenue Court directing mutation to be made in favour of a certain person is an order of a competent Court determining the person entitled to possession within the meaning of section 146 (1) of the Criminal Procedure Code. [*ibid.*]

Criminal revision from an order of the Magistrate, First Class, Etawah, dated the 17th of April 1924.

Messrs. *Baleshwari Parshad, Kumuda Prasad* and *Ambika Prasad*, for the Applicant.

Dr. *M. Wali Ullah*, for the Opposite Party.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—In this case one Jado Rai died on May the 9th, 1923. There were three claimants to his property. *Firstly*, the present applicant, his widow, *secondly*, some collaterals and *thirdly*, Sri Thakurji through Sheo Manohar. With the third of these we are not concerned. A civil suit was filed on behalf of Sri Thakurji but Sheo Manohar expressed his inability to pursue it and it was dismissed. The remaining two parties, the widow applicant and the collaterals have been contending before the Magistrates under Chapter XII of the Code of Criminal Procedure and in mutation proceedings before the Revenue Court. At the request of the parties on the 10th of August 1923, the District Megistrate attached the property under section 146 of the Criminal Procedure Code. In the mutation proceedings mutation was ordered on the 20th of February 1924 in favour of the widow practically on the basis of title. No emphasis, however, need be laid particularly on this last point because whether the mutation Court finds a party entitled on the basis of possession, supported by evidence of title or on title alone, it declares that person's possession and if necessary orders that he be put into possession. In this case the order would necessarily be one that the applicant widow be put into possession as she could not be in possession already, the property being under attachment. In pursuance of this order in favour of the present applicant widow, the Assis-

tant Collector on the 26th of February ordered the Receiver to "hand over" the property to the widow. One day before this, the Collector had, on the application of the opposite party without notice to the present applicant, passed an order staying the delivery of the property to the applicant by the Receiver. Of this order the Assistant Collector had been unaware. On the 28th of February the Collector refused till the hearing of mutation [illegible] the widow [illegible] April and on the 8th of April the Collector again refused the widow's application for possession until the period of limitation for a second appeal had expired or if a second appeal was filed till that appeal was decided. The applicant widow, next on the 17th of April 1924 tried to get the Assistant Collector to order the execution of his order of the 26th of February. This he naturally refused to do in view of the fact that his superior Court, (that of the Collector) had already refused to allow the property to be handed over. At the end of all these proceedings, the applicant has come up in revision against the order of the Assistant Collector dated the 17th of April and has made no application against the order of the Collector dated the 8th of April. If, however, it appears to me that the Collector was not justified in refusing to hand over possession, I think, I in turn should not be justified in refusing to give the applicant here an order merely because she has applied in revision against the order of the Assistant Collector instead of that of the Collector. It would obviously be desirable in the plain interest of justice to pass such an order as I could properly pass under section 561 (*a*) if not otherwise. In one sense the applicant in not wholly to blame for coming up against the wrong order, for originally it was the Collector himself who made a mistake on the 25th of February 1924 in passing his order without notice. It was this that led to alternative cross-applications in his Court and that of the Assistant Collector. The point now that I have to consider is whether the order of the Revenue Court in favour of the applicant widow was an order such as is contemplated by section 146 clause (1) of the Code of Criminal Procedure, *i. e.*, an order of a competant Court determining the person entitled to possession. Two questions arise in this connection:—*Firstly*. Do the words "competent Court" mean "a competent Civil Court". I think that it is really clear [illegible] and it so [illegible] and secondly the Code of 1882 actually had the phrase "a competent Civil Court" and the word "civil" was deliberately dropped in the Code of 1891. The next question is whether the Revenue Court's order under section 40 determined the person entitled to possession. I think this also is hardly open to doubt. Section 40, clause (2), says that the Court, if unable to satisfy itself as to which party is in possession "shall ascertain by summary enquiry who is the person best entitled to the property and shall put such person in possession". It, therefore, appears clear that a competent Court has now determined the right of the widow-applicant here to possession. I may note here that the Collector has not supported his refusal to allow the widow to have possession by any argument that her right to possession has not been determined by a competent Court but merely apparently has been guided by his idea of its being likely to prove convenient to wait further till the matter had been conclusively determined in favour of the widow or the other party. Possession in this view might have to remain with the Receiver until the matter had been decided, some ten years hence, possibly more by the Privy Council.

The application is, therefore, allowed and I order the Collector to take action under section 146 of the Code of Criminal Procedure to release the property from attachment and to order the Receiver to hand it over to the applicant, *Musamma* Ram Sri.

K. S. D. *Application allowed.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 181 OF 1924.
May 21, 1924.
Present:—Mr. Justice Boys.
HIRA LAL—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 414, 562—Order under s. 562 passed in summary trial—Sentence—Appeal.

An order passed under section 562, Criminal Procedure Code, in a summary trial, is appealable. [p. 172, col. 2.]

Section 414, Criminal Procedure Code, says in what cases there shall be no appeal. It does not say in what cases there shall be an appeal. [*ibid*].

Obiter:—An order under section 562, Criminal Procedure Code, does not amount to a sentence. [*ibid.*]

Criminal revision against an order of the Additional Sessions Judge, Cawnpore, dated the 14th March 1924.

Dr. *K. N. Katju*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an application in revision against an order of the Sessions Judge refusing to hear the appeal of one Hira Lal against whom an order in a summary trial has been passed under section 562 of the Criminal Procedure Code, the refusal being based on section 414 of the Criminal Procedure Code which he held barred the right of appeal.

Section 408 gives an appeal from the order of a Magistrate of the First Class to the Sessions Judge. Section 410 gives an appeal from the Sessions Judge to the High Court. If these two sections are uncontrolled there can be no question that an appeal lies under them from orders under section 562 by a Magistrate or by the Sessions Judge respectively.

The case for the Crown here is that as there was a summary trial an appeal is barred by section 414; the argument being that as there is no sentence at all it must be held to be a sentence less than the maximum which is referred to in section 414.

To support the exclusion of a right of appeal, it will have to be argued that "no sentence" is "a sentence of less than a certain maximum". I find it impossible to hold that this is a permissible meaning to give to the language used. It is only necessary to read section 414 to realise instantly on coming to the words "passes a sentence" that here there was no "sentence". It has not been suggested here that an order under section 562 amounts to a sentence. It clearly does not do so and in this connection reference may be made to the words in section 380 "pass such sentence or make such order". This, to my mind, is really sufficient to conclude the question. The learned Sessions Judge says: "Section 414 provides that notwithstanding anything hereinbefore contained there shall be no appeal by a convicted person in any case tried summarily, in which a Magistrate empowered to act under section 260, passes a sentence of fine not exceeding 200 rupees only." This is a perfectly correct statement of what section 414 provides, namely, that there shall be no appeal in certain cases. It does not say anything at all about whether there shall or shall not be an appeal in other cases but the learned Judge continues: "By this section an appeal is allowed only in cases in which the Magistrate empowered to act under section 260, Criminal Procedure Code, imposes a fine exceeding 200 rupees or passes a sentence of imprisonment". It is this latter paraphrase of the section that he has misdirected himself. The section says in what cases there shall be no appeal. It does *not* say in what cases there shall be an appeal and it is by paraphrasing it in this way that he suggests the inference that there shall be no appeal in other cases and in this way has led himself to the conclusion that the section says what it does not say that there shall be no appeal where there is no sentence at all.

There are one or two further points that I may mention. It is asked why should the Legislature have taken away any right of appeal when there is a definite sentence, certainly a fine and possibly a sentence of imprisonment, and yet have allowed a right of appeal when no sentence was passed. An explanation readily suggests itself. It is

quite conceivable that many persons would regard an order of release under section 562 of the Code of Criminal Procedure, coupled with having to enter into a bond to keep the peace and to be of good behaviour for any period up to three years, as something very much more serious than a substantive sentence of fine of, perhaps Rs. 10 or even Rs. 200. In this connection one may notice that an appeal always has been given to the District Magistrate against an order of a Magistrate demanding security for good behaviour, and now the right to appeal against an order for security for good behaviour and also an order for security for keeping the peace has been still further extended. There is, therefore, nothing whatever unnatural or unreasonable in giving a right of appeal to a person who under section 562 has to file a bond both for good behaviour and for keeping the peace. Again, there can be no particular significance in the fact that this was a summary trial. If there is anything in this argument for the exclusion of the right of appeal, that exclusion will be effected just as surely by section 413 whether the trial was summary or not as by anything in section 414 and we may, therefore, take it that anything which is authority for the proposition that section 414 excludes a right of appeal is equally authority in reference to section 413.

Again, if the argument for the Crown be accepted that a right of appeal is excluded by sections 413 and 414, then the whole right of appeal given by sections 408 and 410, under ordinary circumstances, goes clean out of the Statute Book. If that be so, then what is the meaning of the words in section 562, clause (3) " the High Court may, on appeal, when there is a right of appeal to such Court" To suggest that there never is a right of appeal is to make nonsense of that clause. Section 562, clause (3), only happens to make mention of a right of appeal because it is considered desirable to give the High Court a power of what practically amounts to an enhancement when hearing the appeal. But in whatever connection the mention may be made of a right of appeal, it is a certain indication that such a right must exist. If then there is a right of appeal to the High Court from an order under section 562 made by a Sessions Court, there is no logic in suggesting that there is not a similar right of appeal to the Sessions Court from an order of a Magistrate

The order of the Court is that the order of the Sessions Judge, dated the 14th of March 1924, dismissing the appeal is set aside and he is directed to re-admit it and hear it in accordance with law.

S. D. *Re-hearing of appeal ordered.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 73 OF 1924.

March 1, 1924.

Present:—Mr. Justice Fforde.

ABDUL AZIZ—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 439 —Two persons tried together—One person acquitted and other convicted—Appeal by convicted person—Appellate Court's right to express opinion against acquitted person—Remarks, expunging of.

In disposing of the appeal of one of two co-accused, who were tried together, and one of whom was acquitted, the Appellate Court has no right to make use of expressions which amount to a finding that the acquitted accused was wrongly acquitted. Once a person is tried and acquitted of an offence by due process of law and no appeal is preferred against his acquittal, he must be deemed to be innocent of the charge upon which he was tried, and a Court superior to that which tried him has no right to express the opinion that he is in fact guilty although acquitted by the Trial Court. The High Court will not allow such expressions to remain on record. [p. 174, col. 1.]

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Sessions Judge, Lahore, dated the 5th November 1923.

Sheikh *Niaz Muhammad* and Lala *Lachhmi Narain*, for the Petitioner.

JUDGMENT.—This is an application on behalf of Abdul Aziz asking that certain statements concerning him

appearing in the judgment of the Sessions Judge dated the 5th November 1923, should be expunged. The judgment in question was made upon an application by Abdul Aziz for an order for sanction of prosecution of certain witnesses who had given evidence in a criminal case in which he and one Abdul Majid had been prosecuted under section 381 of the Indian Penal Code. In that prosecution Abdul Majid was convicted of the offence charged; but the applicant was acquitted.

In the course of the judgment, which is now complained of, the learned Sessions Judge made the following remarks:—

"(1) The manner in which these cigarette cases were delivered at Jullundur does render it probable the applicant Abdul Aziz had a considerable hand in the successful delivery of this consignment. But as the prosecution witnesses were won over he was lucky enough to be acquitted though the lower Court was of opinion that a *prima facie* case had been made out against him and he was charged.

"(2) The case was a true one. The cigarette cases were stolen and one of the accused has been convicted. Therefore, I have no reason to believe that the witnesses falsely implicated this man. He, however, was lucky enough to get off because some of the witnesses were inimical or because some of the prosecution witnesses were won over to him."

In my opinion the learned Sessions Judge had no right to make use of expressions which amounted to a finding that the applicant had been wrongly acquitted. He was tried and acquitted by due process of law of the offence for which he had been tried. No appeal was had against that acquittal, and accordingly he must be deemed to be innocent of the charge upon which he was tried. The words used by the Sessions Judge place on the record an expression of opinion of a Court superior to that which tried the appellant to the effect that he is in fact guilty although acquitted by the Trial Court. In my opinion it would be a grave injustice to allow such expressions to remain on the record and I accordingly order that the words complained of be expunged from the judgment in question.

S. D.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 266 OF 1924.

June 4, 1924.

Present:—Mr. Justice Boys.

RAJPATTI—APPLICANT

versus

EMPEROR THROUGH *Musammat* DEOLI—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 488 (3) proviso—Restitution of conjugal rights, decree for—Subsequent ill-treatment—Order for maintenance—Wife, whether can be absolved from living with husband—Decree, how far binding—Court, discretion of.

The weight to be attached to a decree must depend upon the particular circumstances of the case and no hard and fast rule can be laid down that a decree of a Civil Court is for ever and always binding on the Magistrate or that his discretion is never fettered. [p. 175, col. 1.]

Where in an application for maintenance under section 488 of the Criminal Procedure Code it appeared that some 13 months before the application the husband had obtained a decree for restitution of conjugal rights but soon after taking the wife to his house had turned her out with blows:

Held, that the Magistrate was justified in exercising his discretion in favour of the woman and in favour of absolving her from the condition that she must live with her husband. [p. 175, col. 2.]

Criminal refernce by the Sessions Judge, Benares, dated the 29th April 1924.

Messrs. *Kumuda Prasad* and *Ambika Prasad*, for the Opposite Party.

JUDGMENT.—This is a Reference by the Sessions Judge of Benares recommending this Court to quash the order of the Joint Magistrate of Benares ordering the accused in the case Rajpatti to pay a monthly allowance of Rs. 8 to *Musammat* Deoli, the applicant in a case under section 488 of the Code of Criminal Procedure. It appears that on the 15th of November 1922 the husband got a decree against the wife for restitution of conjugal rights. The Magistrate in

this case was asked by the wife to give her an order for maintenance unrestricted by any condition that she should live with him. The order actually passed by the Magistrate does not expressly free her from any condition. But it was clearly intended so to do, in that the Magistrate says that he thinks "she is quite justified in refusing to live with him" and then goes on to give her an order. That order he was entitled to make under the proviso to clause (3) of section 488 of the Criminal Procedure Code under ordinary circumstances. The learned Sessions Judge remarks that he would consider the Magistrate's order justified if the matter were *res integra*. But he considers that the decree passed on the 15th of November 1922 was binding on the Magistrate. It seems to me that the weight to be attached to a decree must depend upon the particular circumstances of the case and that no hard and fast rule can be laid down that a decree of a Civil Court is for ever and always binding on the Magistrate or that his discretion is never fettered. It is clear that if the decree had only been passed the day before it would require something very strong indeed to justify a Magistrate in ignoring it. It is equally clear that if it had been passed 20 years before and the woman had yearly endeavoured to get her husband to allow him to live with her and he had driven her out with blows, the Magistrate could not possibly be expected to hold himself bound in any way by the terms of that decree. Now in this case the decree was passed some 13 months before. She made her application on the 11th of January 1924. It is equally clear from her own evidence which I have had read to me that after the decree she was taken to her husband's house and was driven out from there with blows. In other words she was so ill-treated when there that she had to go. The truth of this evidence is confirmed by Damri the Chaudhri of the caste who says that he and others had to go to the husband's house at the request of the husband's mother in order to bring the applicant *Musammat* Deoli away because there were constant rows and she was being ill-treated. Under the circumstances it appears to me that the Magistrate was justified in exercising his discretion in favour of the woman and in favour of absolving her from the condition that she must live with her husband. In fact, any other order would simply amount to this that the husband can first get a decree for restitution of conjugal rights and then turn his wife out without an allowance at all. Let the reference be returned.

K. S. D. *Reference returned.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 881 OF 1923.
(CRIMINAL REVISION PETITION No. 707 OF 1923.)
April 5, 1924.
Present:—Mr. Justice Devadoss.
SOMU PILLAI—COMPLAINANT—PETITIONER
versus
KRISHNA PILLAI—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 520—Sessions Judge's power to vary order of Sub-Divisional Magistrate passed in appeal—Courts of Appeal, Revision, Reference, or Confirmation, what are.

A Sessions Court has no power under section 520, Criminal Procedure Code, to vary or revise an order of a Sub-Divisional Magistrate passed in appeal against a conviction by a Sub-Magistrate, as in respect of such orders, the Sessions Court is neither a Court of Appeal or Revision nor a Court of Reference or Confirmation. [p. 176, col. 2.]

Criminal Revision No. 236 of 1904, relied on.

A Court of Reference means a Court to which references are made and which on reference is entitled to go into the matters and dispose of them. [*ibid.*]

Petition, under sections 435 and 439 and 520 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of 30th October 1923 of the Sessions Court, South Arcot, in Criminal Miscellaneous Petition No. 19 of 1923, preferred against the order, dated 1st February 1923, of the Court of the Sub-Divisional First Class Magistrate, Chidambaram, in Criminal Appeal No. 57 of 1922.

SOMU PILLAI *v.* KRISHNA PILLAI.

Messrs. *K.V. Krishnaswami Aiyar* and *S. Panchapagasa Iyer*, for the Petitioner.

Messrs. *V. L. Ethiraj* and *K. S. Jayarama Aiyar*, for the Respondent.

ORDER.—This is an application to revise the order of the Sessions Judge of South Arcot in Criminal Miscellaneous Petition No. 19 of 1923. The complainant, Somu Pilli, brought a case of theft of bulls against the accused in the Court of the Second Class Magistrate of Chidambaram *Taluk*. The Sub-Magistrate convicted the accused and directed the bulls to be handed over to the complainant. The accused appealed to the Sub-Divisional Magistrate of Chidambaram who acquitted the accused and declined to interfere with the order of the Sub-Magistrate regarding the bulls. Against this order of the Divisional Magistrate, an appeal was preferred to the Sessions Judge of South Arcot Division who set aside the order of the Divisional Magistrate and directed the bulls to be handed over to the accused. It is urged before me that the Sessions Judge had no power under section 520 to vary the order of the Divisional Magistrate. Section 520 is in these terms: "Any Court of Appeal, confirmation, reference or revision may direct any order under section 517, section 518 or section 519, passed by a Court subordinate thereto, to be stayed pending consideration by the former Court, and may modify, alter or annul such order and make any further orders that may be just." The Court of Session of South Arcot is not a Court of Appeal, so far as the order of the Second Class Magistrate concerned. Appeals from the decisions of Second Class Magistrate lie to the District Magistrate and to Sub-Divisional Magistrate who are empowered to hear appeals from Second Class Magistrate. So the Sessions Court is not a Court of Appeal so far as the Stationary Magistrate is concerned. It cannot be said to be a Court of Appeal in respect of the order by the Sub-Divisional Magistrate. The Sub-Divisional Magistrate heard the appeal from the decision of the Second Class Magistrate and no second appeal lay to the Court of Session against the order of the Sub-Divisional Magistrate. The Sessions Court is not a Court of confirmation in cases of this kind. It was feebly urged by Mr. Ethiraj that the Sessions Court may be called a Court of Reference. I think, a Court of Reference means a Court to which references are made and which on reference is entitled to go into the matters and dispose of them. The High Court is a Court of Reference in Jury cases where the Judge differs from the Jury. The Sessions Court is not a Court of Revision so far as the judgment of the Second Class Magistrate are concerned and the Sessions Court has no revisional powers over the orders of a Divisional First Class Magistrate in appeal cases. Section 520 has, therefore, no application to the Sessions Court in cases like this. This point came up for decision in Criminal Case No. 236 of 1904 before a Bench of this Court. In that case the Second Class Magistrate convicted the accused and directed the property to be taken possession of by the Forest Officer. This order was made under section 44 of the Madras Forest Act. On appeal the First Class Magistrate, reversed the order of the Second Class Magistrate and acquitted the accused under section 47 of the Madras Forest Act and made the order which the Sessions Judge took upon himself to revise. The learned Judge held that the Sessions Court was not a Court of Appeal, etc., in those circumstances from the First Class Magistrate, and had no jurisdiction to revise the order. I hold that the order of the Sessions Judge is not authorised by section 520 or any other section of the Criminal Procedure Code. I set aside the order of the Sessions Judge and direct that the order of the Sub-Divisional Magistrate of Chidambaram be given effect to.

V. N. V. *Order set aside.*

BULAKIDAS *v.* AGENT, B. N. RY. CO.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 32 OF 1923.

August 16, 1924.

Present :—Mr. Baker, J. C.

BULAKIDAS—PLAINTIFF No. 2—APPELLANT

versus

THE AGENT, B. N. RY. COMPANY AND ANOTHER—DEFENDANT AND PLAINTIFF No. 1—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Suit against Agent of Railway Company—Defence by Railway Company—Amendment of plaint—Prejudice.

In a suit against a Railway Company, the defendant was described as the Agent of the Railway Company, but all the parties were perfectly aware that the suit was against the Railway Company and the relief asked was against the Railway Company who defended the suit as such :

Held, that the amendment of the plaint by striking out the word "Agent" would not prejudice any rights acquired by the Company by virtue of the Statute of Limitation. [p. 178, col. 1.]

Appeal against a decree of the District Judge, Nimar, dated the 7th October 1922, in Civil Appeal No. 93 of 1922.

Mr. *W. R. Puranik*, for the Appellant.

Mr. *J. C. Ghosh*, for the Respondents.

JUDGMENT.—In this case the plaintiff sued the Agent, B. N. Railway Company, for damages for failure to deliver goods consigned to the Railway Company, within a reasonable time and obtained a decree for Rs. 1,487-8. The claim was against the Bengal Nagpur Company, and the suit was defended by the Company.

No objection was taken in the First Court as to the form of the suit. On appeal to the District Judge, Nimar, it was contended that the suit was bad as being brought against the Agent of the Company and not the Railway Company itself. The District Judge accepted this contention and dismissed the suit. The plaintiff makes this second appeal.

A preliminary objection is taken that the appeal is time-barred by six days. The plaintiff put in an affidavit to the effect that he was prevented by illness from taking any steps in the matter of filing the appeal from October to January. No counter-affidavit has been put in, and the appeal was admitted by my learned predecessor without any note as to limitation; so it appears that he accepted the appellant's affidavit. It is true that this is not binding on the respondents, but in the absence of any evidence that the plaintiff is not speaking the truth and in view of the fact that the plaintiff has a decree in his favour and that his suit is dismissed in appeal on technical grounds, there seems to be no reason why the plaintiff should not have appealed against that decision. I, therefore, hold that under section 5 of the Limitation Act the appeal should be admitted.

As regards the question of the suit being brought against the Agent of the Railway Company instead of the Railway Company itself, there are numerous authorities on this point, and the High Courts have taken different views. The learned District Judge has relied on the case of *Sinehi Ram Bihari Lal* v. *The Agent, East Indian Railway Co.* (1). It is on all fours with the present case. That case relies on *Ram Dass Sein* v. *Cecil Stephenson* (2), *Nubeen Chunder Paul* v. *Cecil Stephenson* (3), and *India General Steam Navigation and Railway Company, Ltd.* v. *Lal Mohan Saha* (4). The Patna case has been expressly dissented from in a recent case. The *Saraspur Manufacturing Co.* v. *B. B. and C. I. Railway Co.* (5). The Patna case was also not followed in an unreported case of this Court [*Firm of Haji Suleman Hussan* v. *Agent, G. I. P. Railway Company* (Civil Revision No. 114 of 1922, decided on 27th January 1923)]. The facts in that case are precisely the same as in the present case and the Bombay case.

It has to be observed that in the present case the Railway Company defeated the suit on its merits. I find that the printed form of *vakalatnama*, used by the Bengal Nagpur Railway Company in suits against them, has the

(1) 64 Ind. Cas. 125; 2 P. L. T. 679.
(2) 10 W. R. 366.
(3) 15 W. R. 534.
(4) 31 Ind. Cas. 35; 43 C. 441; 22 C. L. J. 241.
(5) 73 Ind. Cas. 1027; 47 B. 785; 25 Bom. L. R. 513; (1923) A. I. R. (B.) 152.

"Agent, Bengal-Nagpur Railway" printed as the name of the defendant.

No question arises of any uncertainty as to who was being sued. The suit was against the Railway Company and was defended by the Railway Company and not by the Agent in his personal capacity. It is sought to distinguish the Bombay case on the ground that the Bombay High Court held that there was a practice in the Presidency of Bombay filing suits against Railway Companies in the name of their agents, but the same appears to be the case here in the unreported case of this Court quoted above, and also in Civil Revision No. 113 of 1922, decided on 3rd November 1922, which was also against the Agent, B. B. & C. I. Railway Company.

I entirely agree with the observations of the Bombay High Court in the *Saraspur Manufacturing Co.* v. *B. B. and C. I. Railway Co.* (5) (*Supra*), and I would adopt the reasoning of Crump, J., at pages 788 and 789. In the present case all the parties were perfectly aware that the suit was against the Railway Company, and the relief is asked against the Railway Company who were substantially on the record, and the amendment of the plaint by striking out the word "Agent" would not prejudice any rights acquired by the Company by virtue of the Statute of Limitation. I also agree with the view of my learned predecessor in *Firm of Haji Suleman Hussan* v. *Agent, G. I. P. Railway*, that this is a mere misdescription and that it was the Company who was really being sued.

In these circumstances the decree of the lower Appellate Court dismissing the suit will be set aside and the appeal remanded for its disposal on the merits, the plaintiff being allowed to amend the plaint by striking out the word "Agent". Costs in this appeal will be borne by the respondents; the costs in the lower Appellate Court to abide the result of the appeal.

S. D. *Appeal remanded.*

PATNA HIGH COURT.

PRIVY COUNCIL APPEAL No. 5 OF 1924.

June 17, 1924.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

MAGNI RAM BUNGAR AND OTHERS—APPELLANTS

versus

SRIDHAR CHOUDHURY AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 109—Order appointing or refusing to appoint Receiver—Application for leave to appeal to Privy Council.

An order refusing or granting the appointment of a Receiver does not fall within the provisions of section 109, Civil Procedure Code. [p. 180, col. 1.]

As the appointment of a Receiver is in no way a matter which finally determines the rights of the parties, an order of appointment does not fall under section 109 (*a*). [p. 179, cols. 1 & 2.]

Application for leave to appeal to the Privy Council from a decision of the Patna High Court (Mr. Justice Das and Mr. Justice Ross), printed as 78 Ind. Cas. 620, setting aside an order of the Subordinate Judge, Dhanbad, appointing a Receiver.

Messrs. *Hasan Imam* and *S. K. Mitter*, for the Appellants.

Messrs. *S. M. Mullick*, *A. B. Mukherji* and *N. N. Sen*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an application for leave to appeal to His Majesty in Council from a decision of this Court setting aside an order of the Subordinate Judge of Dhanbad appointing a Receiver of the properties, the subject of the suit.

The suit was a mortgage suit instituted by the petitioner against Nil Money Choudhury and the mortgage which was to secure an advance of eight lakhs of rupees hypothecated certain property for that purpose. Amongst other terms in the mortgage-deed it is provided that if default shall be made in payment of any instalment of interest or if the mortgagor should make any breach of any of the covenants and conditions to be performed by him, the mortgagee shall be entitled to call in the whole of the principal and interest notwithstanding the fact that the date of repayment shall not have arrived, and in the event of a suit being filed it shall

be lawful for the mortgagees without any further consent on the part of the mortgagor to apply for the appointment of a Receiver to take possession of the mortgaged property. The property in this case was certain coal lands and collieries. In the plaint the plaintiffs claimed in addition to their ordinary remedies in a mortgage suit that a Receiver should be appointed. Before the suit came on it appears that the mortgagor Nil Money Choudhury and his brother Sridhar Choudhury (the latter not being a party to the mortgage bond) had instituted a suit in the Calcutta High Court for dissolution of partnership, it being contended that they were in partnership and that the mortgaged property (the subject of the present suit) was part of the partnership assets. In that suit a Receiver was appointed and put in charge of the partnership assets.

The learned Subordinate Judge of Dhanbad, before whom the mortgage suit came for trial, in a preliminary application asking for the appointment of a Receiver, after discussing at some length the questions raised in that application, ordered a Receiver to be appointed. It should be mentioned that before the present suit was instituted the plaintiff had obtained leave from the Calcutta High Court to add the Receiver appointed by that Court as a party to the suit. In the result the Receiver Mr. R. N. Mitter, who had been appointed in the proceedings in the Calcutta High Court, was appointed Receiver on behalf of the mortgagee in the mortgage suit by the Subordinate Judge of Dhanbad.

From that decision Sridhar Choudhury, the brother of the mortgagor, appealed to the High Court at Patna. The appeal was heard before a Bench of two Judges who overruled the decision of the lower Court and set aside the order appointing a Receiver. One of the grounds, if not the main ground, for that decision was that a Receiver having been appointed by the Calcutta High Court there would be a conflict of jurisdiction if this High Court were to appoint another Receiver or even the same Receiver in the interests of other parties.

From that decision we are asked for leave to appeal to His Majesty in Council.

In my opinion this was not a final order within the meaning of section 109 (*a*) of the Civil Procedure Code. The appointment of a Receiver is in no way a matter which finally determines the rights of the parties. It was pointed out, however, that in the present case the appointment of a Receiver was one of the remedies which the mortgagee was entitled to in certain events, and that his right to such appointment was a substantive part of the claim in the mortgage suit. I do not take this view. In the clause which deals with the matter in the mortgage bond, the right, that is given to the mortgagee in certain events, seems to me to be practically no more than a right he would have without such a clause. The only right he is given is, in the event of a suit being filed to apply for the appointment of a Receiver, to take possession of the coal land and it stipulates that he may do that without any further consent on the part of the mortgagor. But in any event it is always for the Court to say in its discretion whether it will appoint a Receiver or not. But for the complications which have arisen by the appointment of a Receiver by the Calcutta High Court in this case I have no doubt whatever that upon an application being made on the mortgage suit being filed the Court would have appointed a Receiver forthwith. The matter, however, is one entirely for the discretion of the Court and whichever way the Court decided it certainly does not, to my mind, finally determine any of the rights of the parties which have arisen out of a mortgage bond. For these reason I do not think that the case falls under section 109 (*a*) of the Civil Procedure Code.

We have been asked to say, however, that the case is of such importance that we ought to exercise our jurisdiction in granting leave under section 109 (*c*) and certify that this is a fit case for appeal to His Majesty in Council. It is true that a question arises in this case as to what is to be done where there would be apparently a conflict of jurisdiction between two different Courts if the order were acceded to. I do no

think, however, that this is in itself any sufficient ground for allowing an appeal to be carried to His Majesty in Council. It seems to me that in the existing circumstances the Receiver, who is now fully aware of the claims of the mortgagee, will be acting at his peril if he deals with the property in any way contrary to his interests. Moreover, it is always open to the mortgagor to apply in the proceedings now going on in the Calcutta High Court, if he considers that his interests are in any way being jeopardised. In the only cases which have been drawn to our attention in which this matter has been considered, namely, the cases of *Chundi Dutt Jha* v. *Pudmanund Singh Bahadur* (1) and *Muhammad Musaji Saleji* v. *Ahmed Musaji Saleji* (2) it was laid down on both occasions that an application, such as this, asking for leave to appeal to His Majesty in Council from an order refusing or granting the appointment of a Receiver was not such an order as fell within the provisions of section 109. It may be that the present case is somewhat unusual and raises questions which have not been determined on a previous occasion, but at the same time I do not think the matter is one of such importance that we ought to exercise our powers under section 109 and grant this application. The application should be dismissed with costs. Hearing fee five gold *mohurs*.

Foster, J.—I agree.

S. D. *Application dismissed.*

(1) 22 C. 928; 11 Ind. Dec. (N. S.) 614.
(2) 10 Ind. Cas. 439; 13 C. L. J. 507.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 131 OF 1923.
June 26, 1924.
Present:—Mr. Justice Dalal.
BISHUNATH RAI—PLAINTIFF—APPELLANT
versus
JODHI RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Father's debt—Son's duty to pay—Mortgage-decree against father—Ancestral property sold—Suit to cancel auction sale—Burden of proof—Immoral or illegal debt.

It is the pious duty of a Hindu son to pay a simple money debt due from his father even during the lifetime of the father. [p. 180, col. 2.]

Where a Hindu son sues for cancellation of a sale of joint family property in execution of a mortgage-decree against his father, the burden is on him to prove that the debt in respect of which the decree was passed was contracted for illegal or immoral purposes. [p. 180, col. 2.]

Second appeal against a decree of the District Judge of Ghazipur, dated the 12th October, 1922.

Mr. *Hamid Hasan*, for the Appellant.

Dr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—A Hindu son sued for the cancellation of two auction sales of joint family ancestral property sold in execution of decrees which the lower Appellate Court held were not binding on him. The question was whether the decrees were such as would bind a Hindu son. One sale was held on the 28th June 1911 in execution of a decree for sale on foot of a mortgage and the other sale took place on the 28th September 1912 in execution of a simple money decree. The simple money decree was for a debt contracted by the father to pay pre-emption money. Both the lower Courts have held that this was a legal necessity for which the father, the managing member of the family, may borrow money. The property is still in the possession of the family. Apart from that it will be the pious duty of the son to pay a simple money debt due from his father even during the lifetime of his father.

The second sale raises a question of burden of proof. It was argued here that it lay on the auction-purchaser to prove that the debt was contracted for valid necessity. This is not correct. The First Court held that the plaintiff and his father were members of a joint family and that the family property was jointly held. Thus the plaintiff could not claim half share of the property in suit as there has been no division of the joint family property. He can avoid the sale entirely if he could prove that the debt was contracted for immoral purposes. This he has failed to do.

The argument was that the burden lay on the purchaser. I had occasion

in Oudh to discuss this matter in First Appeal No. 70 of 1921 [*Rup Kishore* v. *Kanhaiya Lal*]. The distinction between the son's liability under a mortgage executed by a father in a joint Hindu family and his remedy after proceedings taken against the father on the foot of the mortgage was first stated by Lord Hobhouse in the Privy Council judgment of *Nanomi Babuasin* v. *Modhun Mohun* (1).

"It appears to their Lordships that sufficient care has not always been taken to distinguish between the question how far the entirety of the joint estate is liable to answer the father's debt, and the question how far the sons can be precluded by proceedings taken by or against the father alone from disputing that liability. Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for antecedent debt or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is no conflict of authority."

In *Sahu Ram Chandra* v. *Bhup Singh* (2) the law on the subject was again examined by the Privy Council. The question at issue there was the nature of an antecedent debt. Their Lordships pointed out that so far as the joint family estate was concerned the law had been invoked for the protection of third parties whose rights in or with regard to it have been acquired in good faith and they went on to observe :—

"A perusal of the numerous authorities will show that where a joint family property has been sold out and out, or where a decree in execution of the mortgage has been obtained against the property, and rights have thus sprung up with regard to the joint family estate, these rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head."

These pronouncements leave no doubt that the burden of proof in a case like the present lay on the plaintiff. It is admitted that he has not discharged it, so the decree of the lower Court is perfectly correct.

This appeal is dismissed with costs which will include fees here on the higher scale.

K. S. D. *Appeal dismissed.*

(1) 13 C. 21; 13 I. A. 1; 10 Ind. Jur. 151; 4 Sar. P. C. J. 682; 6 Ind. Dec. (N. S.) 510 (P. C.).

(2) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 28 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.).

PATNA HIGH COURT.

CIVIL REVISION No. 74 OF 1924.
May 30, 1924.
Present :—Mr. Justice Das and Mr. Justice Ross.

ASHARFILAL MAHTHA AND OTHERS—PETITIONERS
versus
SURAJMAYA MISHRAIN—OPPOSITE PARTY.

Compromise decree—Fraud—Decree set aside—Rights of parties.

When a compromise decree is set aside on the ground that it was obtained by fraud, the Court is bound to proceed with the original case, as the effect of setting aside the decree is to remit both parties to their original rights. [p. 182, col. 1.]

Civil revision from an order of the Munsif, Darbhanga, dated the 10th of January 1924.

Mr. *Murari Prasad*, for the Petitioners.

Mr. *Lachmi Kant Jha*, for the Opposite Party.

JUDGMENT.

Das, J.—This application must succeed. A consent-decree was passed in a suit on the 20th of November 1920. Thereafter the defendant in that suit, the opposite party before us, instituted a suit, being Suit No. 791 of 1922, against the plaintiff, the petitioner before us, for setting aside the consent-decree on the ground that it was obtained by fraud. That suit succeeded and the petitioner thereupon asked the Court to proceed with Suit No. 216 of 1920 on the ground that the consent-decree having been set aside he was entitled to proceed with the suit. The learned

Munsif dismissed this application holding that "the plaint is now dead" and that "it cannot be received without any formal judicial order of a competent Court to that effect."

The learned Vakil appearing on behalf of the opposite party has relied upon the decision in *Bhimaji Govind Kulkarni* v. *Rukmabai* (1). But he has very properly given us a list of cases against him. Of these cases there is one which was decided by the Judicial Committee in 1876 *viz.*, *Khajooroonissa* v. *Rowshan Jehan* (2). In that case it was held that "the effect of setting aside the compromise was to remit both parties to their original rights." There is a large number of cases on this point, but it is unnecessary to refer to them; and, it is sufficient to say, that we are bound by the decision of the Judicial Committee and that there is no justification of the order passed by the Court below.

The order of the Munsif is accordingly set aside and he is directed to proceed with the hearing of Suit No. 216 of 1920. There will be no order as to costs.

Ross, J.—I agree.

S. D. *Application allowed.*

(1) 10 B. 338; 5 Ind. Dec. (N. S.) 613.
(2) 2 C. 184; 3 I. A. 291; 26 W. R. 36; 1 Ind. Dec. (N. S.) 412 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 134 OF 1923.

March 19, 1924.

Present:—Mr. Baker, J. C.

PUNJARAJSA—DEFENDANT NO. 1—APPELLANT

versus

CHAGANLALSA AND ANOTHER—PLAINTIFF AND DEFENDANT NO. 2—RESPONDENTS.

C. P. Land Revenue Act (II of 1917), s. 203—Abadi site, occupation of, by tenant—Transfer by landlord—Right of tenant to resist entry by transferee—Adverse possession.

The occupation by a tenant of an *abadi* site in a village makes him a licensee and unless the land is given to him as a house site he is not protected by section 203 of the Land Revenue Act. A sale by the landlord puts an end to the license. [p. 183, col. 1.]

No title by prescription can be acquired in respect of such land by the tenant in the absence of any assertion of adverse title against the landlord. [*ibid.*]

Appeal against a decree of the District Judge, Nimar, in Civil Appeal No. 191 of 1922, dated the 2nd February 1923.

Mr. *A. C. Roy*, for the Appellant.

Messrs. *J. C. Ghosh* and *W. R. Puranik*, for the Respondents.

JUDGMENT.—The plaintiff sued to recover possession of two small portions of *abadi* site sold to him by defendant No. 2, the *malguzar*, from defendant No. 1 who is alleged to have taken wrongful possession of them. The defendant No. 1 contended that they were his property. Both the Courts below have found that though he had been long in possession, his possession was merely that of licensee, and under section 59 of the Easements Act, the transferee of the grantor is not bound by the license.

The defendant No. 1 appeals on the ground that the site is occupied by him as part of the *abadi*, in which he has a heritable though not a transferable right under section 203 of the Land Revenue Act. Reference is made to *Bhondusao* v. *Jagat Ram* (1) *Bhayalal* v. *Chunnilal* (2) *Govind Rao* v. *Amrit Rao* (3) and *Motiram* v. *Rup Khan* (4).

These are all cases of transfer by tenants and are not applicable to the present case, and the remarks in the last 2 cases go against the appellants. In *Govind Rao* v. *Amrit Rao* (3) it is remarked that the object of the *wajib-ul-arz* is to recognize the proprietary right of the landlord consistently with the undisturbed occupancy of village building sites by the licensed occupants and their customary successors, and in the next case at page 156 it is distinctly laid down that the occupiers are mere licensees. Their right does not amount to an interest in the property and seems

(1) 12 C. P. L. R. 146.
(2) 16 C. P. L. R. 81.
(3) 4 N. L. R. 142 at p. 153.
(4) 4 N. L. R. 155 at p. 156.

to be a mere license within the definition of that term given in section 52 of the Easements Act.

The leading case on the point is *Narain* v. *Behari* (5) where it is held that tenants residing in the *abadi* are licensees.

Section 203 of the Land Revenue Act refers to house sites. The land in dispute in the present case does not form part of the house site, but is a mere open space near defendant No. 1's house used by him for the purposes of a latrine. There are no permanent structures on it now and though it may have been in his occupation a long time, no title by prescription has been acquired in the absence of any assertion of adverse title against the landlord. Such user as the defendant has made cannot amount to adverse possession: *cf. Radhikadas* v. *Harmohanlal* (6) following *Framji Cursetji* v. *Gokuldas Madhowji* (7).

It was not the appellant's case that this land was granted to him by the *malguzar* along with the house site and this being so, although he may be protected by section 203 of the Land Revenue Act and the *wajib-ul-arz* as regards the site in question he is a mere licensee of the landlord, the *Malguzar*, and under section 59 of the Easements Act the sale to the plaintiff puts an end to the license.

The appeal accordingly fails and is dismissed with costs.

G. R. D. *Appeal dismissed.*

(5) 31 Ind. Cas. 307; 11 N. L. R. 123.
(6) 39 Ind. Cas. 54; 13 N. L. R. 25.
(7) 16 B. 338; 8 Ind. Dec. (N. S.) 703.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1217 OF 1921.
April 4, 1924.

Present:—Mr. Justice Madhavan Nair.

THITHI KUTTI—DEFENDANT No. 1—APPELLANT

versus

NELLAYA VARIATH, MANAGER UNDER *a Karar* RAGAVAN UNNI ELAYA VARIAR AND OTHERS—DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Malabar tarwad—*Maintenance grant—Encumbrance by grantee prohibited—Encumbranc effected against prohibition*—Tarwad, *whethe liable for encumbrance on grantee's death.*

If the member of a Malabar *tarwad* is given *tarwad* property for his life with an express prohibition against encumbering it, and he encumbers it, after his death, the *tarwad* is not liable for the encumbrance. [p. 184, col. 1.]

Second appeal against a decree of the District Court, South Malabar, in Appeal Suit No. 762 of 1920, preferred against a decree of the Court of the District Munsif, Manjeri, in Original Suit No. 390 of 1919.

Mr. *B. Pocker*, for the Appellant.

Mr. *K. P. M. Menon*, for the Respondents.

JUDGMENT.—The first defendant is the appellant. The plaintiff, a member of a Malabar *tarwad*, sues to recover possession of the suit properties allotted to the deceased Krishna Wariar under Exhibits B and C. The defendant is in possession of these properties under the mortgages executed by the deceased Krishna Wariar. The lower Courts have decreed possession to the plaintiff holding that the mortgages are not binding on the *tarwad*. The learned Vakil for the appellant has advanced various arguments in the second appeal. His first argument is that the arrangement under which these properties were allotted to Krishna Wariar amounted to a partition of the *tarwad* properties, that accordingly Krishna Wariar got these properties absolutely for himself and through him his client the mortgagee has now got valid rights to these properties. On a construction of Exhibits B and C, it cannot be held that Krishna Wariar had effected partition of the properties from the *tarwad*.

It is next argued that the present plaintiff was not entitled to institute this suit on the ground that Krishna Wariar who had left the *tarwad* under the maintenance arrangements was not a party to Exhibit D. It is admitted that Exhibit D gives him the right to institute the suit. Krishna Wariar must be considered to have dissociated himself from the *tarwad* under B and C and, therefore, the fact that he was not a party to D, cannot affect the arrangement for the administration of the *tar-*

wad embodied in it and in pursuance of which the present plaintiff gets the right to institute this suit. In my opinion, the plaintiff is entitled to institute this suit under Exhibit D.

The next argument which has been advanced on behalf of the appellant is that his client has perfected a title by adverse possession of mortgagee's interest in the suit properties. It is argued that under the maintenance arrangements in pursuance of which Krishna Wariar got these properties, he is not allowed to encumber them, and that since he encumbered them in violation of the terms, the defendants have perfected for themselves a legal title by adverse possession. The decision of this question depends on the construction of B and C as regards the interest that was conferred upon Krishna Wariar under their provisions. As may be seen from paragraph No. 1 and paragraph No. 2 of Exhibit B the intention of the parties to the document was to give Krishna Wariar a life interest in these properties. It is specifically stated that he will continue to enjoy those properties set apart for him throughout his life-time. The statement that he is not to create any encumbrance in my view only amounts to this, *viz.*, that the *tarwad* after the death of Krishna Wariar will not be liable for these encumbrances. So long as Krishna Wariar is alive the *tarwad* is not entitled to immediate possession of the suit properties. The decision in *Madhava* v. *Narayana* (1) does not, therefore, apply to the facts of this case. It is not the case of the appellants that after the death of Krishna Wariar his client had been in adverse possession for over 12 years. I may also state that it is nowhere mentioned that the *tarwad* was aware of these encumbrances created by Krishna Wariar in favour of the defendant. Under these circumstances, I think that the plea of limitation should also be overruled. The second appeal is dismissed with costs of the first defendant.

V. N. V.

S. D. *Appeal dismissed.*

(1). 9 M. 244; 10 Ind. Jur. 61; 3 Ind. Dec. (N. S.) 567.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 143 OF 1922.

May 30, 1924.

Present:—Sir Cecil Henry Walsh, KT., Acting Chief Justice, and Mr. Justice Ryves.

Pandit BALGOBIND—DEFENDANT—APPELLANT

versus

SHEO KUMAR AND ANOTHER—PLAINTIFFS AND *Musammat* MAHTAB KUAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 148, 151, O. IX, r. 13, O. XXXIV, r. 4—Decree, form of—Mortgage suit—Preliminary decree for foreclosure—Decree not in accordance with judgment, effect of Subsequent proceedings, whether valid Summons, when "duly served" Mortgagor misled by Court's agent—Foreclosure decree, whether can be enforced—Wrongful act of Court, whether creates estoppel—High Court, inherent power of, to correct mistake—Interests of justice—Court, whether can extend time fixed for doing particular act—Protracted proceedings—Interest during interval, nature of.

The decree which is drawn up by a Court must be in accordance with the judgment. Where, therefore, the judgment gives a decree for sale but the decree drawn up is a preliminary decree for foreclosure, it is not in accordance with the judgment, is invalid and vitiates all subsequent proceedings in the case. [p. 186, col. 2.]

A summons cannot be said to be "duly served" within the meaning of O. IX, r. 13, Civil Procedure Code, if it is a misleading document having no relevance to the real proceeding which is contemplated. [p. 188, col. 2.]

It is incumbent on the Court to be scrupulous in the extreme, and very careful to see that no taint or touch of fraud or deceit, or misrepresentation is found in the conduct of its ministers. It must at any rate not fall below the standard of honesty which it exacts from those on whom it has to pass judgment. The slightest suspicion of trickery or unfairness must affect the honour of the Court and impair its usefulness. [p. 189, col. 1.]

Kala Mea v. *Harperink*, 1 Ind. Cas. 122; 36 C. 323 at p. 334; 13 C. W. N. 249; 6 A. L. J. 34; 5 M. L. T. 126; 9 C. L. J. 165; 11 Bom. L. R. 227; 19 M. L. J. 115; 36 I. A. 32 (P. C.), relied on.

Therefore, a Court must not enforce against a mortgagor or any one interested in the equity of redemption, a foreclosure decree when he has been misled by its duly accredited agent through the issue of a notice for a decree for sale. [p. 189, col. 1.]

There can be no estoppel against a litigant arising out of the wrongful acts of the Court, permitted or performed by its own officials. [p. 189, col. 2.]

BALGOBIND v. SHEO KUMAR.

The object of Courts is to decide the rights of parties, and not to punish them for mistakes they may make in the conduct of their case, by deciding otherwise than in accordance with their rights. [p. 190, col. 1.]

Cropper v. *Smith*, (1884) 26 Ch. D. 700; 53 L. J. Ch. 891; 51 L. T. 733; 33 W. R. 60, followed.

The High Court has inherent power under section 151 of the Civil Procedure Code to correct a mistake for the purpose of preventing a miscarriage of justice appearing on the face of the proceedings and to make such orders in the nature of consequential orders, as may be necessary for the ends of justice and to prevent an abuse of the process of the Court, which includes the idle multiplicity of proceedings. [*ibid.*]

Under section 148 of the Civil Procedure Code, the High Court can extend the time fixed by the decree of a Subordinate Court for the doing of any particular act. [*ibid.*]

In a case where proceedings have been protracted through the fault of both parties, interest for the period of suit partakes of the nature of damages and the Court may mould it according to its will. [p. 190, col. 2.]

First appeal from an order of the Second Subordinate Judge, Cawnpore, dated the 7th September 1922.

Dr. *M. L. Agarwala* and Mr. *A. P. Dube*, for the Appellant.

Sir *Tej Bahadur Sapru*, Dr. *S. N. Sen*, Messrs. *Iqbal Ahmad* and *Ajodhia Nath*, for the Respondents.

JUDGMENT.--These are three appeals by certain second mortgagees, and a lessee of the mortgagor, against an order of the Subordinate Judge of Cawnpore, dated the 7th of September 1922, rejecting an application to set aside under O. IX, r. 13 of the Code of Civil Procedure, a decree absolute for foreclosure. The parties are persons of position, but the history of the case illustrates the astounding complications and delays which arise in this country, in effecting service, in fixing dates for hearing, in determining the real controversy between the parties, and in enforcing decrees, and also the difficulties with which this Court is frequently confronted, owing to the gross negligence of the officials in the Subordinate Courts, instances of which generally come to our notice when it is too late to investigate the matter with any hope of saddling the responsibility on the right shoulders. This case, in which the only substantial issue, namely, how much is due under two ordinary mortgages, might have been settled in less than three hours, has taken three years in the lower Court, and owing to the transfers of judicial officers, which have taken place, has passed through the hands of four Judges. It is now nearly eighteen months since the appeal was admitted in this Court.

The plaintiffs are the minor children of the deceased mortgagee Ram Charan Shukul, suing under the guardianship of their mother. The defendants were one Gauri Shanker, the original mortgagor, who died pending the appeal, *Musammat* Gyan Devi, widow of a deceased District and Sessions Judge of this Province, Jwala Devi, her daughter, who are second mortgagees, and Bal Gobind, an Honorary Magistrate, husband of Jwala Devi, and lessee of the mortgaged property.

The difficulties which have occurred in effecting service from time to time, partly owing to the fact that Gyan Devi is a *pardanashin* lady living at Agra, and partly to the desire of the defendants to gain time, are fully set out in the elaborate judgment of the Subordinate Judge. For the purpose of reference, the following schedule of dates, which was prepared by the parties may be useful:—

[The Schedule is omitted as immaterial—*Ed.*]

The original decree in the suit was passed *ex parte* in January 1920. It was, however, set aside by Babu Lachmi Narain Sahib, Subordinate Judge of Cawnpore, in January 1921. The suit was one for foreclosure, and claimed that relief. It was heard on the merits, and decided by the learned Judge on the 5th of February 1921. The defendant Gauri Shankar put in no defence. The issues were settled as follows:—

What sum, if any, are the plaintiffs entitled to on the basis of the mortgage-bonds dated the 4th of January 1912 and the 25th of May 1912?

Whether the interest at 9 per cent. per annum with six monthly rests is penal?

Presumably the defendants, who were interested in the equity of redemption, were desirous of saving the property

from foreclosure, and of obtaining from the Court a decision as to the actual amount due under the mortgages. The learned Judge gives no reason, but in his judgment he ascertains and decrees the amount due, less a sum for proportionate costs, and awards to the plaintiffs interest at the contractual rate till the period of grace, namely, six months, and thereafter future interest at the Court rate, in terms of O. XXXIV, r. 4 of the Code of Civil Procedure allowing six months for payment before sale. It is quite clear that this provisional decree was a provisional decree for sale. In recital of the plaintiffs' claim, the learned Judge describes the suit as one for recovery of the amount due by sale of the hypothecated property. The plaintiffs throughout have relied upon the fact that they were asking for foreclosure. But it is evident from the judgment, that either they modified their claim and asked for a sale, or the learned Judge, in the exercise of his discretion under O. XXXIV, r. 4, sub-section (2), Civil Procedure Code, intended to pass a decree for sale in lieu of a decree for foreclosure. This is made evident by the operative part of the judgment citing O. XXXVI, r. 4. Rules 2 and 3 relate to the preliminary and final decrees in a foreclosure suit, but r. 4, sub-section (2) provides, that in a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of any person interested in the right of redemption, pass a decree for sale in lieu of a decree for foreclosure on such terms as it thinks fit.

The decree drawn up in the office of the Suborinate Judge and signed by the Munsarim, as the ministerial officer of the Court, was a preliminary decree for foreclosure. We have come to the conclusion that the Court of the Subordinate Judge had no jurisdiction, in view of the judgment, to draw up such a decree. The Code is clear in insisting that the decree, which is drawn up by the Court, shall be in accordance with the judgment. It will be necessary for this Court to direct an enquiry in Cawnpore as to the circumstances under which this decree came to be drawn up in this way. In our opinion this decree is invalid and vitiates the whole of the subsequent proceedings which have been taken subsequent thereto in the Subordinate Judge's Court. The objection is stated in the 6th ground of the appeal of Jwala Devi in the following terms :—

"The preliminary decree is incorrect and not according to the order of the judgment dated 5th February 1921, and hence the whole proceedings thereafter are null and void."

With this view we agree. Whether we ought merely to declare it void, or to set it aside ourselves, is a question of procedure, which in view of the line taken by the Bar in this case, must be discussed hereafter. It is contended by Sir Tej Bahadur Sapru, on behalf of the plaintiffs, that the defendants knew of the form of the decree. There is certainly no evidence on the record that they did, but it is said that they must have known. It is *a priori* improbable that they knew. There is no reason why they should have known. Litigation is not conducted in this province by Solicitors, who, as a matter of routine, concern themselves with looking at the minutes or the judgment as actually drawn up in an English Court. In India the Court makes itself responsible for the drawing up and final issue of the decree. An interval of time elapses between the judgment and the final decree, and the officer charged with the duty of writing the decree gives notice to the parties of the intention to prepare the decree. But although the defendants were much concerned to save the equity of redemption if they could, they were not concerned, once a decree for sale had been passed, to examine the formal document in which the decree was drawn up. If the officials of the Court did their duty, the document would follow the judgment, the total sum being a mere matter of arithmetic worked out on the direction contained in the judgment. It could not be worse for the defendants than the decision which the Subordinate Judge had given,

and was not likely to be better. There is a rule in this High Court that the proposed decree, before being finally passed, should be submitted to and initialled by the Vakils on both sides. It is a valuable rule and it is a practice which has been much followed in the Subordinate Courts, but there appears to be no rule in the Subordinate Courts, a matter which this Court may well consider that it would be desirable to rectify.

The difference between a decree for foreclosure and a decree for sale is, of course, considerable. In either case the mortgagor gets six months time to pay the money, but after the expiration of that six months period of grace, in the case of a foreclosure, the property passes to the mortgagee, and no *locus pœnitentiæ* remains to the mortgagor; whereas in the case of a decree for sale, there is the further delay caused by the preparation of the proclamation of sale, and the fixing of the date, a matter, which we understand, frequently covers two months or so. Then if the sale is successful, it has to be confirmed by the Court and the debtor or mortgagor has still a month within which he may deposit the money with interest, and save the property. This is material as indicating that it is by no means surprising to find parties, who are interested in preserving the equity of redemption, treating the period which must elapse once a sale has been ordered before the time is reached, when they must make up their minds once for all to pay or lose the property with considerable indifference. It is a matter ingrained in the habits of the people of this Province, and the majority of mortgagors appears to prefer to put off the evil day as long as possible, even though interest at a high rate is running against them.

The lower Court seems in its judgment to have been not unnaturally influenced by the indications of procrastination on the part of the defendants in this matter and to have come to the conclusion that they were well aware of the foreclosure decree against them before the 15th of June 1922—when they say they learnt it through their agent—from a triumphant remark of the *munib* of the decree-holders, who told them that the decree-holders would obtain possession of the mortgaged property. The learned Judge does not say how and when the knowledge came to them earlier than the 15th of June, and the only evidence of its coming to them is the application upon which the order under appeal was made which was dated 21st June 1922, and it was not until a special and supplementary petition was put in by the defendant Balgobind on the 29th of July 1922, that they formally took objection that the judgment and notice of hearing for the making of the decree absolute was for sale, whereas the actual decree absolute was for foreclosure.

Not the least extraordinary feature of this remarkable case is that the learned Judge himself, from whom this appeal has been brought, in the judgment which is before us, should have missed this point. He says: "The case was then heard on the merits, and the Court passed a foreclosure decree under O. XXXIV, r. 4 of the Civil Procedure Code, (which it could not do by law) on the 5th of February 1921, allowing the defendants six months within which to redeem. I find from a perusal of the judgment of Babu Lachmi Narain Sahib, that the contesting defendants went to issues only on the amount due under the mortgage deeds and the penal nature of interest." We are unable to understand how the learned Judge could have failed to notice the fundamental error which had occurred in these proceedings, if he had read the judgment of the 5th of February 1921, and appreciated that he was dealing with a decree for foreclosure.

On the 30th of August 1921, the plaintiffs presented in the Court of the Subordinate Judge an application for a decree absolute for foreclosure. This application, although ignoring the judgment, was consistent with the original claim for relief in the plaint and with the decree which they had either dishonestly obtained from an innocent and careless official, or which they had procured from him by chicanery and cor-

ruption. Whatever anybody else connected with the case knew on the 30th August 1921, they knew quite well that they were not entitled to a final decree for foreclosure and that the preliminary decree was a dishonest proceeding.

The next step is perhaps more remarkable than anything which has gone before. On the plaintiffs' application for a decree absolute for foreclosure the Court issued a notice, on the ordinary printed form of notices, to the respondents to show cause why an order for preparation of a decree absolute should not be passed, that they the plaintiffs were applying for an order absolute for the sale of the property, and informing the defendants that if they had any objection to an order absolute for sale, they should attend the Court on the 25th of March 1922 at 10 o'clock. This notice, we are told, was issued under the signature of the same Munsarim who had drawn up the preliminary decree for foreclosure, and the matter of the issue of this notice for sale based upon an application for foreclosure, is a further matter upon which this Court will have to direct an enquiry. The greater part of the judgment of the learned Subordinate Judge deals with the difficulties in effecting service, and the shifts adopted by the various parties to evade service, no doubt with the object of putting off the sale as long as possible with the intention of finding the money when they could not longer stave off the sale. They probably had no intention of appearing to resist a decree absolute for sale. There was no reason why they should. They could not hope to resist it successfully, and after the judgment of the 5th of February 1921, they could not escape the obligation ultimately of providing the money, if they were to save the property. But if the decision of the Subordinate Judge is accepted, namely, that they did in fact receive this notice and in some way or another constructively or directly knew all about it, then the result is that, having received notice of an application for sale, and having deliberately kept away, because they could not resist the order, a decree absolute for foreclosure was passed *ex parte* against them for default in appearing to resist a decree for sale. It is clear that an order so passed cannot stand. It matters little on what ground it is put. It seems to be vitiated by almost every objection to which an order can be exposed. One of the contentions before us by Sir Tej Bahadur Sapru on behalf of the respondents was that the case did not come within O. IX, r. 13, of the Civil Procedure Code, because the appellants had failed to satisfy the Court that the summons was not duly served, or that they were prevented by any sufficient cause from appearing. Assuming that they knew that they were summoned to appear to show cause against legal proceedings which were being taken against them, and that they were not prevented from appearing, and probably never had any intention of doing so, the question still arises whether the summons was duly served within the meaning of r. 13 The words "duly served" would appear to relate to the method of service, but in our view a summons cannot be said to be "duly served" which is a misleading document having no relevance to the real proceeding which is contemplated, and having no reference to the order ultimately passed. Under such circumstances, service, even if effected, is a mere sham, and this is not by mere *ex post facto* reasoning, because the train had already been laid by the application of the 30th of August for an order for foreclosure.

Sir Tej Bahadur Sapru, on behalf of the plaintiffs-respondents, argued that no notice is really necessary to show cause against the making of a decree absolute. The learned Subordinate Judge disagreed with this view, and held that the practice in this Province, approved by the High Court, was to give such notice. We do not propose to follow the respondents' Counsel into these high flights of procedure. It is only a rule of practice at the best, and no rule can apply so as to render the issue of a false notice, equivalent to the absence of any notice at all.

It is difficult to acquit the plaintiffs of complicity in the scheming by which this

notice was issued. It is difficult to suppose that it was done by the Munsarim as the result of sheer ignorance and incompetence. He must be credited with having had some object to fulfil, or some obligation to re-pay in adopting such an astounding departure from the ordinary routine of his office. But in considering the rights of the defendants, these alternative contingencies have no importance. The Court issues these notices through its responsible ministers, and as their Lordships of the Privy Council pointed out in the case of *Kala Mea* v. *Harperink* (1) (in dealing with a litigant who had been tricked as the result of clumsy misrepresentation by one of the Court's sale officers) "It is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taint or touch of fraud or deceit or misrepresentation is found in the conduct of its ministers. The Court, it is said, must at any rate not fall below the standard of honesty which it exacts from those on whom it has to pass judgment. The slightest suspicion of trickery or unfairness must affect the honour of the Court and impair its usefulness." To paraphrase their Lordships' final sentence in this connection "it would be disastrous; it would be absolutely shocking, if this Court were to enforce against a mortgagor, or any one interested in the equity of redemption, a foreclosure decree, when he had been misled by its duly accredited agent through the issue of a notice for a decree for sale."

The mortgage-debt is under Rs. 18,000. The property is said to be worth at least Rs. 45,000. Some one is obviously concerned to save the equity of redemption. We are of opinion that no summons for making a decree absolute for foreclosure was ever served at all, and that the decree obtained was irregular and must be set aside.

We now come to the question of procedure which has been much argued before us. It was suggested on behalf of the plaintiffs-respondents when they began to realize that the *ex parte* decree absolute was doomed, that we ought to send the case back, and allow the parties to renew the conflict as from April 1922, when the decree which we now set aside was obtained, and renew it, probably before a fifth Judge, at such time as the Court, already overwhelmed with work, is able to fix, after fresh devastating efforts to serve such of the defendants as may then be still surviving, or their legal representatives. We are unable to take this view. We are seized of the whole matter. The record is here. The rights of the parties are clear. The preliminary decree, even after the expiration of three years and four months, ought to follow the judgment. In our opinion, as we have said, the preliminary decree of the 5th of February 1921 is waste paper, and no decree absolute based upon it would be binding on the defendants.

Sir Tej Bahadur Sapru, on behalf of the plaintiffs, contended that he was entitled to stand on that decree and to enforce foreclosure, although he had never obtained an order for it from any judicial Tribunal. He suggested further, that if we left the defendants to take such steps as the Code and rules provide, either by way of appeal or review, to set aside that preliminary decree, he had a complete technical and equitable answer. It is open to his clients, if the case should go further, to raise any objection they may be advised. So far as we were able to follow his argument, he relied upon a kind of equitable estoppel by conduct. But there can be no estoppel against a litigant arising out of the wrongful acts of the Court, permitted or performed by its own officials and we can see no ground of equity, justice or good conscience, which would justify us in upholding this preliminary decree.

The learned Judge says that the defendents were well aware of all that was going on, but the learned Judge himself appears to be unaware that no notice for a decree absolute for foreclosure was even issued from his Court. Apart from any provision of the Code, we are of opinion that we have inherent power to correct such a mistake by any means consistent with the ends of justice. Even if the de-

(1) 1 Ind. Cas. 122; 36 C. 323 at p. 334; 13 C. W. N. 249; 6 A. L. J. 34; 5 M. L. T. 126; 9 C. L. J. 165; 11 Bom. L. R. 227; 19 M. L. J. 115; 36 I. A. 32 (P. C.).

fendants have not taken every step open to them or have not shown a prompt sense of their obligation, or a right appreciation of the appropriate procedure, it is nonethe-less [as Lord Justice Bowen said in the case of *H. Cropper* v. *Smith* (2)] the object of Courts to decide the rights of parties, and not to punish them for mistakes they may make in the conduct of their case, by deciding otherwise than in accordance with their rights. But it seems to us further that section 151 could not be invoked more appropriately, than in a case like this, for the purpose of correcting such a miscarriage of justice appearing on the face of the proceedings, and there is abundant authority, which it would be wearisome to cite, there being no case quite analogous to this one, where the Courts in India have held themselves justified, under this salutary provision, in making such orders in the nature of consequenial orders, as may be necessary for the ends of justice, and to prevent an abuse of the process of the Court, which we take to include the idle multiplicity of proceedings.

We, therefore, exercise the inherent powers reserved to us by this section, and set aside not only the decree absolute, but the preliminary decree of the 5th of February 1921, and restore the parties to their rights and obligations respectively under the judgment of Babu Lachmi Narain of that date. We are satisfied—although every sort of argument was addressed to us designed to show that we had no such powers—that we have power in the light of what has happened, and what must now be done, to extend the time for payment. The six months' time allowed in 1921 has been affected chiefly by the plaintiffs' own acts. But the Code seems to us to be clear on the subject, as, apart from the provisions of O. XXXIV, section 148 enables a Court to extend any time fixed by the Court for the doing of any act allowed by the Code. The time fixed by Babu Lachmi Narain was clearly a time which he was allowed by the Code to fix, and we have power to extend it, and we differ from the decisions and *dicta* which have been cited to us from judgments in this Court, which seem to hold that the Court has only power to extend the time fixed by its own decree. We are further satisfied that under section 151, we have power, not merely to set aside this abortive proceeding, but to pass such order as the Court ought to have passed itself, and can, if we refer the matter back, still pass. The sole difficulty that has troubled us has been in determining how the interest should run during this litigious interval. The matter seems to us to be due to faults on both sides, and also to faults on the part of the ministerial officers of the Court. In such a matter, interest partakes of the nature of damages, which their Lordships of the Privy Council have said, the Court may mould according to its will. We think that the plaintiffs ought to have the contractual rate for the period granted by the Subordinate Judge, namely, from the 5th of February 1921 to the 5th of August 1921, and after that date, the Court rate down to the date of sale or payment, a result which seems to do rough justice to both parties.

We, therefore, direct a preliminary decree for sale to be drawn up, and we give the plaintiffs six months from the date of this judgment for payment. In other respects the decree is to follow the usual provisions applicable to a decree for sale under O. XXXIV, r. 4 of the Civil Procedure Code. The appellants must have the costs of this appeal on the higher scale and of the proceedings in the Court below.

K. S. D. *Appeal allowed.*

(2) (1884) 26 Ch. D. 700; 53 L. J. Ch. 891; 51 L. T 733; 33 W. R. 60.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 466 OF 1922.
August 8, 1924.
Present:—Mr. Kinkhede, A. J. C.
AMARCHAND AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
SARDAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Tenancy created in favour of mortgagor by prior mortgagee—Subsequent mortgagee

redeeming prior mortgage, whether bound by such tenancy—Tenancy free of rent—Subsequent mortgagee, rights of—Equity.

Where a prior mortgagee creates a rent free tenancy, over a part of the mortgaged property, in favour of the mortgagor, the subsequent mortgagee is not entitled to obtain cultivating possession of the tenancy land by ousting the mortgagor but he is not bound by the contract exempting the mortgagor from paying rent for the land. [p. 193, col. 1.]

The rule that, "where upon a sale by a first mortgagee the property is bought in by the mortgagor himself, he can only acquire the estate subject to the second mortgage", has no application to a case where the subsequent mortgagee takes his mortgage with full knowledge of the liabilities and risk created under the first mortgage, and actually undertakes to free the property from that mortgage, and still fails to carry out the obligations incurred by him. [p. 193, col. 2; p. 194, col. 2.]

A subsequent mortgagee redeeming the prior mortgage stands in the shoes of the prior mortgagee and is, therefore, bound by a grant or disposition, as also by the covenants and equities, made by or existing against him and in favour of the mortgagor. [p. 195, col. 2.]

Appeal against a decree of the District Judge, Hoshangabad, dated the 9th September 1922, in Civil Appeal No. 21 of 1922.

Messrs. *M. Gupta* and *J. Sen*, for the Appellants.

Mr. *S. B. Gokhale*, for the Respondents.

JUDGMENT.—The predecessors-in-interest of the present respondents owned *Mauza* Mathni in proprietary rights. They mortgaged the village with possession to Chhotmal and his brother Deokisan and one Gouridas of Khaperkheda in consideration of Rs. 6,500 found due on a previous mortgage; the possessory mortgage (Exhibit P-17) was executed on 19th September 1876. While the mortgagees were in possession the mortgagors executed a second mortgage (Exhibit P-18) in favour of Thapak Biharilal on 16th March 1885 for Rs. 8,000 out of which Rs. 6,500 were to be paid in redemption of the first mortgage. The prior mortgagees instituted Suit No. 83 of 1893 on the basis of their mortgage against the mortgagors and obtained a decree absolute for foreclosure on 9th May 1894 and entered into possession on 5th December 1894. The subsequent mortgagees were not joined as parties to that foreclosure suit; the result was that they instituted a suit on their own mortgage (Suit No. 19 of 1910) for foreclosure, as against the mortgagors, they claimed the relief of redemption as against the prior mortgagees also. They accordingly obtained a preliminary decree dated 28th November 1911 (Exhibits P-12 and P-14). There is nothing on record to show whether this preliminary decree was at all made final. Plaintiffs have not filed any certified copy of the final decree. It, however, appears that they were put in possession of the mortgaged *malguzari* village by the Executing Court as per Exhibits P-20, P-21, P-22 and P-16. None of these documents mention that actual physical possession of the lands in suit was handed over to the subsequent mortgagees. Exhibit P-16 which is a copy of the receipt for posssession dated 20th December 1913 does not show that in giving possession of everything pertaining to the proprietary rights the mortgagees were put in possession of the fields in dispute in this second appeal.

The fields in dispute in this second appeal appear to have been brought under cultivation some years after 1885 and before the foreclosure decree dated 9th May 1894. While the Settlement operations were going on in the village, the prior mortgagees' suit was filed. The decree absolute for foreclosure did not apparently mention these fields as specifically foreclosed in favour of the mortgagees. There was consequently a claim or a semblance of a claim on the part of the mortgagors to retain them to themselves and this led to some dispute about their possession between the mortgagees and the mortgagors. Some time after the decree absolute for foreclosure was passed, the prior mortgagees at the intervention of the Settlement Officer settled the dispute and permitted the mortgagors to hold the lands under them without any liability for payment of rent as a grant for their maintenance. In the papers of the then Settlement of which Exhibit P-1 is a copy the land was recorded as the *khudkasht* of the mortgagor Chhatarsing; he is described as *hissedar* there; and this has created all the trouble and furnished a handle

for further dispute which has given rise to the present suit. How he happened to be described as *hissedar* is nowhere explained. In the papers of the current Settlement Exhibits P-1 to P-5, D-9, D-10, D-11, D-16, D-17 and D-18 the lands have been described by the Settlement authorities as held on *maufi khairati* occupancy tenure. Exhibit D-2 is a copy of the *wajib-ul-arz* of that previous Settlement of 1892-95 and Exhibit D-10 is a *Bader jamabandi* prepared at that Settlement; while Exhibits D-9, D-11, D-13 and D-14 are *jamabandis* of the current Settlement of 1913-14. Exhibits D-15, D-16, D-17 and D-18 are the Settlement *parchas* granted to mortgagors' sons in respect of the several portions of these lands held by each of them separately by virtue of a partition made between themselves. It will thus be seen that just about the time the subsequent mortgagees entered into possession of the village in 1913 the present respondents were being shown in the Settlement records that were being then prepared, as *maufi khairati maurusi* tenants of the lands. It is an admitted fact that the present appellants who were the landlords of the village were fully aware of the fact that the respondents were so recorded in the papers of the recent Settlement. The plaintiffs have to my mind falsely alleged that they or their predecessors had taken actual possession of the land on 20th December 1913, but were dispossessed the very next day. There is no proof to this effect.

The main question to be considered in this second appeal is about the status of the respondents in regard to the lands mentioned as class (*a*) in the judgments of the Courts below. The mortgagees contend that if the interest of the mortgagors was proprietary, the same had become their property by virtue of the final decree for foreclosure obtained by them in their own mortgage Suit No. 19 of 1910, and that the defendants cannot resist their claim for *khas* possession. If their interest was that of tenants merely, they (mortgagees) contend that even that interest must enure for their benefit, as their mortgage security has either increased in [illegible]ch see[illegible] val[illegible] or would otherwise be diminish[illegible]ower [illegible]ed that extent. It is also urged tha[illegible]decree[illegible] defendants ought to have pleaded [illegible]ection[illegible] did not expressly plead in the form[illegible] set suit that they were tenants of the lan[illegible]pass and further that there is no evidenc[illegible]as- to prove the alleged tenancy and that[illegible]er the finding of the lower Appellate Court[illegible]t that the defendants were occupancy tenants of the same was not correct.

If the pleadings recorded by Mr. Prem Narayan on 23rd and 24th August 1920 were minutely scrutinized, it would be found that the plaintiffs' effort was not so much to deny the factum of the lease as it was to deny its binding nature as against themselves. There is, therefore, no force in the contention that the factum of the lease is not established. It was affirmed in emphatic terms in the pleadings and recorded in the Settlement papers of which they had full knowledge; they never cared to challenge the fact. The interest carved out by the prior mortgagees in favour of the mortgagors was not that of proprietors or assignees of *khudkasht* lands but only of a subordinate nature, namely, that of mere occupancy tenants coupled with a special contract exempting them from payment of rent. The recent Settlement entries have recorded the lands as the *maufi khairati maurusi* lands of the mortgagors' personal representatives. These Settlement entries must ordinarily be presumed to be correct until the contrary is proved. The definition of a tenant as given in the C. P. Tenancy Act is clearly applicable to the defendants-respondents because they hold the land of the proprietors or landlords and are but for special contract liable to pay rent to the appellants who claim to be the landlords. The mere fact that they have been permitted to hold the land rent free by the favour of the then landlord does not make any difference in their status as tenants. The mere recording of the name of Chhatarsingh as *hissedar* in 1891-95 does not make the defendants owners or proprietors or assignees of proprietary rights. That description was partly correct so far as the years 1891-92-93-94

were concerned because the mortgagors were proprietors in those years but it was improper after the foreclosure. That entry does not, in my opinion, conflict with or rebut the correctness of the new Settlement entries describing the defendants as occupancy tenants of the lands. The plaintiffs have not adduced any evidence to show that the intention of the prior mortgagees was to make the defendants transferees or assignees of proprietary rights; moreover such proprietary interest could not be transferred except by a registered instrument. The whole of the proprietary interest had become foreclosed, and vested in the former mortgagees and unless they executed a registered instrument, such interest could not be parted with by them in favour of the mortgagors by an oral transaction. The burden was, therefore, on the plaintiffs to show that the tenant-right was really a proprietary right. This I hold they have failed to prove. The oral evidence of defendant's witnesses Nos. 7 and 8 gives clear indications that what the prior mortgagees proposed to do was to create a subordinate tenure in favour of the mortgagors. The relationship of landlord and tenant could be created by a mere grant or contract of tenancy. The exemption from liability for payment of rent which they granted as an incident attached to this contract of tenancy was a special concession made by them, but I do not think it must necessarily bind the subsequent mortgagees so as to compel them to continue it. As the tenancy is already created and, as I say, validly created, they cannot oust the tenants from possession and claim cultivating possession of the lands from them as if the tenant-right had become non-existent. All that they can claim in a properly constituted suit would be a declaration that they are not bound by the special contract exempting the tenants from liability to pay rent or claim a proportionate share of land revenue. I, therefore, hold that the defendants' interest in the lands class (*a*) was that of occupancy tenants pure and simple, and that the plaintiffs are not entitled to obtain cultivating possession thereof

The appellants contend on the authority of *Otter* v. *Lord Vaux* (1) quoted in Ghose's Law of Mortgage, 5th Edition, page 324, that where upon a sale by a first mortgagee the property is bought in by the mortgagor himself he can only acquire the estate subject to the second mortgage, for it is his duty to discharge the estate for the benefit of the second mortgagee. This is a principle of equity closely allied to the principle underlying the law of estoppel. In *Otter* v. *Lord Vaux* (1) the mortgagor was not allowed by reason of the purchase from the first mortgagee under a power of sale to defeat the title of the second mortgagee. This principle was affirmed by the Privy Council in an Indian case also, *Lutf Ali Khan* v *Futteh Bahadur* (2) and by the Allahabad High Court in *Ganga Sahai* v. *Tulshi Ram* (3) and *Badan* v. *Murari Lal* (4) and by the Calcutta High Court in *Raghunath Sahay Singh* v. *Lalji Singh* (5) and *Bhaju Chowdhury* v. *Chuni Lal Marwari* (6). Such an equity is enforceable upon the principle that acquisitions by mortgagor enure as a rule for the benefit of his mortgagee thereby increasing the value of his security: *Raja Kishendatt Ram* v. *Raja Mumtaz Ali Khan* (7) and *Ajudhia Prasad* v. *Man Singh* (8). This is also a question of intention to benefit the mortgagee or oneself. I have, therefore, to see whether there is proof of such intention and whether there are any equities in favour of the mortgagees and whether their operation is curtailed by any cross-equities or law in favour of the mortgagors.

In the present case as far back as 1885

(1) (1856) 106 R. R. 235; 6 D. M. &. G. 638; 26 L. J. Ch. 128; 3 Jur. (N. S.) 169; 5 W. R. 188; 43 E. R. 1381.
(2) 17 C. 23 at p. 32; 16 I. A. 129; 13 Ind. Jur. 249; 5 Sar. P. C. J. 364; 8 Ind. Dec. (N. S.) 554 (P. C.).
(3) 25 A. 371; A. W. N. (1903) 75.
(4) 28 Ind. Cas. 973; 37 A. 309; 13 A. L. J. 397.
(5) 23 C. 397 at p. 403; 12 Ind. Dec. (N. S.) 264.
(6) 11 C. W. N. 284; 5 C. L. J. 95.
(7) 5 C. 198 at p. 210; 5 C. L. R. 213; 6 I. A. 145; 4 Sar. P. C. J. 17; 3 Suth. P. C. J. 637; Rafique and Jackson's P. C. No. 58; 3 Ind. Jur. 426; 3 Shome L. R. 1; 2 Ind. Dec. (N. S.) 737 (P. C.).
(8) 25 A. 46; A. W. N. (1902) 176.

the mortgagors had arranged with the subsequent mortgagees for payment of Rs 6,500 in full redemption of the prior mortgage of 1876. It was, therefore, the duty of the subsequent mortgagees to offer payment to the prior mortgagee and redeem the mortgage. Exhibit P-12 which is a copy of judgment in Suit No. 19 of 1910, throws great sidelight on the question raised before me. It clearly shows that the present plaintiffs had raised a false plea that they had offered the money to the prior mortgagees but that they improperly refused to accept it, and that thereupon they handed over the aforesaid amount of Rs. 6,500 to the mortgagors. This plea was the subject of Issue No. 1 (*a*) and has been elaborately examined by the learned District Judge in paragraphs 8 to 20 of his judgment. The finding on that issue was that the money remained in deposit with the subsequent mortgagees for payment to the prior mortgagees. It was also held in connection with the question of costs of the redemption suit awardable to the prior mortgagees, that they (prior mortgagees) were not guilty of any misconduct, that there was nothing to show that they (defendants Nos. 6 to 9 in that suit) were aware at the date of their Suit No. 83 of 1893 of the plaintiffs' second mortgage, and that the latter's omission from the said suit was wilful. These findings clearly establish that the subsequent mortgagees took their mortgage with full knowledge of the first mortgage and it was due to their own failure to redeem that mortgage either before or at due date that the prior mortgagees sued on their mortgage and obtained the foreclosure decree against the mortgagors only. The second mortgagees, therefore, must be treated as having failed in the duty which they had undertaken to perform and made it possible for the first mortgagees to foreclose the property as if there was no subsequent encumbrancer. The subsequent mortgage could, therefore, at the most operate only on what may be said to have remained after satisfaction of the first mortgage. Here, the prior mortgagees had become the absolute owners of the whole of the property in satisfaction of the debt due under the first mortgage, by the foreclosure decree and had taken possession as such owners (see Exhibit P-12). The whole of the property therefore may be said to be withdrawn, as it were, from the operation of the second mortgage by title paramount: *Raghunath Prasad* v. *Jamna Prasad* (9) and nothing was left for the second mortgagee to enforce his mortgage against.

In Sir Rashbehary Ghose's Law of Mortgage, 5th Edition, page 324, where the case of *Otter* v. *Lord Vaux* (1) is discussed, we find there is a passage at page 325 in which the authority of *Hakim Ali Khan* v. *Dalip Singh* (10) is cited in support of the proposition which is expressed as under:—

"But it seems, if a second mortgage is made with a convenant against the claims of all persons except those under a prior mortgage, and the property is sold under such mortgage, the mortgagor will not be estopped from claiming the property as unencumbered as against the second mortgage, as he derives his title under the first mortgage which was expressly excluded from his covenant; in other words if a mortgage is made expressly of what remains after satisfaction of the first mortgage the rule under discussion will not apply."

The rule enunciated in *Otter* v. *Lord Vaux* (1) which is really a rule of equity based on the law of estoppel, therefore, seems to be inapplicable to a case where the subsequent mortgagee takes his mortgage with full knowledge of the liabilities and risks created under the first mortgage, and actually undertakes to free the property from that mortgage and still fails to carry out the obligations incurred by him. If the property has gone out of his second mortgage it is because of his own failure and not because of the act of the mortgagor. It would be very inequitous to hold that the mortgagor should make over whatever little property he could get released or granted to himself by the favour of the prior mortgagee *(sic)* should be held by him for the benefit of the subsequent

(9) 29 A. 233 at p. 234; 4 A. L. J. 66; A. W. N. (1907) 31.

(10) 19 Ind. Cas. 676; 11 A. L. J. 478.

mortgagee, who has failed to perform his obligation and brought about the catastrophe of the wholesale extinction of the mortgagor's equity of redemption in enforcement of the prior mortgage. To allow the subsequent mortgagee to enforce his mortgage security against the trifle saved to the mortgagors would be to allow him to profit by his own negligence and laches and to put premium on default. There are clearly no equities in favour of such a defaulting subsequent mortgagee, nor could the mortgagors be charged with the intention to benefit the security of such mortgagee.

The prior mortgagees at the time of their foreclosure or shortly thereafter at the intervention of the Settlement Officer had agreed to carve out the lesser interest of a tenant in favour of the mortgagors in respect of the lands in dispute; this they could, in their capacity of landlords for the time being, legitimately do, whether the grantee was the mortgagor or a stranger. Even if they be treated as mortgagees in possession they were under the terms of the mortgage-deed (Exhibit P-17) empowered to create tenancies. They were, both under law and contract, under no obligation to cultivate the land themselves and to maintain its character as proprietary land for the ultimate benefit of the subsequent mortgagees, who might redeem. It was open to them to implant new tenancy on the *khudkasht* lands, and to accept anybody as tenant on payment of a reasonable rent, in consideration of their agreeing to carve out the subordinate tenure of a tenant in his favour in the course of their ordinary management of the village for the beneficial enjoyment of their interest as landlords of the same. The present plaintiffs as landlords and successors-in-interest of the prior mortgagees could not repudiate or set at naught tenancy already created validly by their predecessors. The only prejudice of which they might, on redemption, have complained was the loss of rent, and not of the right to cultivate the land. I have already held above that the special exemption from payment of rent was a concession which bound only the prior mortgagees or their personal representatives personally, but that the subsequent mortgagees were not and could not be bound by it. By the foreclosure which the plaintiffs say they obtained on foot of their own mortgage, of which however there is no proof on record, all that they got or were put in possession of were all rights *mutalik malguzari ke* (pertaining to the *malguzari*) as recited in the receipt for possession (Exhibit P-16).

If the plaintiffs meant to treat the tenancy right acquired by the mortgagor as appurtenant to the *malguzari* rights or as an occasion enuring for their benefit or increasing the value of their security it was their duty to include that claim specifically in the former suit which they had brought to enforce that mortgage, and to get a decree expressly declaring that such interest was liable to be foreclosed in satisfaction of the mortgage-debt due on the basis of their second mortgage. They, however, did not do so then. They are not, therefore, entitled to agitate that point in a subsequent suit on the principle of *res judicata*. I cannot assume that their title on the basis of the subsequent mortgage is perfected by a decree final, as they have adduced no evidence, and have failed to prove the said title by production of a certified copy of the final decree for foreclosure, they are technically not entitled to a decree for possession in the present suit. Their suit must fail for the simple reason that they have not proved their title to sue. Even assuming that they have a title they are precluded from asserting it by reason of their failure to obtain a decree in the mortgage suit giving them a specific right to *khas* possesion of the lands in suit.

As persons who have redeemed the prior mortgage in pursuance of the directions contained in the decree Exhibit P-14, they would at the most stand in the shoes of the prior mortgagees whom they have redeemed, they must in that capacity necessarily be bound by the grant or disposition as also by the covenants and equities made

by or existing against them, and in favour of the mortgagors, because they as representatives of the prior mortgagees landlords could not repudiate the same, but must carry them out so long as the tenancy validly created by them lasts. I hold that the subsequent mortgagees are not, on the whole, and in the special circumstances of this case, entitled to avail themselves of the benefit of the rule in *Otter* v. *Lord Vaux* (1) which is in effect a rule of equity or of estoppel based on equitable considerations, nor are they entitled to seek relief under the rule that accessions must go to enhance the value of the security, or for the benefit of the subsequent mortgagee. In fact there is no estoppel against the mortgagors in this, because if there be any, it is against the mortgagee; much less are there any equities specially favouring the second mortgagees which could be said to be enforceable against the new tenant-right in the hands of the mortgagors. Their only right at the most is to demand reasonable rent or proportion of land revenue in a properly constituted suit and not possession of the lands from the defendants who are the tenants thereof.

The appeal stands dismissed with costs. Costs in the Courts below will be paid as already ordered.

S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1719 OF 1922.
May 22, 1924.

Present :—Mr. Justice Sulaiman and Mr. Justice Kanhaiya Lal.

Mirza IMDAD HUSAIN—PLAINTIFF—APPELLANT

versus

Mirza HAIDER BEG AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Pre-emption — Wajib-ul-arz—*Presumption—Non-existence of custom in neighbouring* mahal, *effect of—Evidence—"Co-sharer", meaning of—Proprietor not having specified share, whether co-sharer—Right to pre-empt.*

Where there is an entry in favour of a custom of pre-emption in the *wajib-ul-arz* of a village prepared at the last Settlement, the presumption raised by the entry cannot be rebutted by the circumstance that there is an express entry as to freedom of transfer in the *wajib-ul-arz* of one of the other *mahals*, which was carved out of the original village prior to the Settlement, for it may well be that the co-sharers of the other *mahal* had agreed to abrogate the custom which might have been in existence from before. [p. 197, col. 1.]

A person who, although a proprietor does not own a specified fractional share in a *mahal*, cannot be called a co-sharer and is, therefore, not entitled to pre-empt. [p. 198, col. 1.]

Second appeal from the decree of the District Judge, Benares, dated the 18th July, 1922.

Mr. *P. L. Banerji*, for the Appellant.

Mr. *H. Mushtaq Ahmad*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for pre-emption. The plaintiff alleged that there was a custom of pre-emption in the village under which he was entitled to pre-empt the sale by the vendor in favour of the defendant vendee who was said to be a stranger. The vendee defendant No. 1 denied the existence of the custom and also pleaded that he himself was a co-sharer in the *mahal* and, therefore, on the same footing as the plaintiff pre-emptor.

The Court of first instance came to the conclusion that no custom had been established at all and that the entry in the *wajib-ul-arz* relied upon by the plaintiff was a record of contract and not of custom. It, however, held that the defendant No. 1 was not a co-sharer in the same *mahal*, and that even if there had been a custom he would not have been on the same footing as the pre-emptor.

The lower Appellate Court has upheld the decree of the Court of first instance but differed from it on both its findings. It has found that the custom is established but that the defendant vendee is also a co-sharer in the *mahal* and that, therefore, the plaintiff has no preference.

As to the question of the existence or non-existence of a custom it may be noted that the evidence consists of an entry in the *wajib-ul-arz* prepared at the Settlement of 1881. The district,

however, is a permanently settled district and that Settlement is still in force. There is nothing to rebut the presumption raised from this entry except the circumstance that there is an express entry in the *wajib-ul-arz* of one of the other *mahals*, which was carved out of the original village prior to the year 1881, that the co-sharers had a perfect right of transfer. This in our opinion does not necessarily negative the presumption of a custom in the *mahal* in suit; for it may well be that the co-sharers of the other *mahal* had agreed to abrogate the custom which might have been in existence from before. We are, therefore, not entitled to take into consideration the non-existence of such a right in the neighbouring *mahal*. We see no reason to differ from the view taken by the learned District Judge that the plaintiff has established by *prima facie* evidence that the custom of pre-emption prevails in the *mahal*.

The main question in controversy is whether the defendant vendee is or is not a co-sharer in the same *mahal* so as to defeat the right of the plaintiff. Under the terms of the custom as recorded in the *wajib-ul-arz* the first right of pre-emption is given to a co-sharer who is a member of the family of the vendor (*sharik khandan*) and then to the co-sharers of the village. The plaintiff claimed to be a distant relation of the vendor, but that point has not been gone into by the Court below and in the view which we take of the case it is not necessary for us to decide that point. The defendant vendee, however, claimed to be a co-sharer in the *mahal*. A "*hissedar*" means a co-sharer, that is to say, a person who owns a share in the *mahal*. A '*mahal*' is ordinarily divided into 'annas' and 'pies' share or into '*bighas*' and '*biswas*' share. It comprises a certain specified area. A person who owns a fractional share in the 16 annas or a fractional share in the 20 *biswas* necessarily owns a share in the joint *khalsa* land as a co-sharer. But there may be proprietors, who have proprietary interests in the *mahal* and yet do not own a fractional share of the 16 annas or of the 20 *biswas*, as the case may be. That this is so is shown by a number of cases decided by this Court; [*vide Mawasi* v. *Moolchand* (1), *Mahadeo Prasad* v. *Jagar Deogir* (2) and *Izzat Husain Khan* v. *Ram Chander* (3)].

The main question to consider, therefore, is whether the defendant vendee owns a fractional share of the 16 annas in this *mahal*.

A reference to the *khewat* shows that the constitution of the village is as follows:—Against serial No 1 the extent of the share is recorded as 16 annas and the area is 56·24 acres and the Government revenue is Rs. 191-15-1. Under this serial number follows a list of three groups of co-sharers against whose names separate shares to the extent of 6 annas 4 pies and 16 *krants*, 6 annas 4 pies and 16 *krants*, and 3 annas 2 pies and 8 *krants*, are respectively recorded. The total of these three fractional shares is 16 annas. It is obvious that the group of proprietors mentioned under serial No. 1 own among themselves the entire 16 annas comprised in this *mahal*. After serial No. 1 there are other serial numbers, namely, Nos. 2 to 9, against each of which in the share column there is no entry whatsoever, but in the area column specified areas are recorded. Two of the proprietors mentioned therein are the Municipal Board and the Government. There is the Government revenue of Rs. 14 recorded at the end of serial No. 9. The learned District Judge has come to the conclusion that this represents the Government revenue payable on account of serial numbers 2 to 9. Whether that is so or not and whether the revenue of Rs. 14 is confined to serial No. 9 alone, it is not necessary for us to decide. But it is not disputed that this sum of Rs. 14 is no part of Rs. 191-15-1 which are assessed on serial No. 1. Below all these figures we have the grand totals in areas and in the Government revenue, but the 16 annas share is not repeated. On a consideration of the entries in the

(1) 14 Ind. Cas. 278; 9 A. L. J. 670; 34 A. 434.
(2) 33 Ind. Cas. 23; 14 A. L. J. 313; 38 A. 260.
(3) 59 Ind. Cas. 366; 18 A. L. J. 120; 2 U. P. L. R. (A.) 39.

khewat it is clear to us that it is only the proprietors mentioned under serial No. 1 who own the entire 16 annas among themselves. It follows, therefore, that no proprietor in serial Nos. 2 to 9 can be said to own any part of the 16 annas of the *khalsa* land which are exhausted in serial No. 1. The owners of the areas in serial Nos. 2 to 9, although proprietors, cannot, therefore, be called co-sharers, that is, persons who own specified shares in the 16 annas. They are liable to pay Government revenues which are assessed against their shares, but they cannot be deemed to have engaged for the payment of any part of Rs. 191-15-1 which is the Government revenue assessed on the 16 annas share described under serial No. 1. The defendant vendee cannot, therefore, claim to be a *hissedar* on the same footing as the plaintiff pre-emptor. In this view we are supported by the ruling of *Radha Kishen* v. *Abbasi Begam* (4) where the distinction between a mere proprietor and a co-sharer was very clearly drawn.

It is also to be noted that both the Courts below described the properties entered under serial Nos. 2 to 9 as '*haqiat-i-mutafarriqa*', that is to say, miscellaneous properties. They did not describe these as a part or a fractional share of the 16 annas of the *mahal*.

In our opinion, therefore, the finding of the learned District Judge that there is a custom of pre-emption should be upheld and so also the finding of the First Court that the defendant vendee is not a co-sharer in the 16 annas of the *mahal*, and is, therefore, not a *hissedar* within the meaning of the *wajib-ul-arz*.

The result, therefore, is that this appeal is allowed and the decrees of both the Courts below are set aside and the plaintiff's claim for pre-emption is decreed on payment of a sum of Rs. 2,000 on or before the 2nd of July 1924. In case of such payment the plaintiff will be entitled to his costs in all the Courts including in this Court fees on the higher scale, from the defendant vendee. In case of default of payment the suit shall stand dismissed with costs in all the Courts.

S. D. *Appeal allowed.*

(4) 64 Ind. Cas. 480; 19 A. L. J. 859.

MADRAS HIGH COURT.

CIVIL APPEAL No. 310 OF 1921.
March 21, 1924.
Present:—Mr. Justice Spencer and Mr. Justice Devadoss.

OTTAPURAKKAL THAZHATH SOOPI—DEFENDANT No. 2—APPELLANT
versus
KOOTHALANTAVIDA PARKUM CHAKKAN ABDULLA AND OTHERS—PLAINTIFFS Nos. 1 & 3 TO 10 AND DEFENDANTS Nos. 1 & 3 TO 5—RESPONDENTS.

Marumakkathyam *Law—Partnership—Malabar* tavazhi—Tavazhi *property, investment of, in partnership with stranger—Individual* tavazhi *members, if partners—Surrender of property by* karnavan—*Alienation—Right of junior members to follow property—Dissolution of partnership—Junior member's right to sue for accounts.*

Where the property of a Malabar *tavazhi* is invested in partnership trade with a stranger, the *karnavan* of the *tavazhi* is the trading partner and represents the interests of the joint family. In such a case each member of the *tavazhi* does not himself become a partner and would have no right to interfere with the management of the affairs of the partnership so long as it is a joint concern. [p. 199, col. 1.]

Ramanathan Chetty v. *Yegappa Chetty*, 32 Ind. Cas. 427; 30 M. L. J. 241; 19 M. L. T. 66; (1916) M. W. N. 81 and *Grandhe Gangayya* v. *Grandhe Venkataramiah*, 43 Ind. Cas. 9; 41 M. 454; 6 L. W. 708; (1917) M. W. N. 805; 22 M. L. T. 527; 34 M. L. J. 271, relied on.

But the *karnavan* has no right without the consent of the adult members to surrender the interests of the *tavazhi* without any consideration, as such an act amounts to an alienation of *tavazhi* property; and as he is in a fiduciary position, the junior members thereof are entitled to follow the *tavazhi* property into the hands of those in whose favour it has been alienated. [p. 199, col. 2.]

Where the partnership of the *tavazhi* with the stranger has been dissolved by the death of the latter, a suit by the junior members for an account of the partnership and recovery of the property wrongly alienated is not unsustainable merely because plaintiffs were not members of the partnership. [p. 200, col. 1.]

Watts v. *Driscoll*, (1901) 1 Ch. 294; 70 L. J. Ch. 157; 49 W. R. 146; 84 L. T. 97; 17 T. L. R. 101 and *Chidambaram Chetty* v. *Karuthan Chetty*, 58 Ind.

Cas. 80; 39 M. L. J. 511 at p. 514; 28 M. L. T. 138; 12 L. W. 444, relied on.

Appeal against the decree of the Court of the Subordinate Judge, Tellicherry, dated the 31st March, 1921, in Original Suit No. 21 of 1917.

Messrs. *C. V. Anantakrishna Iyer* and *T. S. Viswanatha Iyer*, for the Apellant.

Messrs. *A. Krishnaswami Iyer* and *P. S. Narayanasami Iyer*, for the Respondents.

JUDGMENT.—The parties are Moplahs governed by the Marumakkathyam Law. The second defendant appeals:—The 2nd defendant and one Alipi Haji, now dead, were carrying on a timber trade. In 1895, the 2nd defendant took his son, the 1st defendant, as a partner and a partnership agreement was drawn up which is Exhibit A, dated the 9th February 1896. Under this, each of the partners had a 1/3 share in the profits of the timber trade. The assets contributed by the 1st defendant, were the *putravakasa* property of the *tavazhi* consisting of himself and the plaintiff, the 5th defendant and her children (plaintiffs Nos. 5 to 9) and the wife of the 2nd defendant. The *tavazhi* property was thus invested in the partnership trade, the 1st defendant being the Karnavan of the *tavazhi*. In such a case, each member of the *tavazhi* does not himself become a partner, but as held in *Ramanathan Chetty* v. *Yegappa Chetty* (1) and *Grandhe Gangayya* v. *Grandhe Venkataramiah* (2) the manager of the family is the trading partner and represents the interests of the joint family. That being the case, the members of the *tavazhi* would have no right to interfere with the management of the affairs of the partnership so long as it was a joint concern. But in 1913 the partners entered into an agreement (Exhibit C) to dissolve the partnership and to have a partition deed drawn up. They also made a temporary arrangement for the allotment of the elephants which were used in the working of the timber trade. The dissolution of partnership agreed to at that time was finally embodied in Exhibit I, dated the 22nd November 1914, under which the 2nd defendant was given a half share instead of 1-3 on account of his extra exertion and his supply of funds. Alipi Haji agreed to take one quarter and the 1st defendant also took one quarter. This suit was instituted to declare that that arrangement is not binding on the members of the *tavazhi* and to recover their rightful share.

It is obvious that the 1st defendant as Karnavan had no right to surrender the interests of the *tavazhi* without any consideration, as this amounts to an alienation of *tavazhi* property, and as he was in a fiduciary position, the plaintiffs representing the *tavazhi* are entitled to follow the *tavazhi* property into the hands of those in whose favour it has been alienated. The objection that this suit will not lie on the ground that the plaintiffs are not members of the partnership and have no voice in the direction of the partnership affairs is answered by showing that at the time when the suit was instituted there had been a dissolution of partnership. In *Watts* v. *Driscoll* (3) it was held by the Court of Appeal that the assignee of a share in partnership is not bound by any agreement made by the partners themselves on a dissolution of partnership by which the amount or value of the share is altered. In the English Partnership Act of 1890, section 31 makes it clear that an assignee cannot interfere in the management of the affairs of the partnership, but upon dissolution he is entitled to take his assignor's share of the assets and to have an account from the date of the dissolution. The same principle was followed in *Chidambaram Chetty* v. *Karuthan Chetty* (4). That was a case of sub-partners and the learned Chief Justice observed that in the absence of any settlement between the partners before dissolution which of course would

(1) 32 Ind. Cas. 427; 30 M. L. J. 241; 19 M. L. T. 66; (1916) M. W. N. 81.

(2) 43 Ind. Cas. 9; 41 M. 454; 6 L. W. 708; (1917) M. W. N. 805; 22 M. L. T. 527; 34 M. L. J. 271.

(3) (1901) 1 Ch. 294; 70 L. J. Ch. 157; 49 W. R. 146; 84 L. T. 97; 17 T. L. R. 101.

(4) 58 Ind. Cas. 80; 39 M. L. J. 511 at p. 514; 28 M. L. T. 138; 12 L. W. 444.

be binding on the sub-partner, the sub-partner after the dissolution is entitled to have an account taken to ascertain the share of the partners under whom he claims, as without such an account it would be impossible to say what he was entitled to. The objection to the maintainability of the suit thus fails.

On the merits it is argued for the respondents that the lower Court should have found on the evidence that there was a settlement by arbitrators by which the 1st defendant's and Alipi Haji's shares were reduced after looking into the accounts and the 2nd defendant's share was increased. The Subordinate Judge has held that the alleged mediation was a fiction. We have been referred to the evidence of the defence witnesses. They do not say that in consideration of the extra contribution made by some persons, definite sums were allocated to those partners who had contributed most, but they say that before the net assets of the partnership were ascertained there was an agreement that 2nd defendant should take half of the whole assets and that the other partners should take each a moiety of the remainder, as the arbitrators thought it was proper to do so. Unless the adult members of the *tavazhi* consented to such an arrangement, they would not be bound by the 1st defendant's action against their interests. The witnesses do not speak of any such consent being given by the other members of the *tavazhi*. D. W. No. 1 and D. W. No. 3 say that the 1st plaintiff was present at the mediation. Nanu Menon, the 5th witness, who is supposed to have settled it, says that the first plaintiff was present but he was not consulted and he did not raise any objection. The 1st plaintiff has stated that he did not know about any mediation by Nanu Menon, and he was not cross-examined as to whether he was present on that occasion. D. W. No. 2 and D. W. No. 3 say that they did not see Nanu Menon that day.

It has not been shown that there was any occasion for arbitration on account of any disputes between the partners. The 2nd defendant has not gone into the witness box and given his account of what happened.

On the whole, we see no reason to differ from the Subordinate Judge's conclusion that there was no regular arbitration in the matter. The lower Court's judgment awarding plaintiffs Nos. 1 and 3 to 10 on behalf of themselves and defendants Nos. 1 and 5, one-sixth of the properties given to the second defendant is, therefore, correct. The decree provides that the 2nd defendant do deliver up 1/6th of the properties given to him as shown in Schedules A and E, and if it is not available to pay their value Rs. 27,502. There is no question of the immoveable properties being available or not available.

The memorandum of objections raises the question whether 1/6th of the properties should not have been partitioned and delivered. The decree will be amended by directing that the 2nd defendant do deliver up 1/6th of the immoveable properties and 1/6th of the moveables and providing that if any moveables are not available to be delivered, 1/6th of their value as found by the Commissioner shall be paid by the 2nd defendant, or as ascertained in execution if the Commissioner has not already valued any particular item. With this modification, the appeal is dismissed with costs.

The division of both immoveable and moveable properties may be made in execution.

Upon the memorandum of objections the respondents will recover Rs. 265, the difference between the amount of Court-fee which the appellants actually paid and the amount they ought to have paid. Vakil's fee to be calculated on the correct amount at which the suit ought to have been valued, namely, Rs. 55,000.

V. N. V. *Appeal dismissed.*

HARBAX *v.* LACHMAN.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 418 OF 1923. (TREATED AS CIVIL REVISION No. 235 OF 1924).

July 19, 1924.

Present:—Mr. Kinkhede, A. J. C.

Seth HARBAX AND ANOTHER—PLAINTIFFS—APPLICANTS

versus

LACHMAN AND OTHERS—DEFENDANTS—NON-APPLICANTS.

Civil Procedure Code (Act V of 1908), O. VII, rr. 1 (f), *4—Representative suit—Contents of plaint—Provisions of O. VII, r. 1* (f), *nature of—Jurisdiction, how determined—C. P. Tenancy Act (I of 1920), s. 2—Mortgagee in possession of fractional share in village, whether "landlord"—Assignee of fractional share, position of.*

If a suit is brought in a representative character the plaint must contain a statement to that effect, under O. VII, r. 4, Civil Procedure Code. [p. 201, col. 2.]

The provisions of O. VII, r. 1, clause (*f*) Civil Procedure Code, are imperative. [*ibid.*]

Jurisdiction does not depend on the result of a suit or on the defence set up but on the nature of the claim as brought; that is to say, what decides the venue in a case is the nature of the claim as brought. [*ibid.*]

A mortgagee in possession of a fractional interest in a village is not a "landlord" within the meaning of the C. P. Tenancy Act, and, therefore, cannot maintain a suit for rent against the tenants. The position assignable to him by virtue of the mortgage is that of a mere transferee of a money claim to a portion of the arrears of rent when they accrue due to the landlord of the holdings held by the tenants of the village. [p. 202, col. 2.]

An assignee of only a fraction of proprietary rights in a village does not become a landlord and the assignor continues to be the landlord of the holdings, so long as he retains the remaining fraction to himself. [*ibid.*]

Civil revision against the decision of the District Judge, Nimar, in Civil Appeal No. 116 of 1923, dated the 3rd August 1923.

Mr. *J. Sen*, for the Applicants.

Mr. *M. Gupta*, for the Non-Applicants.

ORDER.—This judgment will dispose of the above appeal as also Second Appeal No. 419 of 1923 between the same plaintiff and another set of tenants, namely, Tulsiram and Rama. These second appeals arise out of what are styled rent suits for recovery of arrears of half rents due from the respective defendants, who are respondents before me, in respect of their holdings situate in *Mouza* Awasel, Tahsil Harda, District Nimar, for the Sambat years 1977 (*2nd kist*) and 1978 (both *kists*). In the plaint it is stated that the plaintiffs have been realising half the rents and the original *malguzar* realises the remaining half of the rents payable by the tenants to the proprietary body. It is not, however, clearly stated in what capacity the plaintiffs made those recoveries. In the pleadings also, this capacity is not disclosed although there is the admission that the plaintiffs are not the *lambardars* of the village. There is thus neither in the plaint nor in the pleadings an assertion even that the plaintiffs are the landlords or at least fractional co-sharer landlords of the holdings in respect of which they sought recovery of rent from the tenants. If they were suing in a representative character, their plaint was, under O. VII, r. 4 of the Civil Procedure Code, bound to contain a statement to that effect, because under the rules framed under section 79 of the new C. P. Land Revenue Act, it was necessary to do so. Similarly, O. VII, r. 1, clause (*f*) directs that the plaint shall contain "the facts showing that the Court has jurisdiction." Non-compliance with these imperative provisions of law had, in my opinion, the effect of making the plaints represent a claim for *money* and not for *rent as such*, and the suits could not, therefore, be treated as suits between landlords and tenants *as such* within the meaning of section 103 of the new C. P. Tenancy Act, so as to invoke the exercise of the exclusive jurisdiction vested in the Revenue Officer under the Tenancy Law. Jurisdiction does not depend on the result of a suit or on the defence set up but on the nature of the *claim as brought*. It has been held in *Bapuji Raghunath* v. *Kuvarji Edulji Umrigar* (1) and *Durbasa* v. *Khalaksingh* (2) and *Prosonno Coomar Paul* v. *Koylash Chunder Paul* (3) that what decides the venue in a case is the nature of the

(1) 15 B. 400; 8 Ind. Dec. (N. S.) 272.
(2) 4 N. L. R. 63.
(3) 8 W. R. 423 at p. 436; B. L. R. Supp. Vol. 759 (F. B.); 2 Ind. Jur. (N. S.) 327.

claim as brought: *Ganpat* v. *Trimbak* (4). In the absence, therefore, of any facts stated in the plaint or in the pleadings showing that the claims as brought called for the exercise of the special jurisdiction vested by law in the Revenue Officer to try suits between landlords and tenants as such, the Additional Judge to the Court of Munsif, Harda, should have seen that the suits were not on the face of them cognizable or triable by him. He was bound to call upon the plaintiffs to disclose, at the very outset, facts on which they rested their right to sue the defendants for half the rents. If pleadings had been recorded with care the plaintiffs would have stated, as they state before me, that they were transferees or assignees of the proprietary rights of the predecessor-in-title of the present *lambardar*, to the extent of half of his interest in the *mouza* under the registered usufructuary mortgage deed, dated the 1st October 1887, and that they claimed to recover half the rents in their capacity of such assignees or mortgagees in possession of half the *mouza*. The Additional Judge would then have been in a position to decide the question whether the nature of the claim as brought by the mortgagees in possession of 8 annas interest in the village, could be treated as being within his special jurisdiction. Without caring to decide this initial question of jurisdiction, that Judge assumed that he had jurisdiction to decide the suits, and proceeded to hold a trial regarding the defence set up by the defendants to the effect that they were not liable to the plaintiffs because they had satisfied their liabilities by payments to the *lambardar* who was the "landlord" of the holdings within the meaning of the Tenancy Act.

It is argued before me that the assignee of proprietary rights is a landlord within the meaning of the definition of that word as given in the Tenancy Act, and reliance is placed on the case of *Gopal* v. *Bhojraj* (5) where it is held that a *lambardar* who assigns all his proprietary rights and interests ceases to be a landlord within the meaning of the C. P. Tenancy Act. That case is easily distinguishable from the present one as here the transfer or assignment is not of all the proprietary rights and interests but only of a fraction. The position of the plaintiffs cannot, therefore, be that of a landlord although as held in *Thakur Maharaj Singh* v. *Jagannath* (6) they could in their capacity of mortgagees in possession style themselves as "proprietors" within the meaning of that expression as defined in the Land Revenue Act. The position assignable to the appellants by virtue of the mortgage is that of mere transferees of a money claim to half the arrears of rent when they accrued or accrue due to the landlord of the holdings held by the tenants of the said *mouza*. Such a transferee would doubtless not be entitled to eject the defaulting tenant. The *lambardar* continues in spite of the assignments to be the *landlord* of the holdings, so long as he retains the remaining 8 annas share to himself. The Courts below have, in my opinion, exercised a jurisdiction not vested in them under the Tenancy Law and their judgments are, therefore, bound to be vacated as being without jurisdiction. The Additional Munsif, or at any rate the District Judge, ought to have returned the plaint for presentation to the ordinary Civil Court. Before me the matter has come up in the form of second appeals. The claims in both these appeals being below Rs. 500 and the suits being of the nature cognizable by the Court of Small Causes no second appeal can lie under section 102 of the Civil Procedure Code. But under law there is ample authority for treating a memo. of second appeal as a petition for revision under section 115 of the Civil Procedure Code. *Merali Visram* v. *Sheriff Devji* (7), *Sita Nath Goswami* v. *Baikuntha Nath Goswami* (8), *Venkata Ramayya Appa Row* v. *Chakali Veera-*

(4) 19 Ind. Cas. 759; 9 N. L. R. 54 at p. 61.
(5) 11 C. P. L. R. 19.
(6) 11 C. P. L. R. 15.
(7) 12 Ind. Cas. 687; 36 B. 105 at p. 107; 13 Bom L. R. 1017.
(8) 9 Ind. Cas. 296; 38 C. 421 at p. 424.

swamigaru (9). I think these are fit cases for interference in revision.

Acting under my revisional jurisdiction I hereby set aside the decrees of the Courts below and direct that the plaint be returned to the plaintiffs for presentation to the proper Court having jurisdiction to grant the relief prayed for by them in their capacity as assignees of a fractional share of the money claim arising in favour of the 'landlord' in respect of the rents due by tenants to him.

Under the peculiar circumstances of the cases I direct that each party will bear its respective costs hitherto incurred.

S. D. *Decrees set aside.*

(9) 45 Ind. Cas. 471; 41 M. 554 at p. 559; 34 M. L. J. 309; 23 M. L. T. 251; 7 L. W. 508; (1918) M. W. N. 327.

BOMBAY HIGH COURT.

APPLICATION No. 171 OF 1922.
February 8, 1923.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

GANPAT BALAJI KALE—PLAINTIFF—APPLICANT

versus

NARAYAN SAWALIRAM KALAHIKAR—DEFENDANT—OPPONENT.

Limitation Act (IX of 1908), Sch. I, Art. 75—Waiver.

If a creditor simply sleeps on his right and does nothing for three years, it cannot be implied from this that he had agreed to waive his right to recover the whole amount of the bond, which accrued to him when the default occurred.

Application for the reversal of the decree of the First Class Sub-Judge, Nasik, in S. C. S. No. 1730 of 1921.

Mr. *L. G. Pradhan* for Mr. *R. G. Pradhan*, for the Applicant.

Mr. *M. V. Bhat*, for the Opponent.

JUDGMENT.—Article 75 of the Second Schedule of the Limitation Act clearly applies to this case, and time began to run from the moment the whole amount of the bond became due owing to the default, unless the plaintiff could prove waiver. That apparently has not been attempted in this case ; and if a creditor simply sleeps on his rights and does nothing for three years then we cannot imply from that that he had agreed to waive the right which accrued to him when the default occurred. Rule discharged with costs.

S. D. *Rule discharged.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1354 OF 1923.
January 24, 1924.

Present:—Mr. Justice LeRossignol.

THAKUR SINGH—PLAINTIFF—APPELLANT

versus

KARAM SINGH, VENDOR AND SUBA—VENDEE—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), s. 30 (1)—"Physical possession," meaning of—Report to patwari, whether enough—Physical possession, why necessary—Symbolical possession—Property in possession of tenant of mortgagee incapable of physical possession by vendee.

The mere reporting to the *patwari* that the vendor has relinquished possession and that the vendee has assumed possession is no proof that there was a giving and taking of physical possession within the meaning of section 30 of the Pre-emption Act. [p. 204, col. 2.]

The law of pre-emption insists on physical possession, because physical possession is visible to all concerned. It is a notice to all would-be pre-emptors that a change has occurred in the enjoyment and possession of the land in question and puts them to inquiry. [*ibid.*]

In the case of cultivated land physical possession may be taken even symbolically, but there must be some evidence of symbols employed. [p. 204, cols. 1 & 2.]

Property in the possession of a mortgagee and in the cultivating possession of a tenant under him at the time of sale, is not capable of being taken into physical possession by the vendee. [p. 204, col. 1.]

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 5th March 1923, affirming that of the Munsif, First Class, Hoshiarpur, dated the 21st November 1922.

Mr. *H. D. Bhalla*, for the Appellant.

Lala *Harbhajan Das*, for the Vendee-Respondent.

JUDGMENT.—This appeal and Appeal No. 1355 of 1923 arise out of two transactions of sale of land. The area in each case was 10 *marlas* and the price Rs. 99-12-0.

GOPAL OJHA *v.* RAMADHAR SINGH.

The vendor in each case was the same person while the vendees are different persons, in fact, two brothers who are joint. There was in reality one sale which was split up into two to avoid the necessity for registering the sale deeds. The date of the sale was the 15th May 1919 and on the 10th February 1921 the plaintiff instituted two cases to pre-empt on both the sales. Both suits have been dismissed on the ground that they were too late inasmuch as although the mutation of the sales was attested on the 27th April 1920 physical possession of the areas sold had been taken by the vendees in November 1919.

These appeals were admitted on the ground that there was no clear finding on the point when and how physical possession was taken by the vendees. The learned District Judge writes "In the case of uncultivated land physical possession may be taken even symbolically. I think the possession of the vendees before December 1920 may safely be taken to be proved by the report on the mutation entered in November 1920 and the entry as to their possession in *khasra girdawari* of *Rabi* 1920-21."

Now the areas sold at the time of the sale were admittedly in the possession of a mortgagee and were in the cultivating possession of one Amian, a tenant under the mortgagee. Consequently at the time of the sale the property sold was incapable of being taken into physical possession by the vendees. The mortgage on the areas sold was redeemed by the vendees on the 13th July 1919 but the physical possession of the land remained with the tenant Amian who gathered the *Kharif* crop some time in October or November of that year. In the following harvest, *i. e. Rabi* 1920, the land is entered as in the possession of the vendees but inasmuch as it remained uncultivated in that year it is not clear that the vendees were even at that date in physical possession. If the vendees had even prepared the land for a crop the entry in the record would have been *traddadi* and not *khali*. The learned District Judge says that in the case of uncultivated land physical possession may be taken even symbolically. This is no doubt correct but he has not stated, nor is there any evidence on the record, what symbols were employed in this case. The vendees might have taken possession by driving a plough through the land or by fencing it round but there is no evidence that they adopted any such method. The law insists on physical possession because physical possession is visible to all concerned. It is a notice to all would-be pre-emptors that a change has occurred in the enjoyment and possession of the land in question and puts them to inquiry whether there has been a sale. The mere reporting to the *patwari* that the vendor has relinquished possession and that the vendee has assumed possession is no proof that there was a giving and taking of physical possession within the meaning of section 30 of the Pre-emption Act.

For these reasons I hold it unproved that physical possession of the land in suit under the sale was taken by the vendees before *Rabi* 1920. That being so the *terminus a quo* for the calculation of limitation is the date of the attestation of the mutation, namely, the 27th April 1920 and, therefore, the suits were brought within time.

For these reasons I accept the appeals and decree possession to the plaintiff on payment into Court, within one month, of Rs. 99-12-0 in each case less his costs throughout. If payment is not so made, the suit shall stand dismissed with all costs.

S. D. *Appeals accepted.*

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 79 OF 1920.

June 17, 1924.

Present :—Justice Sir Jwala Prasad, KT., and Mr. Justice Macpherson.

GOPAL OJHA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAMADHAR SINGH *alias* LALJI SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Grant on fixed rent—

GOPAL OJHA *v.* RAMADHAR SINGH.

Grant to two persons—Joint tenancy—Common tenancy—Right of re-entry—Contract Act (IX of 1872), s. 62—Novation—Terms of grant clear—Evidence of conduct—Suit for declaration and possession—Parties.

Where according to the terms of a grant of lands to two brothers, the grant was perpetual (*istimrari*); the grantees and their descendants (*al aulad*) were to pay a fixed rent and enjoy the lands generation after generation (*pusht dar pusht*); the descendants (*al aulad*) of the grantor were to realize the fixed rent generation after generation (*pusht dar pusht*); and in the event of default in payment of the fixed rent for three *kists*, the fixed lease (*mukarrari*) was to be void:

Held, (*i*) that the grant was permanent in its duration, fixed in the rental, descendible to heirs both in the male and female lines and was to be held generation after generation: that is to say, the grant was an absolute, perpetual, heritable and transferable grant; [p. 210, col. 2.]

(*ii*) that the grant was not resumable. [*ibid.*]

Perkash Lal v. *Rameshwar Nath Singh*, 31 C. 561, *Ram Narain Singh* v. *Chota Nagpur Banking Association*, 36 Ind. Cas. 321; 43 C. 332 at p. 409 and *Lal Gajendra Nath Sahi Deo* v. *Lal Mathuralal Nath Sahi Deo*, 35 Ind. Cas. 383; 1 P. L. J. 109; 20 C. W. N. 876, distinguished.

The novation of a contract implies a fresh contract, directly or by implication, in place of the original contract. Therefore, if the holders of a perpetual and heritable grant, subsequent to the grant, divide the subject-matter of the grant without reference to the grantor, so that their respective heirs might succeed to the specific properties, the principle of novation does not apply. [p. 213, col. 1.]

The incidents of a joint tenancy may be changed and a member of the joint tenancy may sever his connection by effecting partition of his interest and, after this is done, the rule of survivorship of succession will not apply, but the heirs of the separated tenant would succeed to his interest in the tenancy. [p. 213, cols. 1 & 2.]

Upon the death of one of two joint grantees, the lessor does not become entitled to enter as to one half of the property demised, as the lease does not terminate till the death of the survivor of the two lessees, and, therefore, the landlord's right to re-enter does not arise till both the lessees are dead. [p. 213, col. 2.]

Ram Narain Singh v. *Chota Nagpur Banking Association*, 36 Ind. Cas. 321; 43 C. 332 at p. 409, referred to.

To a suit for a declaration that an entry in the Survey Record of Rights of a village is incorrect and for recovery of possession, if the plaintiff is deemed to be out of possession, all persons, recorded as in possession of the village and as claiming title adverse to the plaintiff, are necessary parties. [p. 209, cols. 1 & 2.]

Per *Macpherson, J.*—Where the terms of a grant are unambiguous, evidence is not admissible of conduct of the parties leading to another inference. [p. 216, col. 1.]

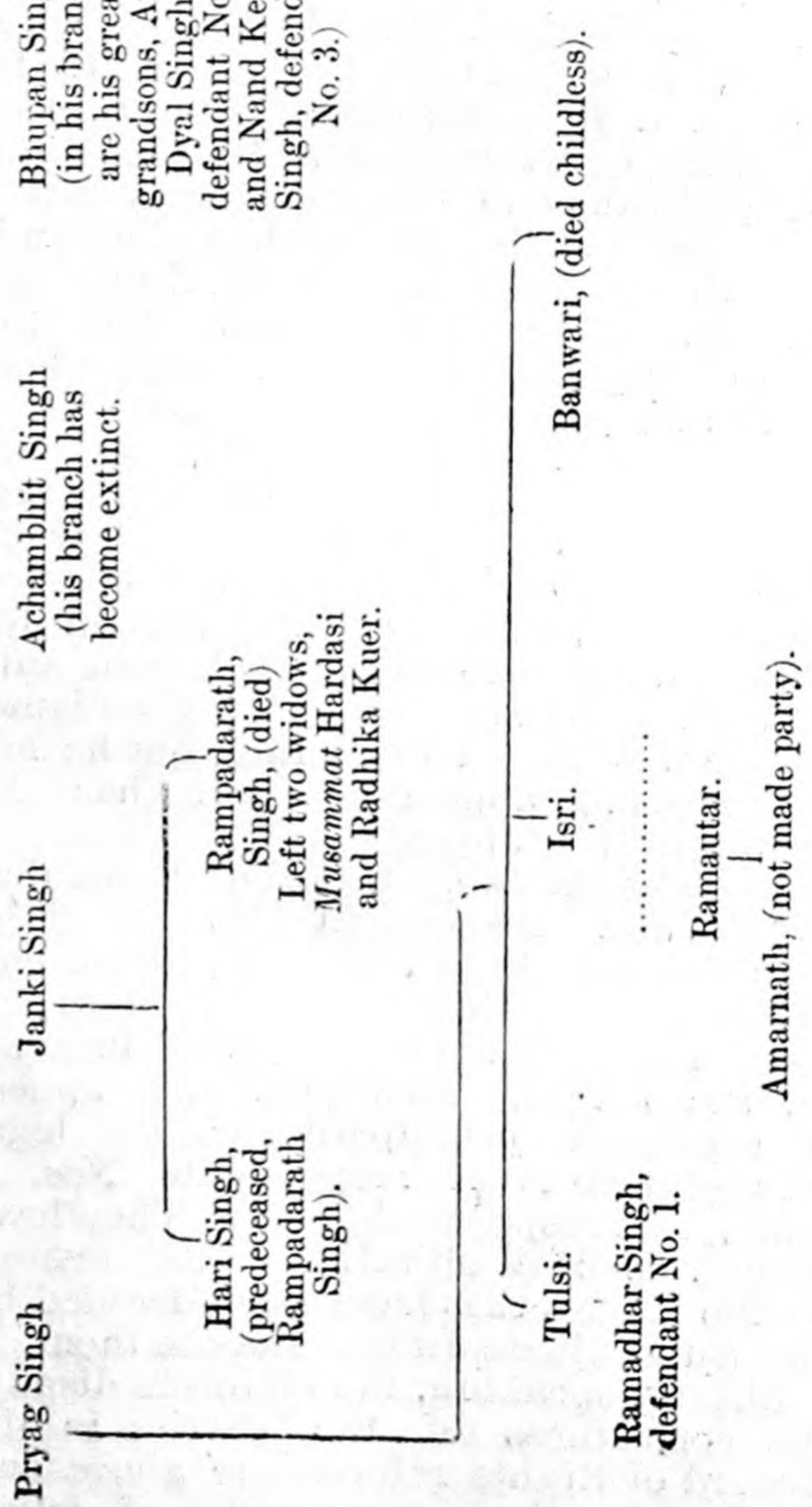
Appeal from a decision of the Additional Subordinate Judge, Palamau, dated the 28th January 1920.

Messrs. *C. C. Das* and *L. K. Jha*, for the Appellants.

Messrs. *S. M. Mullick* and *S. Saran*, for the Respondents.

JUDGMENT.

Jwala Prasad, J.—This appeal arises out of a claim for resumption. The plaintiffs are the appellants. The following genealogy culled from the evidence of Ramadhar Singh, defendant No. 1, which is not challenged, may be useful and is accordingly set out in the beginning.



Thus defendants Nos. 1, 2 and 3 have been recorded in the Record of Rights prepared at the last Survey in 1917 as being in possession of the properties as *mukarraridars*, 8 annas in the name of defendant No. 1 and 8 annas in the names of defendants Nos. 2 and 3. The tenure has been recorded as *mukarri istamrari* not resumable. The aforesaid entry is the result of a decision arrived at by the Assistant Settlement Officer dated the 6th March 1917 (Exhibit 5) in a hotly contested dispute between the parties. The decision was upheld on objection under section 83 of the Bengal Tenancy Act by the Assistant Settlement Officer in charge by his decision (Exhibit 6) dated the 17th of June 1917.

The defendant No. 4 Babu Chain Singh, is alleged in the plaint to be the son of Babu Sheosagar Singh by a daughter of Rampadarath Singh. Both the plaintiffs and the defendants Nos. 1 to 3 disputed the relationship of defendant No. 4 with Rampadarath Singh and the Court below has held that the relationship has not been established: that this defendant, who was made respondent in this appeal, entered appearance and filed a cross objection challenging the decision of the learned Subordinate Judge so far as it affected him. He is, however, dead and in his place one Sahdeo Singh has been substituted at the instance of the appellants. Notice was served upon him, but he has not entered appearance nor has he contested this appeal.

Respondent No. 1 Babu Ramadhar Singh and respondent No. 3 Babu Nandkeshwar Singh are also dead and in their place their respective heirs and legal representatives have been brought on the record. Therefore, this appeal is contested principally by the legal representatives of respondents Nos. 1 and 3, and respondent No. 2. They have lodged a cross-objection with respect to the issues that have been decided by the Subordinate Judge against them.

Shortly speaking, the plaintiffs dispute the correctness of the entries in the Record of Rights referred to above and in fact they base their cause of action upon the decision of the Assistant Settlement Officer in charge dated the 17th June 1917. They say that they have been all along in *sir* possession of both the *mauzas* in dispute Manhu and Saharewa and that their possession has not at all been disturbed on account of their wrong entry in the Survey Record of Rights. They also assert that the tenure is resumable and was, as a matter of fact, resumed. Their case is that the villages in question, Manhu Saharewa and Majhigawan in *Pargana* Palamau, were held by their ancestors on the mother's side in *khairat*. The two *Mauzas* Manhu and Majhigawan were granted in *mukarrari* to two brothers Janki Singh and Pryag Singh shown in the above pedigree, by a deed, dated the 19th *Chaitra* 1234 *Fasli* (corresponding to 1st April 1827) at an annual *jama* of Rs. 71 and Rs. 21 respectively. Under the terms of that deed (a correct translation of which has now been made by the Superintendent of the Translation Department under our direction) the rent was to be paid in three instalments with a stipulation that in the event of default of payment of three *kists* the deed would become inoperative. The defendants did make default in payment of the three *kists* after the death of Janki Singh and Pryag Singh. The plaintiffs further assert that according to the custom prevalent in the District of Palamau the grant is liable to resumption after the direct male line of the last male-holder of village Manhu has become extinct. After the death of Janki Singh, his son Rampadarath Singh came into possession of that village, and after the death of Rampadarath Singh the ancestors of the plaintiffs wanted to enter upon and take *sir* possession of the village, but at the request of the widows of Rampadarath Singh, namely, *Musammat* Haridasi Kuer and *Musammat* Radhika Kuer, the plaintiffs' ancestors allowed those ladies to remain in possession of the village during their lifetime as a sort of maintenance. During the survey operations *Musammat* Radhika Kuer in 1323 *Fasli* (corresponding to 1916) and defendants Nos. 1 to 3 Ramadhar Singh,

Amardayal Singh and Nand Keshwar Singh contested the claim of the plaintiffs and the defendants were ultimately recorded by the Survey Officers in the *khewat* as being in possession and the tenure being not resumable. The plaintiffs also alleged that defendants Nos. 1 and 3 are distant *gotias* and are not heirs of Rampadarath and as such are not entitled to the property in question and that after the death of *Musammat* Radhika Kuer the *mukarrari* is liable to be resumed by them.

As regards Sahorswa the plaintiffs claim that this village is unconnected with and not falling under the *mukarrari* grant, dated the 1st April 1827 (Exhibit 1) and as such it has been in possession of the plaintiffs but in the Record of Rights this village has been recorded as also *mukarrari istimrari* of the defendants Nos. 1 to 3 as part and parcel of village Manhu.

Upon these allegations the plaintiffs claimed the following reliefs :—

(1) It may be adjudicated and declared by the Court that on account of default made in the payment of three instalments and also on account of the failure of the male line of Babu Janki Singh, *Mauza* Manhu has been in the *sir* possession of the plaintiffs, that the plaintiffs are in *sir* possession of *Mauza* Sahorswa also that both the *Mauzas* Manhu and Sahorswa belong to them in their *khairatdari* interest, that the defendants in this suit neither have nor supposed to have acquired any interest in the *mukarrari* of the said *mauzas* and that the defendants are not entitled to get their names entered in the *khewat* as *mukarridars* in respect of *Mauzas* Manhu and Sahorswa.

(*ii*) If on account of any illegal action on the part of the Survey and Settlement Department, etc., the defendants be deemed to be in possession then in that case the Court may be pleased to put the plaintiffs in *sir* possession of *Mauzas* Manhu and Sahorswa, Tappa Nandiha, *Pargana* and District Palamau, boundaries, Survey Numbers and Thana Numbers whereof are given below, by removing the unlawful possession of the defendants.

(*iii*) All costs in Court with interest *pendente lite* and future interest may be awarded.

The defendants Nos. 1 to 3 filed one written statement and defendant No. 4 filed another. They resist the plaintiffs' claim on various grounds both in law and on facts. They plead limitation, *res judicata* and insufficiency of Court-fee as pleas in bar to the plaintiffs' claim.

As to their right under the deed of grant in question the defendants assert that two villages Manhu including Sahorswa and Mahjigawan were jointly granted to the two brothers, Janki Singh and Pryag Singh, in *mukarrari istimrari* descendible from generation to generation, that subsequent to the grant the two brothers arranged to hold the two villages separately, Janki having got Manhu including Sahorswa and Pryag having got Majhigawan, that under the deed in question the grant is not resumable on failure of heirs of the grantee, male or female that there was no *kist* mentioned in the deed and hence the plaintiffs have no right to resume the grant on failure to pay the instalments as alleged by the plaintiffs.

The defendants repudiate the plaintiffs' suggestion of there being any custom in the District of Palamau for the resumption of such *mukarrari* grants on failure of heirs and deny the correctness of the allegation that the possession of the widows of Rampadarath Singh, namely, *Musammat* Hardasi and Radhika, after the death of their husband, was permissive and assert that the said ladies got possession of the villages as heiresses of Rampadarath Singh and on payment of rent. They also deny that there was any default in payment of any *kist* as alleged in the plaint and aver that the rents of 1323 and 1324 were deposited by the defendants in Court to the credit of the plaintiffs who refused to accept the same when tendered. The defendants further traverse the allegation of the plaintiffs as to their having got *sir* possession of the villages in question and of their having established their *bhandar* there and say that they are in possession of the villages

as heirs of Rampadarath Singh after the death of his widows in *mukarrari istimrari* under the grant referred to above. Those defendants deny as observed above, the relationship of Chain Singh with Rampadarath Singh and state that the said Chain Singh is a creature of the plaintiffs and his claim has been set up in this case by the plaintiffs to defeat the defendants' right. As regards Sahorswa the defendants say that it is a *tola*, and not a separate village, and has always been in possession of their predecessor-in-interest as part and parcel of Manhu under the grant in question.

We need not now refer in detail to the plea of defendant No. 4 as in the circumstances mentioned above he may be considered to have been deleted from the litigation.

Upon the pleadings of the parties the following issues were raised in the Court below:

(*i*) Have the plaintiffs any cause of action for the suit?

(*ii*) Is the Court-fee paid insufficient?

(*iii*) Is the suit barred by limitation?

(*iv*) Is the suit barred by *res judicata*?

(*v*) Is the *mukarrari* of *Mauza* Manho resumable for non-payment of rent for 3 *kists*, if so, can the *mokarrari* be resumed without giving an opportunity to the defendants to pay up the arrears of rent?

(*vi*) Is the *mukarrari* of *Mauza* Manho resumable on failure of heirs male of the grantees. If so, can it be resumed so long as the heirs male of Pryag Singh are in existence?

(*vii*) Did the plaintiffs make any life grant of the disputed *mokarrari* to *Musammat* Radhika Kuer or she was in possession in her own right as legal heir of her deceased husband Padarath Singh?

(*viii*) Did *Musammat* Radhika pay up the *mukarrari* rent up to the year 1322 *Fasli* and have there been any deposits of rent for the years 1323 and 1324 *Fasli*?

(*ix*) Is there any custom in the *Parganah* of resumption on failure of heirs male in direct line as alleged by the plaintiffs? If so does the custom apply to the grant in suit?

(*x*) Are the plaintiffs in *sir* possession so far as the defendants are concerned of Manhu and Tola Sahorswa as alleged?

(*xi*) Is defendant No. 4, the daughter's son of Padarath Singh, deceased? If so, has his right to succession over the properties of Padarath Singh become extinguished in consequence of his becoming a *sadhu* and have the defendants Nos. 1 to 3 become entitled to these properties?

(*xii*) Is the suit bad for defect and misjoinder of parties?

(*xiii*) To what relief, if any, are the plaintiffs entitled?

Issues Nos. 1 to 4 do not now arise and have been set at rest by the decision of the Court below.

The findings of the Court below upon Issues Nos. 3 and 4, namely, limitation and *res judicata* have not been challenged in this Court, and in fact, it appears that the view of the Court below is correct.

Issues Nos. 5 and 8 decided against the plaintiffs-appellants are also not pressed in appeal.

Issue No. 11 was decided against defendant No. 4 he being held not to be the son of daughter of Rampadarath Singh. There was, as observed above, a cross-objection by defendant No. 4 against the finding on this issue, but there has been no appearance on behalf of his heirs in this Court, and the plaintiffs and other defendants accept the finding of the Court below, the latter having denied the relationship set up by defendant No. 4. This issue consequently does not now need further consideration in this appeal.

The first parts of Issues Nos. 6 and 9 have been decided in favour of the plaintiffs. The Court below has held that the *mukarrari* tenure in question is resumable on failure of heirs male of the grantees under the terms of the grant as well as under the custom of resumption on failure of heirs male in direct line of the grantees set up by the plaintiffs as being prevalent and in vogue in *Pargana* Palamau. The defendants are aggrieved by the decision of the Subordinate Judge upon these points and have filed a cross-objection.

Issue No. 12 has also been decided in favour of the plaintiffs, the Court below having held that the absence of Amarnath from the record does not affect the maintainability of the suit. The defendants do not accept this view of the Court below and have, therefore, filed a cross-objection.

The second parts of Issues Nos. 6 and 9 and Issue No. 10 have been decided against the plaintiffs, the Court below having held that the *mukarrari* of *Mauza* Manhu cannot be resumed so long as the heirs male of Pryag Singh are in existence and that the plaintiffs have never been in *sir* possession of Manhu or of *Tola* Sahorswa.

The result of the decision of the Subordinate Judge upon these issues against the plaintiffs have been that the plaintiffs' suit has been dismissed *in toto*.

The main questions, therefore, for consideration in this appeal are those involved in the aforesaid Issues Nos. 6, 7, 9, 10 and 12. To put it clearly the points are (1) whether the *mukarrari* of *Mauza* Manhu is resumable *firstly* under the terms of the grant (Exhibit 1), dated the 1st April 1827, and *secondly* upon the custom of resumption pleaded by the plaintiffs, (2) if the tenure is resumable upon the happening of certain events so as to entitled the plaintiffs to resume the *mukarrari* in question, (3) is Sahorswa a part or *tola* of *Mauza* Manhu, or is it a separate village unaffected by the grant in questions (4) is Amarnath, the great-grandson of Pryag Singh, a necessary party in the case and is the suit, therefore bad on account of his absence from the record.

The last point may be disposed of at once. The plaintiffs' action is virtually levelled against the entry in the Survey Record of Rights and they seek a declaration that the entry is incorrect. They expressly state that the persons entered in Record of Rights set up a false claim with respect to the *mauzas* in question against the plaintiffs' right. The Survey has recorded amongst others Amarnath as being in possession of the villages in question and as claiming *istimrari mukarrari* interest adverse to the plaintiffs. The plaintiffs further claim in the alternative recovery of possession in case they be deemed to have been out of possession. Now, the persons recorded as in possession of the villages in question and as claiming title adverse to the plaintiffs are necessery parties to the plaintiffs' action for a declaration of their title and for recovery of possession in the alternative. The Court below has held that "the defendant No. 1 is the only person entitled to this *mukarrari* but as the Survey Records have entered the names of defendants Nos. 2 and 3 also they are necessary parties to this suit." This reason stated by the learned Subordinate Judge applies with equal force to the case of Amarnath and, therefore, the Subordinate Judge is wrong in his view, for which he has given no reason, that "the absence of Amarnath from the records of this suit does not affect its tenability." Therefore, the objection of the defendants must prevail and the finding of the Court below on Issue No. 12 is set aside.

The next question is as to whether the tenure is resumable either under the terms of the grant or under the custom set up by the plaintiffs. The deed in question is said to be a *patta* granted by Nut Nath Jha the predecessor-in-interest of the plaintiffs, to Raj Kumar, Sri Pryag Singh and Babu Janki Singh, the ancestors of the defendants-respondents. It runs as follows:

"*Swasti Sri Maharaj Pujit Sri Sri Minhaidar* Mauza *Kishunpur wogarah Paragana Palamau Zillah Ramgarh age Tappe Deogan maha* Mauza *Naudiha wo mahuari ke bari maha* Mauza *Manhu wo* Mauza *Majhigawan yeh dono guon hamara khairati hai se ham Raj Kumar Babu Sri Pryag Singh wo Babu Sri Janki Singh ko* mukarrari *likh del mai am, mahua jalkar, bankar, tar, bagh, kath, koa, parjakur, chakur sayan mai jahat istamrari likh del take jama molguzarijat wo rupia sikha kaldar* mukarrari *biyanwe rupia wo Babu mazkur ke ali aulad pusht dar pusht likhla muafiq malguzari del karat sal basal jagah blog karat Ham wo hamar ali auladi likhla muafig malguzari pusht dar pusht del kari sal basal.*"

The English translation of the above is as follows:—

Respected and worshipped by the Maharaj, (I am) the *mainhaldar* of *Mauza* Kishunpur, etc., Pargana *Palamau*, District Ramgarh. I hold in *khairati* (charity) *Mauza* Manhu and *Mauza* Majhigawan in the Barhi of (appertaining to?) *Mauzas* Naudiha and Mahuari in Tappa Deogan. I have granted it (in writing) (in) *mukarrari* to Rajkumar Babu Shri Pryag Singh and Babu Shri Janki Singh, including mango and mahua (trees), *jalkar*, bankar, palm trees, orchards, catechu, cocoons, houses of tenants, the four boundaries; (I have) granted (it) in writing as a perpetual (*istimrari*) grant by all means. The amount of rent in respect thereof is ninety two-rupees in *kalladar* coin.....fixed (amount) Rs. 92. The Babus, aforesaid, and their descendants (*alaulad*) generation after generation, should pay the rent written (above) year after year, (and) enjoy the lands. I and my descendants (*alaulad*) generation after generation, shall realise the rent written (above), year after year. Details of the rent:—For *Mauza* Manhu seventy one rupees for *Mauza* Majhigawan Rs. 21. In the event of default (in the payment of) rent for three *kists* the *mukarrari* shall be void." Dated Sari, the 19th Chait 1234 *Fasli Sambat* 1884."

In the translation the words "heirs and representatives" have been put down for the vernacular words "*ali aulad*" and the words "generation after generation" for the words "*pusht dar pusht.*"

The grant of the two villages, Manhu and Majhigawan, has been made to the two brothers, Pryag Singh and Janki Singh. The grant is to be enjoyed by the grantees and their heirs and representatives (*al aulad*) generation after generation (*pusht dar pusht*). The grantor and his heirs and representatives (*al aulad*) have to receive the rent generation after generation (*pusht dar pusht*).

According to Fellon's Dictionary the word "*al*" in Arabic signifies the issue born to the daughters and "*aulad*" the issue of the son. The two words "*al aulad*" put together would mean the offspring or children or descendants both in the male and in the female line "*pusht dar pusht*" means through successive generations; generation after generation; *parampara*.

The word '*istimrari*' is derived from "*istimrar*" which means permanence, perpetuity, uninterrupted possession. In law it means a fixed rent not liable to alteration. "*Istimrardar*" is the holder of a lease in perpetuity. "*Istimrari*" is an adjective and means perpetual, continuative, never ceasing. "*Istimrari patta*" is a lease or form granted at a fixed rent and in perpetuity. In this view the Permanent Settlement of Lord-Cornwallis is said to be *istimrari* and a piece of land is said to be settled *istimrari* when it is settled permanently.

Mukarrari, a fixed lease, quit rent, a fixed stipend. It connotes fixity of rent and also permanency.

The aforesaid words in the *kabuliyat* (*al aulad*) *pusht dar pusht*, *mukarrari* and *istimrari* indicate etymologically that the grant was perpetual, permanent in its duration and fixed in the rental descendible to heirs both in the male and female lines and was to be held generation after generation. Not the terms of the document but the entire context thereof shows that the grant conferred, upon the grantees in unambiguous and clear terms, a permanent, perpetual and heritable grant. It was a grant unlimited in the way of succession or in duration. Therefore, so far as the terms of the grant are concerned the plaintiffs cannot ask us to put any limitation upon its enjoyment by the heirs of the grantees either in the male or female line or by their representatives. It was an absolute grant heritable and transferable. The plaintiff's right to resumption has not at all been reserved in the deed. Therefore, the contention of the plaintiff that the grant was resumable on failure of the male heirs in direct line of the grantees must fail upon the construction of the document.

The plaintiffs wanted to fortify their position by making the grant resumable

upon custom said to have been in vogue in the part of the country where the lands in question are situate. The learned Subordinate Judge has held that no reliable evidence of any custom has been given in this case. Now, the clear and unambiguous terms of the documents conferring an absolute and irresumable right on the grantees can be abandoned or controlled only by clear evidence of custom ancient, invariable and unambiguous and so having acquired the force of law. The learned Counsel on behalf of the appellants has not attempted to support the custom set up by the plaintiffs by reference to any evidence on the record. Therefore, the view of the Court below that there is no evidence offered or produced by the plaintiffs to show that there was a custom prevalent by which the words "*al aulad*" were understood to mean lineal male descendants. The learned Subordinate Judge has based his decision on the fact that "*al aulad*" and "*pusht dar pusht*" in the present case must have restricted meanings application to male descendants only upon certain authorities relied upon by him. The first case referred to by him is *Perkash Lal* v. *Rameshwar Nath Singh* (1). That case related to a *khairat bishanprit* grant made to a Brahman by the Rajah of Kunda in Hazaribagh and special custom was pleaded whereby the words "*al aulad*" related only to male descendants, and the evidence in proof of the custom was accepted. The contention of the Advocate-General was that "although the words *al aulad*, etymologically considerd, include both male and female descendants, yet according to the custom prevailing in the Kunda Raj at the time of the grant such *khairat* grants were resumable on the failure of lineal male descendants, and admittedly no such descendants exist. The evidence on custom is overwhelming". This argument was accepted by the Court. Therefore, in order to apply the principle of that decision it must be established by evidence that by custom the words must not be understood in their etymological sense but in a restricted sense as meaning male descendants in the direct line only. Another distinguishing feature of that ruling is that the terms of the grant quoted in the judgment show that the words of inheritence employed were only "*al aulad*", and not "*pusht dar pusht*". Here, these additional words go to confirm that the grant was meant to be descendible both in the male and the female lines. Therefore, upon the findings of the Court that ruling has no application to the present case.

Mr. Das then relied upon the case of *Ram Narain Singh* v. *Chota Nagpur Banking Association* (2) in order to show that the view taken in the case of *Perkash Lal* v. *Rameshwar Nath Singh*, (1) was approved of by the Privy Council. This is so but the view was confirmed with respect to the meaning of '*al aulad*' having been restricted by custom. The Privy Council decision refers to the case of a *putra putradik* grant by the Maharajah of Chota Nagpur and it was held upon evidence that the words "*putra putradik jagir*" as employed in the grants made by the Maharajah meant only an estate for life descendible to male heirs only, and resumable on the extinction of the male heir of the grantee in the direct line. This decision also, therefore, does not apply to the present case. The same remark applies to the decision in the case of *Lal Gajendra Nath Sahi Deo* v. *Lal Mathura Lal Nath Sahi Deo*, (3) which refers to the estate of the same Maharajah in the the Ranchi District.

The aforesaid cases referred to by Mr. Das do not at all realte to *Pargana* Palamau and will not apply to a custom set up in the present case. Therefore, the first part of Issues Nos. 6 and 9 must be decided in favour of the defendants and the view taken by the Court below must be set aside.

The plaintiffs' case was that after the death of Rampadarath, son of Janki Singh, the *mukarrari* of *Mauza* Manhu came to an end and was resumable; but his widows, Hardasi and Radhika, were allow-

(1) 31 C. 561.

(2) 36 Ind. Cas. 321; 43 C. 332 at p. 409.
(3) 35 Ind. Cas. 383; 1 P. L. J. 109; 20 C. W. N. 876.

ed to remain in possession with the leave and license of the plaintiffs and consequently they obtained life grants which terminated after the death of the survivor of them *Musammat* Radhika in 1916. This story of their permissive possession of the widows of Rampadarath seems to be a myth and has not been substantiated by reliable evidence on the record. It is impossible to conceive that the widows would have been allowed to remain in possession merely for the asking and without any deed having been executed in their favour. Receipts used to be granted to them: *Vide* Exhibits A-8, A-9, A-24 to A-46, a large number of receipts in A series. These receipts described the ladies as heirs and successors of Babu Rampadarath Singh, the deceased *mukarraridar*, for instance *vide* Exhibit A-8, dated the 6th January 1881, and Exhibit A-9, dated the 16th January 1881. The Subordinate Judge rejects the story and we have no hesitation in accepting his finding. But the finding leads to an important inference and that is that the two females succeeded to the *mukarrari* as heiresses of their husband which conclusively established that the grant from its inception was heritable in the female line. The ladies remained in possession for 30 years. This instance of succession of females to the *mukarrari* successfully repudiates the suggestion that *al aulad* and *pusht dar pusht* in the document in question should have a restricted meaning.

The learned Subordinate Judge says that assuming that the grants were resumable on failure of heirs male of the grantees either under the deed or under the custom set up by the plaintiffs, there has, as a matter of fact, been no failure of heirs male so long as the male heirs of Pryag Singh, the joint grantee with Janki Singh, is alive. The learned Subordinate Judge holds that the grant created a joint tenure in favour of the two brothers Prayag Singh and Janki Singh, and the subsequent division of the *mauzas* between the two brothers, namely, Janki Singh, getting village Manhu and Pryag Singh getting village Majhigawan, does not affect the original terms of the grant and does not create a separate grant of *Mauza* Manhu to Janki Singh and Majhigawan to Pryag Singh, so that on the failure of male heirs of Janki Singh, Manhu should revert to the grantor. Mr. Das impugns this view of the Subordinate Judge and contends that there was no joint tenure created by the deed and Janki Singh and Pryag Singh were not joint tenants but were merely tenants-in-common. A plain reading of the deed (Exhibit 1), dated the 1st April 1827, does not support the contention of Mr. Das. He says that Manhu was granted to Janki Singh, and Majhigawan to Pryag Singh. The words in the deed are "*Mauza* Manhu and *Mauza* Majhigawan," the two *mauzas* are granted to "Rajkumar Prayag Singh, and Babu Sri Janki Singh". The two *mauzas* were jointly granted to the two brothers jointly. The rent payable to the landlord is mentioned in the aggregate for the two villages, namely, Rs. 92, in the document. How this rent has been arrived at is stated at the foot of the document as Rs. 71 for *Mauza* Manhu and Rs. 21 for *Mauza* Majhigawan. Mr. Das contends that the specification of the two *mauzas* with respect to the rent separately at the foot of the document shows that the two villages were separately granted. I confess I have not been able to follow this argument. The question is not as to the apportionment of the rent over two villages, but the liability of the grantees for payment of the rent. What is there in the document to show that one of the brothers is liable to pay anything less than Rs. 92, or the separate rent of Rs. 71 for *Mauza* Manhu and Rs. 21 for *Mauza* Majhigawan? Both of them, acccording to the terms of the document are liable for the rent whether it be a consolidated rent for the two villages taken together, or separate rent for each of the villages. No inference for separate grants can be made from the specification of rent in the document with respect to each *mauza* separately. Had there been any separate grant, then Manhu having been mentioned first would have gone to Pryag Singh who is mentioned first in order of the grantees and Majhigawan having been mentioned second would have gone to

Janki Singh who is mentioned second in order of the grantees, but this not so. Therefore, the original grant cannot possibly be held, upon the construction of the deed, to be a separate grant of Manhu to Janki Singh and Majhigawan to Pryag Singh. Mr. Das then says that had the grant been joint, then after the death of Janki Singh, the two brothers would have been joint tenants and after death of Janki Singh, the survivor of them Pryag Singh would have aucceeded to the grant, and not the son of Janki Singh with respect to *Mauza* Manhu. This was an arrangement between Pryag Singh and Janki Singh and there is evidence that subsequent to the grant they divided the properties so that their respective heirs might succeed to the sepecific properties. It is conceded that the grantor is not bound by such an arrangement. Therefore the grantor cannot take advantage of the separate arrangement. It is not possible to treat the grant as a lapsed one so long as any male member in the direct line of any of the grantees is alive.

Mr. Das says that the separate holding of the properties subsequent to the grant by Janki and Pryag shows that there was a novation. Now, novation of a contract implies a fresh contract, directly or by implication in place of the original contract, so the parties to the original grant must also be parties to the novation of the new contract. In the present case it has not been shown that the landlord was ever a party to the arrangement so as effectively to create a new contract in place of the old one set forth in the solemn document (Exhibit 1). The principle of novation, therefore, does not apply to the present case.

Mr. Das has referred us to Williams on Real Property 23rd Edition, pages 144 to 147, in order to show the distinction between "joint tenancy" and "tenancy-in-common" and their incidents. There is no dispute as to the meaning and incidents of the two kinds of tenancies. It would, however, appear by reference to page 147 that the incidents of a joint tenancy may be changed and a member of the joint tenancy may sever his connection by effecting partition of his interest and after this is done the rule of survivorship of succession will not apply but that the heirs of the separated tenant would succeed to his interest in the tenancy.

Mr. S. M. Mullick has referred us to the case of *Ram Narain Singh* v. *Chota Nagpur Banking Association* (2). While discussing the objection as to limitation, upon the ground that the cause of action with respect to a moiety of the tenure accrued after the death of one of the *mukarraridars*, Mr. Justice Mookerjee observed:

"The objections as to limitation and recognition are equally fallacious. They are based on the assumption that upon the death of one of the two original grantees, the lessor became entitled to re-enter as to one half of the property demised. This argument overlooks the elementary proposition that the lease would not terminate till the death of the survivor of the two lessees. There is a fundamental distinction between the question of the duration of the lease as a whole and the question of the devolution of the interest thereunder on the death of the first lessee. We are not now concerned with the question, whether upon the death of the first lessee, his heirs or his co-lessee would be entitled to occupy the demised premises. It is sufficient for our present purpose that the landlord was not entitled to re-enter till both the lessees were dead. In this view, no question of limitation or recognition arises."

The learned Subordinate Judge has very ably clearly discussed this point and we entirely agree with his view that even if the grant was limited to the male heirs in the direct line of the grantees the right of re-entry or resumption in favour of the landlord has not in this case accrued so long as the male descendant of one of the grantees Pryag Singh is alive.

The result is that Issues Nos. 6, 7 and 9 are decided in all their parts in favour of the defendants and against the plaintiffs. We also agree with the Subordinate Judge that the plaintiffs failed to prove that they were ever in *sir* posses-

sion of the lands in dispute, and in deciding Issue No. 10 against the plaintiffs. The investigation during the survey operations clearly shows that the plaintiffs were not found in possession of the villages in question. The widows of Pryag Singh, were admittedly in possession up to 1916 until the death of *Musammal* Radhika Kuari. The orders of the Survey Department upholding the possession of the defandants are dated the 6th March 1917 and 17th March 1917 (Exhibits 5 and 6 already referred to). The dispute must have commenced much earlier, and it is impossible to conceive that the defendants soon after the death of *Musammat* Radhika Kuari would have allowed the plaintiffs to take possession of the properties in dispute when they were claiming to hold the properties as permanent lessees under the *mukarrari istimrari* deed.

Now to prove that the tenure in question was a limited grant descendible only to the male heirs in the direct line of the grantees and to prove the right of resumption as well as the possession and dispossession, the onus is heavily upon the plaintiffs, not only because they are the plaintiffs and want reliefs in the present case but the statutory provision raises a presumption of the correctness of the survey entries in favour of the defendants. The defendants have given evidence in the case and the presumption of the Survey Record of Rights has not been rebutted by the plaintiffs.

The same remark applies to the claim of the plaintiffs with respect to *Tola* Sahorswa. Certain maps have been produced in this Court. Exhibits 9A and 9B are separate maps of the two villages filed by the plaintiffs. The defendants have filed a map (Exhibit Q) showing the two villages to be one. The Assistant Settlement Officer in his judgment (Exhibit 5) says:—

"The *mukarrari* having been granted in 1827 Sahorswa evidently then was a *Tola* of Manhu and since the Revenue Survry of 1864 has heen treated as a separate village and this clearly accounts for the omission of Sahorswa from the *mukarrari* deed besides this the actual rent-receipts granted to the *Musammat* by the Ojhas, Hiranand Gunanand and others, show that they too have all along treated Sahorswa as a *Tola* of Mahu and have mentioned it to be so in the numerous rent-receipts that have been filed before me. No serious attempt has been made by the Ojhas to throw doubt on the genuineness of these receipts and they all appear to be genuine. Such being the case, I am of opinion that this claim too that Sahorswa was not included in the grant fails miserably."

Here also the onus is upon the plaintiffs to rebut the presumption of the finding of the Survey Officer and the entry made in the Record of Rights in accordance with that finding. The learned Subordinate Judge has come to the same conclusion as the Assistant Settlement Officer.

We have carefully considered the evidence in the case and the arguments of Mr. Das, and we do not think Mr. Das has been able to show that the view taken by the Survey Officers and the learnend Subordinate Judge is in any way wrong.

I would in this case commend the judgments of the Survey Officers (Exhibits 5 and 6) who have gone in detail into the matter and have clearly met all the points raised by the plaintiffs in order to found their claim and those urged by Mr. Das in support of his contention.

I have already decided Issue No 9. There was no dispute between defendant No. 1 and defendants Nos. 2 and 3 as regards their own right in the tenure in question, and the learned Subordinate Judge should not have raised this question and decided it. The finding of the Subordinate Judge on Issue No. 9 that "the defendants Nos. 2 and 3 have no right in this village and that it is the defendant No. 1 alone who is entitled to the entire village after Radhika's death" must be set aside. We are not at all concerned with the claims of the defendants *inter se*. We are concerned only with the claim of the plaintiffs, and it is already held that they have failed to substantiate their claim, and, therefore,

the finding of the Subordinate Judge on issue No. 9 must be set aside.

The result is that the plaintiffs have failed to prove their case. The appeal must fail, and the cross-objection must succeed. The decree passed by the Subordinate Judge is, therefore, confirmed. The respondents will be allowed their costs in the appeal. There will be no separate costs with respect to the cross-objection.

Macpherson, J.—I agree that the appeal must be dismissed with costs.

The averments and issues upon which the parties went to trial have been fully set out in the judgment just delivered by learned brother, but I may state succinctly the main conclusions of the Trial Court in so far as they are in contest in appeal or in the cross appeals. It is to be observed that the plaintiffs' prayer for ejectment on the ground that the *mukarrari* has become void because three *kists* or more of the rent of the tenancy were in arrears has been definitely given up in appeal by Counsel for the appellants. The learned Subordinate Judge has held:

(*i*) that the *mukarri al-aulad pusht dar pusht* of villages Manhu and Majhigawan created and made *istimrari* by the *patta*, Exhibit 1, in favour of Rajkumar Babus Pryag Singh and Janki Singh is not non-resumable as is shown in the Record of Rights, but is, in accordance with what he finds to be the custom of *pargana* Palamau, resumable on the failure of the male line of descent of the original grantees;

(*ii*) that the *mukarrari* is not resumable in part on the failure of heirs male of one only of the grantees so long as there are heirs of the other grantee; and in particular that Manhu is not resumable on failure of the line of Babu Janki Singh so long as heirs male of the line of Babu Pryag Singh exist, and that in fact such heirs male do exist;

(*iii*) that *Musammat* Radhika Kuer, widow of Babu Rampadarath Singh, son of the grantee, Babu Janki Singh, was in possession as heir of her husband, and not merely, as plaintiffs aver, with their permission after they became entitled to resume on the death of her husband;

(*iv*) that plaintiffs were not and never had been in *sir* possession of Manhu or of Sahoreswa and that Sahorswa is a *Tola* of village Manhu;

(*v*) that defendant No. 4 was not the son of the daughter of Rampadarath Singh; and

(*vi*) that the suit was not bad for defect of parties by reason of the fact that Amarnath Singh great-grandson of Babu Pryag Singh is not a party.

On behalf of the appellants the second, third and fourth of these findings has been assailed before us. Defendants Nos. 1,2 and 3 might under O. XLI, r. 22 (1), Civil Procedure Code, have supported the decree in their favour on the grounds decided against them in the Court below; but they have also filed a cross objection to the decree contesting the first and last of the above findings. A cross-objection was also filed on behalf of Babu Chain Singh, defendant No. 4, against the fifth finding but the representative in interest substituted in his place, after his death in the appeal has not entered appearance and the appellants have not attacked the fifth of the above findings.

In support of the appeal Mr. C. C. Das contends first, that the second finding of the Trial Court cannot be maintained inasmuch as the *patta* (Exhibit 1) granted by the *khairatdar* in 1827 created not a joint tenancy but a tenancy-in-common. This contention has manifestly no force. These two villages together constituted the *khairat* tenancy of the grantor. The document cannot be interpreted otherwise than as conveying the two villages Manhu and Majhigawan jointly in a single tenancy to two persons jointly as the tenant and on a consolidated rental for the whole tenancy. The mere fact that the *mukarrari patta* contains a specification of the rent of each village does not detract from this view of the document as a whole the specification only shows how the consolidated rental stipulated for was arrived at. It is impossible to find in the document itself anything to support the contention of the appel-

lants that Manhu, which is mentioned first, was the tenancy of Babu Janki Singh who is mentioned second, and Majhigawan which is mentioned second, was the tenancy of Babu Pryag Singh who is mentioned first. On the contarary, it is explicitly provided that "the said Babus and their *al-aulad* shall *pusht dar pusht* pay the *mukarrari* rent of rent of Rs. 92 *sikka*", so that both grantees and their descendants are made responsible for the whole tenancy. To my mind Exhibit 1 is altogether unambiguous and this contention of Mr. C. C. Das fails completely.

Mr. Das then urges that the conduct of the parties, and in particular the payment of rent from the outset by Babu Janki Singh for Manhu and by Babu Pryag Singh for Majhigawan shows that Manhu was a separate tenancy of the former. But as the grant is unambiguous evidence is not admissible of conduct of the parties leading to another inference.

The third plea advanced by learned Counsel is akin to the second. It is that the grantor having allowed the two grantees from the outset to pay rents separately, that is, one grantee to pay the rent of one village and the other grantee to pay the rent of the other village, there was a novation. Now all the reliable evidence available in support of this view is merely (1) that from the outset Babu Janki Singh paid the quota of the consolidated rent of Rs. 92 which represents Manhu and Babu Pryag Singh the quota which represents Majhigawan, and (2) that much later the descendants of Babu Janki Singh paid the quota in respect of Manhu to the co-sharer descendants of the original grantor separately in proportion to the shares of these co-sharers in the *khairat* grant and that the position was apparently the same in respect of Majhigawan. In the absence of other circumstances these facts are not sufficient to establish a novation. The fact that the grantees for convenience of enjoyment divided the area demised has no significance, and the fact that the grantor then received the rent of each of the two divisions (even though they were the old natural divisions) from the grantee in enjoyment and even sued him separately, is not sufficient to show that the parties desired to depart from the original contract. On the other hand it is abundanly clear from the litigation of the early years of the present century that though the *khairatdars* sued separately for rent in accordance with their shares, and sued the successor-in-interest of Babu Janki Singh in respect of Manhu and the descendants of Babu Pryag Singh in respect of Majhigawan, yet when they sued for ejectment on the ground that the lease had become void, they sued as 16-annas *khairatdars* and impleaded as defendants the descendants or successors-in-interest of both the original grantees and claimed recovery of possession of the *mukarrari* tenancy consisting of both Manhu and Majhigawan as originally created. This is clear from the plaint, Exhibit L. in the ejectment suit No. 121 of 1901-02 the judgment in which is Exhibit R, (Exhibit 3 is the judgment in two rent suits Nos. 120 and 121 of 1900). Moreover it was held in that suit that the division by the grantees of their *mukarrari istimrari* grant of Manhu and Majhigawan which was a joint grant, into two portions was not binding on the grantor even though the grantor realised the rents of the two portions separately, and that the latter was not prevented from evicting from the whole tenancy either by reason of the sub-division or by reason of the separate realisation of rent. Again in Suit No. 1 of 1904 which was brought by the whole body of representatives of the grantor of Exhibit 1 for cancellation of Exhibit 1 and possession of both Manhu and Majhigawan, all the descendants in the male line of Babu Pryag Singh with *Musammat* Radhika Kuer as representing the line of Babu Janki Singh, were impleaded as defendants. In the face of these documents it is impossible to uphold the suggestion of novation. If there had been novation such as is suggested, a separate suit would have been brought

in respect of each of the two sub divisions of the original grant.

Mr. Das has mentioned the fact that English Law struggles against a joint tenancy and prefers a tenancy-in-common. He is, however, vague as to the time when the latter tenancy came into existence in this case, and in any case no analogy ought, if it can possibly be avoided, to be drawn between the law of England highly developed in accordance with his own local conditions, and the grant made a century ago in a backward area in even for India the backward *pargana* of Palamau. More possible is the analogy with *istimrari mukarrari* tenancies in the Ramgarh Estate in the neighbouring District of Hazaribagh. Most of these grants whether life grants or *al aulad pusht dar pusht* are made out in the names of two persons and it is well-known [see also *Ram Narain Singh* v. *Chota Nagpur Banking Association* (2)] that even in the life grant class the tenancy does not become resumable, even in part, until both grantees are dead. There is certainly no reason why a different rule should apply where, as here, the grant is to two grantees and their offspring generation after generation.

It is admitted that offspring and even heirs male of Babu Pryag Singh, one of the grantees, exist at present.

Accordingly the second finding of the learned Subordinate Judge is correct. The circumstances in which resumption may take place, if it can at all take place, have not arisen.

The third finding also is correct beyond any possibility of doubt. The claim that on the death of Rampadarath Singh, the *khairatdars* resumed Manhu and arranged with *Musammat* Radhika Kuer that she should remain in possession during her lifetime is altogether contrary to all the probabilities and is unsupported by a tittle of credible evidence, and indeed many of the rent-receipts granted by the different sets of co-sharer *khairatdars* give the life to the present claim, since they refer to her and the other *bahurias* as heiresses or heiresses and successors of Babu Rampadarath Singh deceased. It has not even been suggested before us that the finding that the appellants were never in *sir* possession of Manhu proper at any time, or the grounds on which it is based are not correct.

Thus appellants are not entitled to possession of Manhu either by way of recovery of last possession which they never had or by right of resumption, and the appeal in respect thereto fails completely.

A word may now be said as to the remainder of the fourth finding which relates to Sahorswa. Appellants assert that it is a separate village from Manhu, is not a part of the grant of 1827 and is in their *sir* possession. The Record of Rights favours the contention of the defendants Nos. 1 to 3 that Sahorswa is covered by the grant. The defendants further contended that it was always so held. The Trial Court held that it is a *Tola* of Manhu in possession of defendants Nos. 1 to 3 as such and that it has never been held *sir* by appellants. This finding is unquestionably correct. The only evidence placed before us in support of the case of appellants that Sahorswa was not a part of the grant is the two maps Exhibit 9(*a*) and Exhibit 9 (*b*). These entirely fail to rebut the presumption arising from the Record of Rights. Though erroneously called *thakbast* maps they appears to be copies of something better—a Revenue Survey Map. Each is in fact a copy of the part of the original map of which the third map which is filed by defendants, is a full copy. Clearly the only inference which can be drawn is that Sahorswa was a new village formed at the Revenue Survey out of the area till then considered to be the village of Manhu: otherwise the two would not be depicted on the same map. Then the plaintiffs could have produced the details papers of the Revenue Survey or even of the *thak* demarcation, and in their absence no inference in their favour can be drawn from the maps on record. But apart from that the evidence on the other side is overwhelming that Sahorswa is a part of Manhu and that plaintiffs have never been in *sir* possession. The *raiyats* of Sahorswa have

testified in favour of defendants Nos. 1 to 3 whereas neither the evidence of tenants nor counterfoil receipts are forthcoming on behalf of the appellants. Furthermore the rent-receipts granted to *Musammat* Radhika Kuar by the various co-sharer *khairatdars* show that the tenancy was Manhu-Sahorswa, Manhu and Saharewa or *Manhu-asli-mai-dakhili*. The Trial Judge could not possibly have arrive at any conclusion except that Sahorswa is a *Tola* of Manhu and is held as part of Manhu under Exhibit 1, that appellants were never in possession of *Tola* Sahorswa and are not entitled to possession thereof on the ground that it is outwith Manhu. It has already been held that they cannot resume Manhu.

This really disposes of the appeal. The fact is, as pointed out more than once by the Courts: "that the plaintiffs are dissatisfied with the arrangements made by their ancestors and have resolved in getting rid of them and of the defendants at all costs." But a few words may be said as to the questions raised in the cross-appeal, if such it can be termed of defendants Nos. 1 to 3.

I agree with my learned brother that Amarnath Singh, a descendant of Babu Pryag Singh who has a share in Manhu, was both a proper and a necessary party to the suit.

As to the first finding of the learned Subordinate Judge, which is in favour of the appellants, all that Mr. S. M. Mullick on behalf of the respondents asked during argument was that if the suit failed on other grounds, this issue should remain open. The learned Subordinate Judge also considered that the question had lost much of its importance in view of the second finding. Again in the "reliefs" set out in paragraph 15 of the plaint no definite prayer is made for a declaration that the entry "Not resumable" in the Record of Rights is incorrect or of the circumstances in which the tenancy is resumable. It was admitted that no part of the tenancy was resumable until at least the heirs male of one of the grantees became extinct and it has now been decided that no part is resumable so long at least as an heir male of either of the grantees survives. What remains is the question whether the appellants have by evidence rebutted the entry in the Record of Rights so far as to show that the *khairatdars* may resume the tenancy.

(1) When there are heirs other than heirs male of one of the original grantees, or failing that (2) when there are no heirs, either male or female.

I am loath to enter upon this difficult question where it is not absolutely necessary to do so. But I may mention that at first sight the considerations advanced by the learned Court below for his finding in favour of the appellants appear insufficient to rebut the entry in the Record of Rights. The Kunda case is admittedly not in point as appellants have not given evidence of a custom by which *al aulad* in 1827 was restricted in *pargana* Palamau to lineal male descendents. It may well be the case that the general custom in *pargana* Palamu is that *al aulad pusht dar pusht* grants are resumable on failure of heirs male, but I cannot hold that the judgment, Exhibit VII, is sufficient to prove the custom that the tenure in the present instance, in regard to which the entry in the Record of Rights, is not resumable expires on failure of heirs male. The previous rulings refer to cases in which there was no adverse entry confronting the plaintiffs. The grantor too in this instance was a Tirhutia Brahman newly arrived from Darbhanga, and the grant is not definitely a *jagir* or an *ijara* (even of the *ijaras* in Palamau which often are *doami* in tenure, though the rent is subject to enhancement). In my experience, also, ordinarily it is not possible to predicate a custom of the Division of Chota Nagpur as a whole. It generally goes by estates, *e. g.*, Chota Nagpur (equivalent broadly to Ranchi District, and called 'Nagpur' in the vernacular) or Ramgarh or Pachete, or by great Pargana, often corresponding to estates, such as Porahat, Dhalbhum, Barahabhum, Tori or Plamau; and though analogy of neighbouring *parganas* or estates may help, it does not always do so and is rarely conclusive. I feel insecure, therefore,

in disposing of the general question of resumability in this appeal, and I would accordingly leave the question open between the parties as requested by cross-appellants and not objected to by plaintiffs, except, of course, to this extent that the *mukarrari istimrari* grant is not resumable so long as there survives any heir male of either of the original grantees.

I would associate myself with the warning addressed by my learned brother at the instance of their Vakil, to defendants Nos. 1 to 3 that incidental remarks or even decisions in the judgments in this litigation must not be taken as determining the rights of defendants Nos. 1 to 3 and Amarnath Sing *inter se*. These, may well be governed by considerations outwith the matters appearing in or relevant to this litigation, and in particular it does not appear to follow from the fact that because the tenancy cannot be resumed while defendant No. 1 or Amarnath survive, that the other defendants or even outsiders may not have interest therein. If controversy arises, settlement by private arbitration would appear to be indicated.

S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 162 OF 1923.

June 17, 1924.

Present:—Sir Cecil Henry Walsh, KT., Actg. Chief Justice, and Mr. Justice Ryves.

Rai Saheb Lala KHUB LAL AND OTHERS —OPPOSITE PARTIES—APPELLANTS

versus

Lala BISHAMBHAR SAHAI AND OTHERS —APPLICANTS—RESPONDENTS.

Arbitration and award—Arbitrator—Jurisdiction exceeded or not exercised—Consent of parties—Arbitrator as witness—Duty of Court—Examination on commission—Limit of examination—Award—Minors parties.

The consent of the parties to an arbitration that the arbitrator should leave certain items undetermined may take various forms; an expressed withdrawal, a mutual understanding not to submit the necessary materials, a mutual recognition by the parties that a condition of things exists which makes a decision impossible, or a diplomatic silence with regard to a mutual understanding. [p. 222, col. 1.]

If an Arbitrator chooses to undertake the decision of a variety of matters with the consent of parties and he deliberately, or by an oversight, without the consent of the parties, omits from his decision anything really material, it is sufficient to destroy the award; because, he derives his authority only from the consent of parties and from the moment he goes outside that consent, either by omitting to decide what they have submitted to him, or by deciding something which they have not submitted to him, he ceases to be clothed with the legal authority from which alone he derives his jurisdiction. [p. 221, col. 1.]

If in the course of events, which have happened since he took upon him his office, it has become impossible, or no longer desirable, either in the view of the Arbitrator or in the view of the parties themselves, to decide any one or another of the points originally submitted, and the parties themselves realise that the Arbitrator should disregard that point, the defect which would otherwise invalidate the award, ceases to be a defect. [p. 222, col. 1.]

An Arbitrator is not in the position of an ordinary witness. Therefore, a Judge ought never to issue a Commission for the examination of an arbitrator or submit him to a roving Commission by way of examination by the parties uncontrolled by the Judge himself, and when an arbitrator appears before him, he ought to exercise the severest possible control and circumspection over the examination. [p. 224, col. 1.]

O'Rourke v. *Commissioner for Railways*, (1890) 15 A. C. 371; 59 L. J. P. C. 72; 63 L. T. 66, referred to.

The practice of calling Arbitrators indiscriminately, as though they were witnesses to the issue of fact, is not only an unreasonable burden upon the Arbitrators and certain to lead to a great deal of irrelevant evidence, but it also tends to lead the Judge unconsciously into a kind of re-hearing of the Arbitration. Nothing can be worse than that, because there is no appeal from an Arbitrator, and a Judge ought, from the first severely to discountenance any proceeding which attempts to take that form. But more than that he ought to exercise a severe control over the interrogatories or examination of the Arbitrator when summoned. [*ibid.*]

An Arbitrator is a judicial person in respect of the matter of which he has been appointed. He is entitled to the respect and consideration due to a person occupying that position, and his evidence ought to be confined strictly to the points which are in the eyes of the law material as coming from him. That is to say, any question of fact, upon some evidence or allegation tending to establish or disprove his own misconduct, may be put to him if he is charged with misconduct. [p. 224, col. 2.]

Where an Arbitrator finds as a fact that a party did withdraw or did agree to certain things, that

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is a finding of fact which a Court of law cannot go behind. [p. 224, col. 2.]

An Arbitrator may be examined upon the course of procedure which he has adopted, the material which he has utilised in arriving at his decision and all matters affecting the award itself, that is to say, the drawing up of the award, the piece of paper and so forth. The slightest attempt to get to the materials of his decision, to get to the back of his mind, and to examine him as to why and how he arrived at a particular decision, should be immediately and ruthlessly excluded as undesirable. [*ibid.*]

O'Rourke v. *Commissioner for Railways*, (1890) 15 A. C. 371; 59 L. J. P. C. 72; 63 L. T. 66, relied upon.

Obiter:—When the guardian of a minor has been properly appointed and the minor is properly represented in arbitration proceedings and his guardian is a party to the award both in his own capacity and as guardian of the minor, the award is binding on the minor for the time being through his guardian, and he cannot be heard to raise any objection which might be open to him as minor on the ground that his interest as an infant has not been properly looked after, until he reaches majority and raises it in the ordinary way. [p. 225, col. 2.]

First appeal from an order of the Subordinate Judge, Aligarh.

Messrs. *Iqbal Ahmad* and *Baleshwari Prasad*, for the Appellants.

Sir *Tej Bahadur Sapru* (with him Messrs. *Gulzari Lal* and *Uma Shankar Bajpai*), for the Respondents.

JUDGMENT.—This is in many ways a lamentable specimen of the abuse of a valuable and simple piece of machinery which has been provided by the Legislature, to enable people, if they wish to avoid Law Courts, to settle their disputes in a friendly way with the assistance of friends and members of their own brotherhood. That is not to say that the legal aspect of the questions which have been argued before us have not been admirably handled, but nobody acquainted with this litigation, or listening to such parts of the case as have been relevant to the argument before us, can have the slightest doubt that the two main parties to this arbitration proceeding, namely, Khub Lal and Bishambhar Sahai, were well advised to seek the assistance of three Arbitrators to adjudicate upon their controversy; that they succeeded in obtaining apparently gratuitously able, conscientious and honest Arbitrators and that in the main, it would be difficult in the whole history of arbitration to find work which had been better done. It is heart-breaking (except to those who regard quarelling with members of their own family and litigating in the Law Courts as an existence in itself) to find that one of these parties, after all this labour and expenditure of time, and usefulness and hard honest work, should be so lost to any sense of decency, as to try and upset the whole arrangement. It does not follow that he is not entitled to succeed. Unfortunately it has been only too truly said of the law that from time to time under its protection knavery flourishes, but we are glad to say that the attack upon the Arbitrators in this case, and the childish objections which have been raised to this admirable award, have entirely broken down. But the matters in dispute were substantial, and the variety of items, which had to be dealt with was considerable. How long the arbitration proceedings actually lasted, it is impossible to say. But it would be equally impossible to conduct such an arbitration from beginning to end without exposing the proceedings to attacks, which at any rate in the hands of an able Advocate can be made to look formidable, until they have been pulverized by the respondents on the other side, and there were, when this appeal was opened before us, a certain number of formidable points which were worthy of consideration in the way they were presented by Mr. Iqbal Ahmad. The appeal comes before us in a way which is not unfamiliar. The Judge, or the Arbitrator, has not yet been invented who is able to satisfy both parties in a difficult and complicated controversy. He will probably never be found in our day, and, therefore, when this award was published it was almost certain that one or other of the parties would be dissatisfied. It would not perhaps be a violent presumption to assume that the party, Khub Lal, who is dissatisfied in this case, has not done quite so well as he hoped. Possibly he hoped that the other party to the award would be the one to be dissatisfied. But being

apparently dissatisfied, and not willing to accept the decision of the Arbitrators, he indirectly forced his opponent to take the necessary proceedings under paragraphs 20 and 21 of the Second Schedule of the Code to have the award filed as a decree and made finally binding upon the two branches of the family. Then of course his batteries opened fire and the usual string of objections were filed in the Court below—too numerous, and some of them, too trifling to be set out in detail here—and a very thorough enquiry was held in the Court below into the proceedings of the Arbitrators, who, as a matter of course, were charged with misconduct—apparently they would not be real Arbitrators if they did not lay themselves open to suspicion—and various other technical points were raised. A great deal of evidence was taken, including the evidence of a well-known and highly respected Vakil of this Court who happened to be the Umpire, and the evidence of one of his colleagues. To this matter we will refer again in a moment. But the learned Judge before whom the matter came, after apparently a most painstaking hearing, worte an admirably clear and comprehensive judgment dismissing the objections and ordering the award to be filed. Thereupon the usual appeal was filed in this Court. The memorandum of appeal shows that the proceedings in the Court below had been in substance an appeal from the Arbitrators' decision, and that an attempt was being made also in this Court by way of appeal from the Court below, to continue the appeal from the Arbitrators. As an example of the kind of attack which was being made upon the proceedings, it is interesting to note that the 6th ground asks this Court to set aside the award upon the ground that Mr. Panna Lal, Vakil High Court, was suffering from defective memory with regard to something which he had dicided about somebody or another's house, a matter which he must have desired to forget as soon as possible and now had nothing to do with for several months. If a defective memory is to be a ground for setting aside legal proceedings there would be very few decrees which would ever achieve absolute finality. This attack upon an Arbitrator for defective memory has a bearing upon something which we will have to say hereafter. But out of these numerically heavy attacks which have been made upon the proceedings of the Arbitrators and of their conduct, one or two points have emerged in the skilful handing by Mr. Iqbal Ahmad in this Court which deserve to be dealt with by us and which necessitated our calling upon Sir Tej Bahadur Sapru to put his client's view of the matter, more out of respect for the points that were raised, than for any legal difficulty which they created. A detailed and to some extent microscopic examination of the property which was dealt with by the Arbitrators, and of the proceedings of the Arbitrators, and of the award does disclose that certain matters, which were originally intended to be disposed of by the Arbitrators, have been ignored or omitted from the award, or as it is sometimes said, left undetermined. Now in this case the agreement between the lawyers on either side about the principles is so complete, that it is hardly necessary to refer to authorities. It is agreed, on the one hand, that if an Arbitrator chooses to undertake the decision of a variety of matters with the consent of parties, and he deliberately, or by an oversight, without the consent of the parties, omits from his decision anything really material, it is sufficient to destory the award. The reason for that is obvious. We are discussing, be it observed, an arbitration without the intervention of the Court. The Tribunal derives its authority only from the consent of the parties and from the moment when it goes outside that consent, either by omitting to decide what they have submitted to him, or by deciding something which they have not submitted to him, he ceases to be clothed with the legal authority from which alone he derives his jurisdiction. About that there has been no controversy before us. Similarly there has been no controversy with regard to a corollary which follows,

If in the course of events, which have happened since he took upon him his office, it has become impossible, or no longer desirable, either in the view of the Arbitrator or in the view of the parties themselves, to decide any one or another of the points originally submitted, and the parties themselves realise that the Arbitrator should disregard that point, the defect which would otherwise invalidate the award, ceases to be a defect. To take a simple illustration, if the matter in dispute were an elephant which had died (a thing which really happens I think to elephant) in the course of a dispute, it would be absurd to suppose that an award could be upset merely because an Arbitrator failed to divide among the parties the elephant which was dead and buried before the award was issued. It is not necessary, as we have said, to go through the authorities which Sir Tej Bahadur Sapru rightly cited from the English and Indian reports establishing this proposition. There are several items in this case which the Arbitrators have left undetermined. The learned Judge, with regard to those of any importance, has found that that was done with the consent of the parties. There was abundant evidence upon which he could come to that conclusion, and we see no reason to interfere with it. The consent for such a purpose may take various forms: an expressed withdrawal, a mutual understanding not to submit the necessary materials, a mutual recognition by the parties that a condition of things exists which make a decision impossible, or a diplomatic silence with regard to a mutual understanding. Almost every one of these illustrations exists here. Two admirable illustrations occur in this particular case, one which was pressed upon us by Mr. Iqbal Ahmad, and one which was not. It so happened that in this wealthy family there were implements or accessories connected with indigo factories, which were scattered, difficult to value, impossible to divide, and altogether a troublesome item to handle. Whether the objection came from the Arbitrators themselves, all of whom were lawyers, and who, as they were giving their services freely at great sacrifice to themselves, could hardly be expected to make the necessary journeys and to undertake the burdensome task of collecting, assessing, dividing and apportioning these factory implements, or whether the parties themselves anticipated the objection which was certain to come sooner or later from the arbitrators, by a kind of tacit understanding, which is only to be expected of reasonable business men, the Arbitrators were given to understand that the factory implements were in themselves so trivial, or at any rate the dispute with regard to them so minute, that they need not trouble their heads about them. Nobody we imagine was better pleased by this decision than the Arbitrators themselves, except possibly the Subordinate Judge who might be asked to hear an appeal on the question as to whether these implements had been fairly divided. Another illustration is what we have described as the diplomatic tacit understanding. There was an unfortunate skeleton in the family cupboard. Skeletons in cupboards may be prefectly innocuous, but sometimes, when they are galvanized in to activity, they may become extremely troublesome, and this skeleton appeared to belong to the latter class. There was a house which has been left severely alone by the Arbitrators. The evidence is clear that the Arbitrators were given to understand that no decision could be arrived at with regard to this house without opening the door of the cupboard, and letting the skeleton out, and it was agreed by one of those tacit diplomatic understandings which are so much more frequent in real life than in legal agreements, that the cup board should be kept closed, and tha nothing should be said about the house and nothing was said about the house That point is clearly covered by the principle relied upon by Sir Tej Bahadur Sapru, namely, a point left undetermined by the consent of parties, and if there is one thing about which Khub Lal is to be congratulated in this case, it is that he preferred it should be left undetermined. Another formidable

point raised by Mr. Iqbal Ahmad was the question of the two villages, which certainly gave us a great deal of trouble. In substance what has been done about these two villages is this. Strictly speaking it was the duty of the Arbitrators to divide these villages as they were in the *zemindari* held in common and recorded in the revenue papers of a Tahsil which remained undivided, and although with regard to the property relating thereto the parties approved of the agreement which the Arbitrators adopted, and although the Arbitrators were prepared, and indeed carried out declaration of right as to the rateable shares of both parties corresponding to the type of declaration contemplated by O. XX, r. 18, the view of Mr. Panna Lal, Umpire, as expressed in the box, was that it was practically impossible if not absolutely impossible and there is no difference between practical and absolute impossibility so far as an Arbitrator in a matter of this kind is concerned to go over the ground and to make the necessary partition by metes and bounds. Therefore, they did what they could, and did not attempt to do what they realised they could not, and by way of explanation or possible justification of the excellence of their decision, Sir Tej Bahadur Sapru has produced in Court for our inspection the result of the partition which has actually been carried out by the Revenue Authorities with all their experience and knowledge, leaving us to draw a lurid picture of what would have happened if Mr. Panna Lal and his colleagues had even endeavoured to do the same thing their failure to do which, Mr. Iqbal Ahmad suggests, has invalidated these proceedings. It is difficult to see how anybody would have profited by that proceeding. We think that Sir Tej Bahadur Sapru has put the proper construction on these proceedings. Mr. Iqbal Ahmad's contention naturally made was that there was no clear evidence of consent by the parties to the omission. Sir Tej Bahadur Sapru's answer is that he does not suggest that this was a point left undetermined by the consent of the parties. Rather was it a point which has been decided in the only way in which it wa humanely possible for the Arbitrator to decide. One or two other point s which would have been of great interest were raised by Mr. Iqbal Ahmad, but we have come to the conclusion that his client is prevented from raising them in this Court as they were not properly raised in the Court below. This much suffices for the disposal of this appeal, but it leaves two matters untouched which we feel we cannot entirely ignore: (1) a simple and pleasant task, (2) the other not so pleasant and somewhat difficult. The first task is this, that we think we ought to express our admiration for the way in which this arbitration proceeding has been carried out as well as for the way in which it has been handled by the Judge in the Court below, and by the gentlemen who have discussed it before us during the last two days. I have some experience of agreements, of reference, and I am bound to say that I have seldom seen one, which seemed to me more admirable, than that which Mr. Panna Lal prepared for the parties in this arbitration. I have no experience of large arbitration proceedings, but we both of us feel that in this matter all the Arbitrators must have devoted themselves with extraordinary industry, and on the whole with unparalleled success to the preparation of a clear document which should successfuly record the right of the parties for all time, and in spite of Khub Lal's dissatisfaction, we think both parties ought to be grateful to the Arbitrators for the way in which they have done their work. In our view the learned Judge has handled the matter in the Court below with one exception admirably. The exception is this, and after what has been said before us in argument we think we ought not to pass the matter over without some observation. As a matter of policy it is obvious that if arbitration is for the general benefit of the community in India, it can only become so by being put in the hands of men of position and ability, and if it is to become, as we are afraid it has to a large extent, a recognised practice the moment an award is

completed to start an unjustifiable attack upon the personal character and conduct of those who have only been doing their best to please the parties, and to drag them before a Court of Law, to cross-examine them as witnesses, and have offensive suggestions flung at them, the thing will become so unpopular as to be almost impracticable. But it is not merely as a matter of policy that we would mention it. As a matter of law it should be clearly understood by the Courts below that an Arbitrator is not in the position of an ordinary witness. All those concerned in this case recognise that a great deal of the examination to which Mr. Panna Lal was submitted as Umpire was quite unjustifiable. The Judge could not stop it because Mr. Panna Lal's evidence was taken on Commission. But if the principles governing the competence of Arbitrators are clearly understood it is obvious that a Judge ought never to issue a Commission to an Arbitrator. We are not prepared to go the length of Sir Tej Bahadur Sapru's suggestion that a Judge ought not to summon an arbitrator without an affidavit as to what he is required to say, but he certainly ought not to submit an Arbitrator to a roving Commission by way of examination by the parties uncontrolled by the Judge himself. Assuming without deciding that a Judge cannot refuse the issue of a summons to an Arbitrator, when the Arbitrator appears before him, the Judge ought to exercise the severest possible control and circumspection over the examination. The practice of calling Arbitrators indiscriminately as though they were witnesses to the issues of fact is not only an unreasonable burden upon the Arbitrators and certain to lead to a great deal of irrelevant evidence, but it also tends unfortunately to lead the Judge unconsciously into a kind of re-hearing of the Arbitration. Nothing can be worse than that, because there is no appeal from an arbitrator, and a Judge ought, from the first severely to discountenance any proceeding which attempts to take that form. But more than that he ought to exercise a severe control over the interrogatories or examination of the Arbitrator when summoned. An Arbitrator is a judicial person in respect of the matter of which he has been appointed. He is entitled to the respect and consideration due to a person occupying that position, and his evidence ought to be confined strictly to the points which are in the eyes of the law material as coming from him. That is to say any question of fact upon some evidence or allegation tending to establish or disprove his own misconduct may, no doubt, be put to him if he is charged with misconduct. So with regard to Mr. Iqbal Ahmad's contention in this case, his failure to decide the points submitted to him. So too with regard to the withdrawal by the parties of points originally submitted, bearing this in mind that Sir Tej Bahadur Sapru was right when he argued that where an Arbitrator finds as a fact that a party did withdraw or did agree to certain things, that is a finding of fact which a Court of Law cannot go behind. In short an Arbitrator may be examined upon the course of procedure which he has adopted, the material which he has utilised in arriving at this decision and all matters affecting the award itself, that is to say the drawing up of the award, the piece of paper and so forth. The slightest attempt to get to the materials of his decision, to get to the back of his mind, and to examine him as to why and how he arrived at a particular decision, should be immediately and ruthlessly excluded as undesirable. We think this view is fully supported by a dictum to be found quoted in the judgment of Lord Watson in the case of *O'Rourke* v. *Commissioner fro Railways* (1) quoted from a judgment of Earl Cairns in a previous authority in the House of Lords: "He (*i.e.*, the Arbitrator or Umpire) was properly asked what had been the course which the argument before him had taken—what claims were made and what claims were admitted; so that we might be put in possession of the history of the litigation before the Umpire up to the time when he proceeded to make his award. But there it appears to me the right of ask-

(1) (1890) 15 A. C. 371; 59 L. J. P. C. 72; 63 L. T. 66.

ing questions of the Umpire ceased." In our view that is a short and comprehensive statement of the liability of an Arbitrator to be questioned in the presence of or by the Court with regard to matters affecting the award, and we trust that Judge before whom this direction of ours may come on a future occasion, will adhere to that principle. Strangely enough the learned Judge for whom one has great sympathy had clearly in his mind, supported by authority, the rule that a Judge has no business in an application of this kind to sit in judgment on the decision of the Arbitrators. But nonetheless in a long passage a portion of which precedes his correct declaration of the law and a portion of which follows closely upon it the learned Judge was engaged in an analysis of the accounts and the decision of the Arbitrators upon the accounts which we are satisfied must have caused him hours of work.

The appeal must be dismissed with costs including in this Court fees on the higher scale.

Inasmuch as Mr. Iqbal Ahmad has pressed upon us with great earnestness his objection to the way in which the Arbitrators dealt with a specific piece of property which had originally been in this family and indeed still belonged to the family in one sense though undoubtedly impressed with a trust, either expressly or impliedly, created by the deceased head of the family we will add a word or two about it although we are bound to say that it was not open to Mr. Iqbal Ahmad to argue it here. We agree with Sir Tej Bahadur Sapru's construction of the decision of the Arbitrators that it was not a new disposition of the property, but merely a temporary and no doubt admirable arrangement for the provisional treatment of the property. One way of putting it is that it was not, as suggested by Mr. Iqbal Ahmad's client, an alienation at all. Nor is there the slightest foundation for the suggestion of any impropriety on the part of the Arbitrators, with the consent of the parties, to take part in the general administration and the provisional working of this property through a committee to which they belonged. Mr. Iqbal Ahamd pressed upon us that as representing the minors, the grand-children of Khub Lal who could not speak for themselves, he was entitled to object to this part of the decision, although Khub Lal himself could not, being *sui juris*. We recognise that it is somewhat unusual, and perhaps hard on Mr. Iqbal Ahmad, that we should rule him estopped from raising the point because he had not raised it adequately in the Court below and at the same time that we should decide against the point in the course of observation in our judgment. But we would merely add this, in regard to the interest of the minors, that in our opinion, though it is not necessary for us to arrive at any decision on the point, the guardian having been properly appointed and the minor properly represented in this proceeding, and the guardian having been a party to the award both in his own capacity and as guardian, the award must be binding upon the minors for the time being through their guardian, and they cannot be heard to raise any objection which might be open to them as minors on the ground that their interests as infants have not been properly looked after until they reach majority, and raise it in the ordinary way, and when if ever they do so they will doubtless be reminded if they are not at that age already keenly conscious of the fact themselves that the arrangement which was arrived at was one which received the unanimous and almost enthusiastic approval of all those who were *sui juris* and who were best able to judge what was not in the general interest of the family and of the minors themselves, and also the approval of the Judge before whom the matter came originally and of the Court of Appeal.

S. D. *Appeal dismissed.*

NAINAPILLAI *v.* RAMANATHAN.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

December 14, 1923.

Present:—Lord Shaw, Lord Carson, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

A. S. N. NAINAPILLAI MARAKAYAR, SINCE DECEASED (NOW REPRESENTED BY A. S. N. SHEIK MUHAMMAD MARAKAYAR AND OTHERS)—APPELLANTS

versus

T. A. R. A. RM. RAMANATHAN CHETTIAR AND OTHERS—RESPONDENTS.

GOPALA THEVAN AND ANOTHER—APPELLANTS

versus

T. A. R. A. RM. RAMANATHAN CHETTIAR AND OTHERS—RESPONDENTS.

Landlord and tenant—Ejectment suit—Plea of permanent tenancy—Onus of proof—Permanent right of occupancy, how acquired—Kudivaram, *meaning of*—Melvaram, *meaning of—Temple—Manager's position—Trustee—Alienation—Necessity—Duty to protect property—Alienation by Manager of temple, whether binding on his successor — Tenant—Adverse possession — Uncertain vernacular terms, whether can be acted upon.*

When in defence of an ejectment suit a tenant of lands sets up a permanent tenancy, the onus of proving that he has such a right is upon him. [p. 227, col. 2.]

Secretary of State for India in Council v. *Luchmeswar Singh*, 16 I. A. 6; 16 C. 223; 13 Ind. Jur. 10; 5 Sar. P. C. J. 275; 8 Ind. Dec. (N. S.) 147 (P. C.) and *Seturatnam Iyer* v. *Venkatachala Goundan*, 56 Ind. Cas. 117; 47 I. A. 76; (1920) M. W. N. 61; 27 M. L. T. 102; 11 L. W. 399; 38 M. L. J. 476; 22 Bom. L. R. 578; 18 A. L. J. 707; 43 M. 567; 25 C. W. N. 485, referred to.

A permanent right of occupancy in land is a right, subject to certain conditions, of a tenant to hold the land, which he occupies, permanently. It is a heritable and in some places may be a transferable right. This permanent right of occupancy may only be obtained by a tenant by custom, or by a grant from an owner of the land who happens to have power to grant such a right, or under an Act of the Legislature. [p. 227, col. 2; p. 228, col. 1]

The presumption in favour of a permanent tenancy implies that there is ground for inferring that the tenure was always intended to be and always was hereditary, or that it acquired that character by subsequent grant. But a presumption in favour of a transaction assumes its regularity, it cannot be made in favour of that which offends legal principles. [p. 232, cols. 1 & 2.]

Satya Sri Ghoshal v. *Kartik Chandra Dass*, 13 Ind. Cas. 596; 15 C. L. J. 227; 16 C. W. N. 418, relied upon.

When a tenancy in the Presidency of Madras commences under a terminable contract there is nothing to prevent the landlord from ejecting the tenant at the end of the term. [p. 232, col. 2.]

Seena Pena Reena Seena Mayandi Chettiyar v. *Chokkalingam Pillay*, 31 I. A. 83; 27 M. 291; 8 C. W. N. 545; 14 M. L. J. 200; 8 Sar. P. C. J. 587 (P. C.), relied upon.

No tenant of lands can obtain any right to a permanent tenancy by prescription in them against his landlord from whom he holds the lands. [p. 233, col. 1.]

Madhavrao Waman Saundalgekar v. *Raghunath Venkatesh Deshpande*, 74 Ind. Cas. 362; 50 I. A. 255; 25 Bom. L. R. 1005; (1923) M. W. N. 689; (1923) A. I. R. (P. C.) 205; 33 M. L. T. 389; 47 B. 798; 28 C. W. N. 857; 20 L. W. 248 (P. C.), relied upon.

"*Kudivaram*" is a Tamil word which signifies a cultivator's share in the produce of land as distinguished from the landlord's share in the produce of the land received by him as rent, which is sometimes designated as "*Melvaram.*" [p. 228, cols. 1 & 2.]

Suryanarayana v. *Patanna*, 48 Ind. Cas. 689; 45 I. A. 209; 41 M. 1012; 25 M. L. T. 30; (1918) M. W. N. 859; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U. P. L. R. (P. C.) 11; 36 M. L. J. 585; 21 Bom. L. R. 547; (1919) M. W. N. 463 (P. C.) and *Upadraishta Venkata Sastrulu* v. *Divi Setharomudu*, 51 Ind. Cas. 304; 46 I. A. 123; 17 A. L. J. 725; 37 M. L. J. 42; 21 Bom. L. R. 925; 26 M. L. T. 175; 30 C. L. J. 441; 10 L. W. 633; 24 C. W. N. 129; 43 M. 166; 2 U. P. L. R. (P. C.) 16, referred to.

A public temple is a religious institution, and is recognised in law as a juridical person, but it can act only through persons who have authority to act for it, and they can act for the temple only within the scope of their authority. The position of the *shebait*, the manager or the trustees of a temple, is, so far as their power to deal with the endowed lands of the temple is concerned, analogous to the position of a *Mahant* of a *mutt* to deal with the endowed lands of a *mutt*. They can sell or mortgage the endowed lands of the temple if there is an actual, special, and unavoidable necessity of the temple to do so, but the necessity would have to be proved by those who alleged that it existed. Except in a case of such unavoidable necessity the *shebait*, the managers or the trustees of a temple, or the *Mahant* of a *mutt*, have no power to sell or mortgage the endowed property in their custody, and obviously they have no right to impair the endowed property by creating or granting in favour of any one rights of permanent occupancy in the endowed lands. [p. 231, col. 2.]

Maharanee Shibessouree Debia v. *Mothooranath Acharji*, 13 M. I. A. 270 at p. 275; 13 W. R. P. C. 18; 2 Suth. P. C. J. 300; 2 Sar. P. C. J. 528; 20 E. R. 552, *Abhiram Goswami Mohant* v. *Shyama Charan Nandi*, 4 Ind. Cas. 449; 36 I. A. 148; 36 C. 1003; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1 (P. C.); *Palaniappa Chetty* v. *Deivasikamony Pandara*,

39 Ind. Cas. 722; 44 I. A. 147; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 507; 26 C. L. J. 153; 40 M. 709; 6 L. W. 222 (P. C.) and *Vidya Varuthe Thirtha Swamigal* v. *Balusami Ayyar*, 65 Ind. Cas. 161; 48 I. A. 302; (1921) M. W. N. 449; 41 M. L. J. 346; 44 M. 831; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.), referred to.

In the case of a *shebait* a grant by him, in violation of his duty, of an interest in endowed lands, which he has not authority as *shebait* to make, may, under some circumstances, be good as against himself by way of estoppel, but is not binding upon his successors. [p. 232, col. 1.]

A vernacular term of uncertain meaning cannot be acted upon by Privy Council. [p. 233, col. 2.]

Seena Pena Reena Seena Mayandi Chettiyar v. *Chokkalingam Pillay*, 31 I. A. 83; 27 M. 291; 8 C. W. N. 545; 14 M. L. J. 200; 8 Sar. P. C. J. 587 (P. C.), referred to.

Consolidated appeals from decrees of the Madras High Court (Sadasiva Aiyar and Napier, JJ., in A. S. Nos. 248 of 1914 and 115 and 116 of 1915), dated the 22nd December 1916, printed as 41 Ind. Cas. 788, dismissing appeals from decrees of the Court of the Subordinate Judge, Tanjore, in O. S. Nos. 40 and 42 of 1913, dated the 24th April 1914.

Sir *G. Lowndes, K. C.*, and Mr. *Narasimham*, for the Appellants.

Messrs. *DeGruyther, K. C.*, and *K. Brown*, for the Respondents.

JUDGMENT.

Sir John Edge.—These are two consolidated appeals by defendants or their representatives from decrees, dated the 22nd December, 1916, of the High Court at Madras, which dismissed two appeals from decrees, dated the 24th April, 1914, which a Subordinate Judge of Tanjore had made in Original Suits Nos. 40 and 42 of 1913 in favour of the plaintiffs for the ejectment of the defendants from lands, including groves, in Tanjore and for mesne profits.

The plaintiffs in each of the suits were five of the six trustees of the Mantrapureeswarasami Temple in Kovilur, in Tanjore. That temple will hereafter be referred to as "the Temple." The sixth trustee, who was made a defendant in each suit, did not interfere in the conduct of the suits. It will be understood that when, later in this judgment, the defendants are referred to, the reference is to the defendants other than the sixth trustee.

The lands in respect of which a decree of ejectment has been made in each suit are part of the village of Mangal in Tanjore, and are part of the endowed property of the Temple. It is not disputed that the defendants were tenants of the Temple of lands to which the suits relate, nor is it now disputed that they received notices to quit. The defendants admit that the *melvaram* rights in the property in question are vested in the Temple, but their case is that the *kudivaram* rights in that property are vested in them and never were vested in the Temple, and they claim that they have permanent rights of occupancy in the lands under section 6 of Madras Act I of 1908, and also independently of that Act.

It cannot now be doubted that when a tenant of lands in India in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant. In *Secretary of State for India* v. *Luchmeswar Singh* (1), it was held that the onus of proving that they had a permanent right of occupancy in lands was upon the defendants, who alleged it as a defence to a suit by their landlord to eject them, and that proof of long occupation at a fixed rent did not satisfy that onus; and in *Seturathan Iyer* v. *Venkatachala Goundan* (2) in a suit by their landlords for the ejectment of the defendants from lands in a *ryotwari* District in Madras, the giving of notice to quit not being disputed, it was held that the onus of proving that the defendants had rights of permanent occupancy was upon them.

A permanent right of occupancy in land in India is a right, subject to certain conditions, of a tenant to hold the land permanently which he occupies. It is a heritable right, and in some

(1) 16 I. A. 6; 16 C. 223; 13 Ind. Jur. 10; 5 Sar. P. C. J. 275; 8 Ind. Dec. (N. S.) 147 (P. C.).

(2) 56 Ind. Cas. 117; 47 I. A. 76; (1920) M. W. N. 61; 27 M. L. T. 102; 11 L. W. 399; 38 M. L. J. 476; 22 Bom. L. R. 578; 18 A. L. J. 707; 43 M. 567; 25 C. W. N. 485.

places it possibly may be transferable by the tenant to a stranger. That permanent right of occupancy can only be obtained by a tenant by custom, or by a grant from an owner of the land who happens to have power to grant such a right, or under an Act of the Legislature. No custom by which the defendants could have obtained a right of permanent occupancy is alleged or proved in these suits.

Their Lordships will first consider whether the defendants have proved that they have rights of permanent occupancy under Madras Act I of 1908 in the lands in suit, and then whether they have proved that they have, otherwise than under that Act, rights of permanent occupancy in the lands.

Unless the endowed lands of the Temple in the village of Mangal constitute an "estate" within the meaning of that term in Madras Act I of 1908 that Act does not apply to them, and the defendants are not tenants with a right of permanent occupancy under section 6 of the Act. An "estate" is defined by section 3 of the Act, which so far as it is material in this case is as follows:—

"3. In this Act, unless there is something repugnant in the subject or context:—

* * * *

(2) "Estate" means

* * * *

(*d*) any village of which the land revenue alone has been granted in *inam* to a person not owning the *kudivaram* thereof, provided that the grant has been made, confirmed, or recognised by the British Government, or any separated part of such village;"

The term "*kudivaram*" is not defined in the Act, but, as was explained by the Board in *Suryanarayana* v. *Patanna* (3) "*kudivaram*" is a Tamil word which signifies a cultivator's share in the produce of land as distinguished from the landlord's share in the produce of the land received by him as rent, which is sometimes designated as "*melvaram*." See also *Upadraishta Venkata Sastrulu* v. *Divi Setharomudu* (4) where it was mentioned by the Board that the "*kudivaram*" or "*kudivaram* interest," as it is called in section 8 of the Act, is in fact a species of tenant right or right of permanent occupancy.

It is the plaintiffs' case that the village of Mangal including the *melvaram* and *kudivaram* rights in it, was at some time before 1723 granted as an endowment to the Temple by the then Raja of Tanjore, subject to a yearly payment in cash to the Raja, part of which he remitted to the Temple as an allowance for the maintaining of *pooja* at the Temple. The grant, or *sanad*, has been lost. The Raja of 1723 had recalled the grant, but had continued the cash allowance to the Temple. In 1723 the managers of the Temple complained to the then Raja of Tanjore that the allowance in cash was insufficient to maintain the *pooja* at the Temple, and thereupon the Raja granted to the Temple a *sanad* which as translated is as follows:—

"Rokha Dafter Karkoon. Ta: (*Taluq*) Kovil Kottay.....(illegible) Kadoorambh. On Thursday thirtieth Vaisak Bahoolam Sobhankruth Samvatsar, Soorsan year Arba Isarin Muyu Alph (1124), at Vedarania, on the auspicious occasion of the solar eclipse, Tilai Naik Bhandari, residing at Vedarania came before—— and made a representation as follows: 'That the mohin (allowance)—account of the Divani (Government Treasury for *pooja* worship) of the Devastan Kovil Kottay is very insufficient, that Nakshi Gootga (Rokkaguthakai) village was being carried on for the Devastan from the beginning and thereby daily worship, special worship, and car-festivals used to be performed. Has been made Sanjayath. For this reason, God's worship and oochavams are not being performed as before and car-oochavams and special oochavams have remained unperformed. Hence, His Highness will be graciously pleased to per-

(3) 48 Ind. Cas. 689; 45 I. A. 209; 41 M. 1012; 25 M. L. T. 30; (1918) M. W. N. 859; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U. P. L. R. (P. C.) 11; 36 M. L. J. 585; 21 Bom. L. R. 547; (1919) M. W. N. 463 (P. C.).

(4) 51 Ind. Cas. 304; 46 I. A. 123; 17 A. L. J. 725; 37 M. L. J. 42; 21 Bom. L. R. 925; 26 M. L. T. 175; 30 C. L. J. 441; 10 L. W. 633; 24 C. W. N. 129; 43 M. 166; 2 U. P. L. R. (P. C.) 16.

mit to be carried on as before the Nakshi Gootaga village for the God and for this purpose an order should be issued.' To this effect he made a petition. Thereupon, His Highness being pleased by way of favour has ordered the Nakshi Gootaga (village) to be carried on and has approved of the berij (assessment). This permission is dated . . . (torn), Ramjan. From the year aforesaid the Nakshi Gootaga (Rokkaguthakai) of the Manje Mangal village including the *nanja* and *punja* lands has been given (to) Sri Buddhi-pradeswar Swami (of) Kovil Kottay on the annual (payment) of Chakras 125—the previous Gootaga (lease amount) being 100, one hundred Chakras and the present increase being Chakras 25—in all, Chakras one hundred and twenty-five. Out of this (amount), let credit be given for Chakras 72 seventy-two per year for the Mohin—Divani's (Government's) Mohin (allowance) for worship out of the Gootaga (lease amount) and let the balance be credited in the Divani (Treasury) from time to time. Matters should be conducted in this way from year to year. Let a copy be taken and let the original *sanad* be returned to the Sthanik. Pa Hoo Pa . . . (illegible) Hajrat Rajesri Siv Row Narsing Row Peshway Prepared, date 1 . . (illegible).

"Commenced."

The grantee of the *sanad* is the Temple, and the village which in the *sanad* of 1723 is described as the Nakshi Gootga (Rokkaguthakai) village is, beyond doubt, the village of Mangal. Rokkaguttaghei, another spelling of the vernacular word Rokkaguthakai, means, according to the Manual of the District of Tanjore, an "assessment, also fixed at favourable rates, either from favour or as an inducement to reclaim waste." (*See* p. 487 of *A Manual of the District of Tanjore*, compiled under the orders of Government, printed at Madras in 1883.)

In 1724 an official memorandum was sent to the State Officer of Kadaramban which mentioned the petition upon which the *sanad* of 1723 was granted and continued thus :—

"An *arzi* was therefore submitted praying that Saheb Avargal would be pleased to pass orders for continuing the Rokkaguthakai village as before and thereupon an order was passed accordingly for treating Mangalam village inclusive of *nanja* and *punja* as Rokkaguthakai village for Sri Budhipradeswaraswami of Kovil Kottay, for 125 Pons per annum. *Beriz* fixed therefor is as follows :— Previous *guthakai*, 100 Pons ; increase now made, 25 Pons; total, 125 Pons. It was granted for this sum. Out of this sum, 72 Pons being the annual allotment made for the Sirkar *pooja* mohini shall be remitted, and the balance of *beriz* credited to the Sirkar. This shall be followed every year. The original *sanad* shall be returned to the Stanikar after taking a copy thereof.

"(By order of Huzur.)

"Seal of M. R. Ry. Hazarath Siva Rao Narasinga Rao Peishwa."

There can be no doubt that the *sanad* of 1723 was granted ; the only question as to it is, what does it mean?

That *sanad* of 1723, in their Lordships' opinion, purports to re-grant to the Temple all the lands of the village of Mangal as a religious endowment of the Temple subject to the assessment mentioned in it, and the effect of that re-grant was to pass to the Temple all the *melvaram* and the *kudivaram* rights in the village. The Temple had, obviously, been deriving from the village under the original *sanad* an income sufficient for the maintenance of the *pooja* worship at the Temple, and it must have obtained that income from the cultivation of the village lands either by its servants or by its tenants, but there is nothing in the *sanad* of 1723 to suggest that there was in 1723 any tenant of lands in the village who had any right of permanent occupancy in them. There is no proof that in 1723 there was any tenant of lands in the village who had any right of permanent occupancy in them. The village was in 1723 of that class of village which in Tanjore was known as Ekabhogam villages, or villages of which the sole occupancy right was vested in one individual—in Mangal the Temple—to distinguish them from Arudikarie villages,

which were held by a number of individuals in separate shares, and from Samudayam or Parsunkarie villages, which were held in common. (As to the three classes of villages, see page 105 of the *Manual of the District of Tanjore.*)

At some time between 1749 and 1799 the Tanjore territory in which the village of Mangal is situate came by cession from the Raja of Tanjore or by conquest under the control of the East India Company, and in 1809 a Register of lands in the village of Mangal was made by Mr. Cotton as the Collector of the District. The following is an extract from his Register of Rokkaguthakai lands.—

"Nature of the Sannad.	Names of the grantors.	Names of the original grantees.	Name of the present possessor.	Relationship of the present possessor to the original grantees.	Date of the original sannad.	Names of the villages or portions of villages comprised in the grant.	Nature and extent of the land so granted.	Amount of the revenue. Nanja, Punja and Bagayat.	Total.
2	3	4	5	6	7	8	9		10
* Dufter Rogah directing that the village Mangalam be held every year by Munderapureesvaraswami Covil in Covilcotoy, liable to the fixed annual money rent of 125 chakrams and specifying that Tillainayaga Pandaram at Vedaraniem has on the day of Sun Eclipse represented that the Mohini hitherto allowed by the Sirkar to the said Pagoda is very small, that it had formerly enjoyed that Rokkaguthakai village which afforded them the means of performing its daily and coach ceremonies, etc., which being since resumed under *amani*, the performance of these ceremonies ceased and that as he, therefore, requests the restoration of the said village, it is now accordingly made over to the said Pagoda liable to the increased annual rent of 125 chakrams instead of the 100 formerly levied thereon and that after deducting from the said 125 chakrams the mohini of 72 chakrams allowed by the Sirkar, the remainder is to be payable by the said Pagoda).	Unknown.	Munderapureesvaraswami Covil.	Munderapureesvaraswami Covil.	This village is enjoyed by the said Pagoda ever since this Rogah was granted.	Of Arban Glesarson Myulut Date-- (illegible) in this sanad.	The village Mangalam in Mannargoody Taluk, (is) consisting of 10 velis of nanja and 15 velis of punja as mentioned in the Palace account, but the said Pagoda actually enjoys Velis 37, M3 and G. 12½ of nanja. Velis 43, M.4, and G.62½ of punja, and Velis 16, M.11, and G.15 of poramboke, composing the whole of that village.	Nanja. 10 0 0 / Punja. 15 0 0 / Total Bagayat. 25 0 0	...	Rs. a. p. 125 0 0

" (Signed) J. COTTON,
" *Collector.*"

The entry in column 4 shows that the village had been originally granted to the Temple, and the entries in columns 5 and 6 show that, according to the Collector's information, the village had been enjoyed by the Temple from the time of the original grant down to the time when he made the Register in 1809. The entries in columns 2 and 8 show that, according to the Collector's information and belief, all the lands of the village had been granted to the Temple. Their Lordships regard the entries in the Register of 1809 relating to the village of Mangal as valuable as showing what, on the information which he had obtained, the Collector believed to be the title to the village of Mangal and to all the lands in that village.

In the *Paimash*, or Survey Account, for *Fasli* 1226 (1816 or 1817), the person

then in the enjoyment of the total *nunja* (dry land), *punja* (wet land), *tope* and *manai* garden, of the village of Mangal was stated to be the Temple, and the enjoyment was stated to be Rokkaguthakai Ekabhogam. In the *Paimash* for *Fasli* 1238 (1829), the village of Mangal was described as a Rokkaguthakai Miras Ekabhogam village, which meant that it was a Rukkaguthakai village and that all the lands in the village were the property of one proprietor.

It is stated in the judgment of the High Court—and it must be assumed correctly—that 21 velis of the wet land of the village of Mangal were cultivated by the Temple, by its servants and with its own ploughs, before 1820, and that in those 21 velis of the endowed lands the Temple then owned both the *melvaram* interest and the *kudivaram* interest, and the defendants were unable to explain how it happened that the Temple could have owned the *kudivaram* interest in 21 velis only of the endowed lands.

It was proved that in 1883 a small area of the waste lands of the village of Mangal was acquired by the Government under the Land Acquisition Act, and that no part of the compensation paid for those waste lands was claimed by any person except the Temple, and that to the Temple was paid all the compensation awarded under that Act. From that fact it may be concluded that the grant of the lands in the village in 1723 included the waste lands of the village, if there could be any doubt that all the lands of the village of Mangal were granted by the *sanad* of 1723 to the Temple as an endowment.

Their Lordships find that the *melvaram* and the *kudivaram* interests in the lands of the village of Mangal were at some time before 1723 granted by a Raja of Tanjore, and re-granted in 1723 by the then Raja of Tanjore, to the Temple, and consequently, that the lands in suit are not an "estate" within the meaning of Act 1 of 1908, and that the defendants did not obtain any rights of permanent occupancy under that Act.

It remains to be considered whether the defendants have proved that they, or those through whom they claim title as occupiers of the lands in suit, obtained at any time a right of permanent occupancy in the lands. No grant of a right of permanent occupancy has been produced. But the defendants asked the Courts below, and now ask their Lordships, to presume that they or those through whom they claim, were tenants of those lands in suit with a right of permanent occupancy in them. It does not appear that in 1723, or in 1809 or in 1816 or in 1829, there were any tenants of lands in the village who had a right of permanent occupancy in the endowed lands of the Temple. As Act I of 1908 does not apply in this case, and as there is no proof of any custom conferring on tenants of lands of the village any right of permanent occupancy and as no grant of a right of permanent occupancy has been produced or even alleged, it is not apparent how a right of permanent occupancy could have been obtained by the defendants or by any predecessors-in-title of theirs, except by a lost grant or grants, and that is not even suggested.

A public temple, such as is the Temple in this case, is a religious institution, and is recognised in law as a juridical person, but it can act only through persons who have authority to act for it, and they can act for the temple only within the scope of their authority. The position of the *shebait*, the manager or the trustees of a temple, is, so far as their power to deal with the endowed lands of the temple is concerned, analogous to the position of a *Mahant* of a *mutt* to deal with the endowed lands of a *mutt*. They can doubtless sell or mortgage the endowed lands of the Temple if there is an actual, special, and unavoidable necessity of the temple to do so, but that necessity would have to be proved by those who alleged that it existed. Except in a case of such unavoidable necessity the *shebait*, the managers or the trustees of a Temple or the *Mahant* of a *mutt*, have no power to sell or mortgage the endowed property in their custody, and obviously they have no right to impair the endowed property by creating or grant-

ing in favour of any one rights of permanent occupancy in the endowed lands. The law on this subject is well established: see *Maharanee Shibbessouree Debia* v. *Mothooranath Acharjee* (5), *Abhiram Goswami Mohant* v. *Shyama Charan Nande* (6), *Palaniappa Chetty* v. *Deivasikamony Pandara* (7), *Vidya Varuthe Thiriha Swamigal* v. *Balusami Ayyar* (8). In the case of a *shebait* a grant by him in violation of his duty of an interest in endowed lands which he has not authority as *shebait* to make may possibly under some circumstances be good as against himself by way of estoppel, but is not binding upon his successors.

In *Satya Sri Ghoshal* v. *Kartik Chandra Dass* (9) which came before the High Court at Calcutta in second appeal in a suit to eject the defendants from *debutter* lands, which the lower Appellate Court had dismissed on a presumption that the defendants had a permanent tenancy in the lands, Sir Lawrence Jenkins, C. J., and Chatterjee, J. said that the decree appealed from rested not on direct proof but on presumption, and that it would seem that the property there in question was *debutter*, and remanded the suit so that it might be ascertained if that property was *debutter* when the tenancy commenced, holding, rightly, that :—

"The presumption in favour of a permanent tenancy implies that there is ground for inferring that the tenure was always intended to be and always was hereditary, or that it acquired that character by subsequent grant. But a presumption in favour of a transaction assumes its regularity, it cannot be made in favour of that which offends legal principles."

They further rightly said :—

"If it was *debutter* at the time the tenancy originated, then this would affect the applicability of the presumption, for, to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in a *shebait*, and is not therefore presumable."

In the present case there was nothing proved, or even attempted to be proved, from which it could be inferred that the tenure of tenants of the lands in suit, or of any lands in the endowed property of the Temple, had originally been a tenure of permanent occupancy or any higher tenure than that of a tenancy-at-will. Between 1820 and 1830 some of the endowed lands in the village of Mangal were let by the Temple for cultivation on short leases of from one to five years; such leases were granted to the highest bidders. In 1831 some of the tenants of the Temple's endowed lands, apparently all of them, agreed amongst themselves to cultivate jointly the endowed lands of which they were tenants, and they executed and delivered to the Collector, who was then the manager of the Temple and its endowments, a *muchalka* by which they took the endowed lands for a term from *Fasli* 1241. That *muchalka* is absolutely inconsistent with any of the tenants having then any right of permanent occupancy in any of the endowed lands of the Temple and with their believing that they had any right of permanent occupancy in any of the Temple's lands. In 1870 Sir C. H. Scotland, C. J., held that when a tenancy in the Presidency of Madras commenced under a terminable contract there was nothing to prevent the landlord from ejecting the tenant at the end of the term from the lands which had been let to him. See also *Seena*

(5) 13 M. I. A. 270 at p. 275; 13 W. R. P. C. 18; 2 Suth. P. C. J. 300; 2 Sar. P. C. J. 528; 20 E. R. 552.

(6) 4 Ind. Cas. 449; 36 I. A. 148; 36 C. 1003; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 1234; 19 M. L. J. 530; 14 C. W. N. 1 (P. C.).

(7) 39 Ind. Cas. 722; 44 I. A. 147; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 507; 26 C. L. J. 153; 40 M. 709; 6 L. W. 222 (P. C.).

(8) 65 Ind. Cas. 161; 48 I. A. 302; (1921) M. W. N. 449; 41 M. L. J. 346; 44 M. 831; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.).

(9) 13 Ind. Cas 596; 15 C L. J. 227; 16 C. W. N. 418.

Pena Reena Seena Mayandi Chettiyar v. *Chokkalingam Pillay* (10).

One of the reasons for these consolidated appeals as stated in the case for the appellants is: "4. Because the appellants have acquired permanent occupancy right by prescription." No tenant of lands in India can obtain any right to a permanent tenancy by prescription in them against his landlord from whom he holds the lands. See *Madhavrao Waman Saundalgekar* v. *Raghunath Venkatesh Deshpande* (11) decided by the Judicial Committee on the 10th July, 1923.

Another reason for these consolidated appeals as stated in the case for the appellants is: "5. Because the respondents having allowed and recognised the alienations made by the predecessors of the appellants, are now estopped from denying that they have permanent rights of occupancy." The appellants' case that they have permanent rights of occupancy, was not argued on the ground of an estoppel, for there is no estoppel on the evidence in the case, but on the ground that it must be presumed, from matters which will be presently referred to, that the defendants, or those through whom they claim titles as tenants, had at some time acquired rights of permanent occupancy in the land in suit.

In the very able argument which was addressed to their Lordships in support of these consolidated appeals it was contended that their Lordships ought to presume that the defendants or those through whom they claim had acquired at some time rights of permanent occupancy in the lands in suit from the fact that in some receipts given by servants of the Temple tenants of endowed lands in the village were described as "*kudimiras*." Their Lordships are not certain what in Tanjore "*kudimiras*" means. No doubt by itself "*miras*" generally means a proprietor of some kind, and "*kudi*" by itself appears to mean a house, a village, a town, an inhabitant, or a tribe. "*Kudimiras*" in those receipts may have been a description of the tenant as the proprietor of a house in the *abadi* of the village, or it may have been a misdescription. It appears from one *paimash* that there were men who were described as "*kudimiras*" in respect of their interests in houses in the *abadi* of the village. In the case already cited from *Seena Pena Reena Seena Mayandi Chettiyar* v. *Chakkalingam Pillay* (10) the Board declined to act on a vernacular descriptive term of parties in that case, which the Board considered as being of uncertain meaning. The particular descriptive term was "*ulavadai mirasidar*." The appeal in that case related to lands in Tanjore. Also, in support of the argument that their Lordships ought to presume that the defendants had a right of permanent occupancy in the endowed lands, many other documents and papers were relied upon as showing that tenants of the endowed lands had to the knowledge of officials of the Temple sold or mortgaged such interests as they had in endowed lands of the village of Mangal. Their Lordships are unable to make any such presumption. Such a presumption would mean that some managers or trustees of the Temple had violated their duty to the Temple. It has not been proved that there ever were any lands in the village in which, by grant or custom, there was any right of a tenant to a permanent occupancy, and the only presumption which their Lordships can make in the cases of such sales and mortgages is that it was to the interests of the Temple that the ordinary cultivators of the Temple lands should be solvent persons, and not persons who were compelled to sell or mortgage such interest as they had in Temple lands in order to raise money.

All the documents and papers from which their Lordships have been asked by the Counsel for the defendants to presume that the defendants had rights of permanent occupancy in the lands in suit were before Mr. G. Kothanda Ramanjulu, the Subordinate Judge who tried the suits, and on the appeals before

(10) 31 I. A. 83; 27 M. 291; 8 C. W. N. 545; 14 M. L. J. 200; 8 Sar. P. C. J. 587 (P. C.).

(11) 74 Ind. Cas. 362; 50 I. A. 255; 25 Bom. L. R. 1005; (1923) M. W. N. 689; (1923) A. I. R. (P. C.) 205; 33 M. L. T. 389; 47 B. 798; 28 C. W. N. 857; 20 L. W. 248 (P. C.).

Sadasiva Aiyar, J., who wrote the judgment of the High Court with which Napier, J., concurred. All those learned Judges were from their local knowledge in a better position than their Lordships are to correctly appreciate the meaning of the vernacular terms in use in the Tamil country of Tanjore in reference to interests in lands, and all those learned Judges, in carefully considered and exhaustive judgments, found, to state briefly their findings, that the endowed property of the Temple, of which the lands in question formed part, was not an "estate" within the meaning of Madras Act I of 1908, and that the defendants were not, under that Act or otherwise, tenants with a right of permanent occupancy.

The appellants having failed to prove that they or any of them had any right of permanent occupancy in any of the lands in suit, their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed with costs.

S. D. *Appeals dismissed.*

Solicitor for the Appellants:—Mr. *Douglas Grant.*

Solicitors for the Respondents:—Messrs. *T. L. Wilson & Co.*

LAHORE HIGH COURT.

MISCELLANEOUS PETITION No. 577 OF 1923.
CIVIL APPEAL No. 1370 OF 1921.
December 18, 1923.
Present:—Mr. Justice Zafar Ali.

MEHTAB SHAH—PETITIONER—APPELLANT
versus
ALI HAIDAR SHAH AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 10, 115—Order refusing to stay suit—Revision—High Court, whether can interfere.

Under section 115 of the Civil Procedure Code the High Court can set aside an order refusing to stay a suit under section 10 of the Code pending the final decision of a previously instituted suit between the parties, the matter in issue in both being identical. [p. 235, col. 1.]

Petition under Order XLI, rule 5 and section 10 of the Civil Procedure Code for stay of proceedings pending the decision of the appeal case noted above by the High Court.

Mr. *Aziz Ahmad*, for the Petitioner.

Mr. *Mukand Lal Puri*, for the Respondents.

ORDER.—The petitioner in this case seeks revision of an order of the Court below refusing to stay, as required by section 10 of the Civil Procedure Code, the trial of a suit instituted therein against him before the final decision of a previously instituted suit, the matter in issue in both being identical.

The facts briefly are that the plaintiffs-respondents brought a suit for a declaration that the gift of a specified immoveable property made by a female proprietor would be inoperative against them on her death or re-marriage. That suit was decided on appeal by the District Judge in favour of the plaintiffs, but the defendant's second appeal to this Court has been admitted to a hearing by a Division Bench and has not yet been decided. As the donor has now died, the plaintiffs have brought the said second suit to obtain possession of the gifted property. That suit must stand or fall in accordance with the result of the defendant's appeal to this Court in the previous case, and, therefore, according to section 10 of the Civil Procedure Code its trial must be stayed pending the decision of the appeal. The learned Counsel for the plaintiffs-respondents objects:

(1) that this Court has no jurisdiction to interfere with the order of the Court below; and

(2) that no order can be made because the petitioner did not file a copy of the order complained against.

As regards the latter objection it is not denied that the order complained against was made and, therefore, it is not essential to have a copy of that order placed on this record. With regard to (1) Counsel for the petitioner cites section 151 of the Civil Procedure Code and states that this Court can in exercise of its inherent power revise the order which violates an express provision of

law. I am of opinion that section 151 of the Civil Procedure Code cannot be resorted to because it relates to matters in respect of which no express provision exists in the Code. The present case is governed by section 10 of the Civil Procedure Code and as the Court below did not carry out the rule laid down therein the question is: Can this Court interfere and make the order which must have been made by that Court. I consider that the order is subject to revision under section 115 because if not revised the defendant-petitioner shall have no other remedy against the evil that it will entail in the way of subjecting him to the cost and trouble of a useless litigation. An interlocutory order which can ultimately be corrected on appeal from the final decision may not be liable to interference under section 115, but there must be a remedy for an illegal order of this description where a Subordinate Court refused to exercise a jurisdiction which it is its imperative duty to do. I may note here that the view taken by the Calcutta High Court as to the scope of section 115 of the Civil Procedure Code commends itself to me.

I accordingly accept this petition, set aside the order of the Court below and direct that the trial of the suit be stayed pending the decision of the appeal referred to above. The plaintiffs-respondents to pay the petitioner's costs in this Court.

K. S. D. *Revision allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2333 OF 1921.

March 31, 1924.

Present:—Mr. Justice Walmsley and Mr. Justice Mukerji.

RAJENDRA NARAYAN RAI—PLAINTIFF—APPELLANT

versus

BHAIRABENDRA NARAYAN ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers — Tenants-in-common — Exclusive occupation—Equitable principles—Decree for joint possession and mesne profits.

If there be two or more tenants-in-common and one of them *A.* be in actual occupation of part of the estate and engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and another tenant-in-common *B.* attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which *A.* is engaged and the profitable use by him of the said part, and *A.* resists and prevents such entry, not in denial of *B.*'s title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of *A.* would not entitle *B.* to a decree for joint possession. [p. 237, col. 1.]

Watson & Co. v. *Ramchund Dutt*, 18 C. 10; 17 I. A. 110; 5 Sar. P. C. J. 535; 9 Ind. Dec. (N. S.) 7 (P. C.), relied upon.

Prima facie, co-owners are entitled to hold joint possession of joint property and consequently if one co-sharer seeks to defeat the claim of another co-sharer to joint possession to joint property, special circumstances must be alleged and established so as to justify exclusive occupation of the joint property by one of the co-sharers. [p. 237, col. 2.]

Jatindra Nath Roy v. *Sabidannessa Khatun*, 35 Ind. Cas. 36; 24 C. L. J. 165; 20 C. W. N. 1258, relied upon.

The mere setting up of a rival claim or a hostile title in the written statement would not entitle the plaintiff to allege that there was ouster and, on that footing, to seek for a decree for joint possession. It must be proved that there was a setting up of hostile title or ouster prior to the filing of the written statement. [*ibid.*]

Therefore, where some of the co-sharers set up an exclusive or adverse right in joint lands, the above principles shall apply. [p. 238, col. 1.]

Appeal against a decree of the District Judge, Rajshahye, dated the 4th of March 1921, modifying that of the Subordinafe Judge of that District, dated the 31st of May 1919.

Babus *Mokendra Nath Roy* and *Jatindra Nath Sen*, for the Appellant.

Babus *Sarat Chunder Roy Chowdhury* and *Krishna Kamal Maitra*, for the Respondents.

JUDGMENT.

Mukerji, J.—This appeal arises out of a suit to recover joint possession of certain lands on establishment of the plaintiff's *Zemindari* right thereto to the extent of 3 annas 9 *gundas*, 1 *kag* share. The allegations upon which the suit was based shortly stated were that the defendants Nos. 13 and 14 were co-sharers of the plaintiff to the extent of

5 annas 3 *karas* 3 *kags* and that the remaining 7 annas 10 *gundas* share belonged to certain persons called the Parsha *Zemindars* who, however, are no parties to this litigation. The plaintiff alleged that the defendants Nos. 13 and 14 had settled the lands in dispute with the defendants Nos. 1 to 12, that the said settlement was unauthorised and that those persons were cultivating the lands and were in possession thereof. He, therefore prayed for recovery of joint possession to the extent of his share as stated above.

The contesting defendants, namely, defendants Nos. 13 and 14, alleged that, out of the lands in suit, 129 *bighas* were *debuttar* of Madan Mohan Thakur, that of the remaining lands, a portion was the *debuttar* land of Kali Thakurani and another portion was the *kamat* land of the Parsha *zemindars* and, furthermore, that the said Thakur and Thakurani were in possession of the said lands which belonged to them respectively for over twelve years and that, therefore, the plaintiff had no right whatsoever therein.

The learned Subordinate Judge came to the conclusion that the right in which the defendants Nos. 13 and 14 proposed to hold the lands in suit was a right which they were relying upon in utter denial of the plaintiff's right, and, in that view of the matter, he held that, although the said defendants were co-sharers of the plaintiff, they were not entitled to the protection of the well known principle of equity laid down in the case of *Watson & Co.* v. *Ramchund Dutt* (1). He accordingly decreed the plaintiff's suit with costs declaring the plaintiff's right to a 3 annas 4 *gundas* 1 *kag* share in the disputed land and awarding him joint possession of the same with the defendants. He also passed an order directing that the plaintiff would get mesne profits to be defermined later on on the plaintiff's application.

The defendants Nos. 13 and 14 preferred an appeal against the aforesaid decision. At the appellate stage, there was a change of point on the part of these contesting defendants and, to use the words of the learned District Judge, whereas in the whole of their pleadings the appellants, namely, the defendants Nos. 13 and 14, "took up a position in denial of the plaintiff's title, their learned Vakil in the course of the appeal threw over-board the whole of the pleading and took stand on the position that the plaint disclosed no cause of action." The learned District Judge, however, came to the conclusion that there was no evidence that prior to the filing of the written statement any circumstance existed to justify the assumption that the plaintiff had been excluded from the enjoyment of the joint property in consequence of the assertion of hostile title on the part of the defendants Nos. 13 and 14 and, having taken that view, he set aside the decision of the learned Subordinate Judge and, in lieu thereof, made a decree to the effect that the plaintiff would only be entitled to compensation from the defendants Nos. 13 and 14 in the shape of a proportionate share of the rent to which they were entitled. The learned District Judge also upheld the decree of the Court of first instance as regards mesne profits. Against this decision, the plaintiff has preferred this appeal.

Now, the principle laid down in the case of *Watson & Co.* v. *Ramchund Dutt* (1), is well known. It is an equitable principle which, however, has got to be applied very carefully, regard being had to the particular circumstances of the case which comes up before the Court. In that case, their Lordships of the Judicial Committee held "If there be two or more tenants-in-common and one *A*. be in actual occupation of part of the estate and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property and another tenant-in-common *B*. attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which *A*, is engaged and the profitable use by him of the said part and *A*. resists and prevents

(1) 18 C. 10; 17 I. A. 110; 5 Sar. P. C. J. 535; 9 Ind. Dec. (N. S.) 7 (P. C.).

such entry, not in denial of *B*'s title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of *A* would not entitle *B*. to decree for joint possession." Their Lordships went on to observe, in Bengal, the Courts of Justice, in cases where no specific rule exists, are to act according to justice, equity and good conscience and if in a case of shareholders holding lands in common, it should be found that one share-holder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work or to allow any other shareholder to appropriate to himself the fruits" of the other's labour or capital. Now applying these principles to the facts of the present case can it for a moment be suggested that the defendants Nos. 13 and 14 were resisting the plaintiff's right, not in denial of the plaintiff's title, but simply with the object of protecting themselves in the profitable enjoyment of the land, or can it be said that the plaintiff in seeking to get a decree for joint possession was trying to appropriate to himself the fruits of the labour and capital of the defendants Nos. 13 and 14? In the view that I take of the facts of this case, the principle relied upon by the learned District Judge does not seem to be applicable at all. It is not necessary to refer to the cases of *Madan Mohan Shaha* v. *Rajah Ali* (2) and *Surendra Narain Sinha* v. *Hari Mohan Misser* (3), because in my judgment the facts of those cases are entirely distinguishable from those of the case now before us. The case which makes the nearest approach to the present one is that of *Jatindra Nath Roy* v. *Sabidannessa Khatun* (4), where it was held that "*prima facie*, co-owners are entitled to hold joint possession of joint property and consequently if one co-sharer seeks to defeat the claim of another co-sharer to joint possession of joint property, special circumstances must be alleged and established so as to justify exclusive occupation of the joint property by one of the co-sharers; and further that where the defendants who appeared to be co-sharers of the plaintiffs, as regards the land in dispute, had all along been denying the title of the plaintiffs and asserted that they had been in possession of the land under a third person in a suit for recovery of land upon declaration of title the plaintiffs are entitled to a decree for joint possession. The learned District Judge in the present case distinguished the decision in that case upon the ground that in his opinion there was no evidence that prior to the written statement there was any circumstance to show that the co-owner plaintiff had been excluded from the enjoyment of the joint property by the assertion of a hostile title. It is true that the mere setting up of a rival claim or a hostile title in the written statement would not entitle the plaintiff to allege that there was ouster and, on that footing, to seek for a decree for joint possession. But, in the present case, it is difficult to say why it should be held that there was no setting up of hostile title or ouster prior to the filing of the written statement. The fact that the lands in dispute were settled with the defendants Nos. 1 to 12 in *adhi* settlement upon the footing that they belonged exclusively to the defendants Nos. 13 and 14 the fact that they thus remained in occupation for about five years, the fact that when the right of the defendant Nos. 13 and 14 to settle the lands was challenged in the suit, they put forward a defence to the effect that the lands were not the joint property of the plaintiff and themselves but that they were the *debuttar* property of Madan Mohan Thakur and Kali Thakurani and also that a portion of the lands was *khimat* land of the Parsha *zemindars*, who, as I have said, are no parties to this litigation, all these taken together clearly show that the right under which the settlement was preferred to have been made by the defend-

(2) 28 C. 223.
(3) 33 C. 1201.
(4) 36 Ind. Cas. 36; 24 C. L. J. 165; 20 C. W. N. 1258

ants Nos. 13 and 14 was a right set up adversely to the plaintiff and in that view, I think the principle laid down in the case of *Watson & Co.* v. *Ram Chund Dutt*, (1) referred to above does not apply to the present case. I, therefore, think that the decree passed by the learned District Judge should be set aside and that passed by the learned Subordinate Judge should be restored with costs in this Court and also in the lower Appellate Court.

Walmsley, J.—I agree.

S. D. *Appeal allowed.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 1 OF 1923.
July 1, 1924.

Present:—Sir Cecil Henry Walsh, KT., Actg. Chief Justice, and Mr. Justice Sulaiman.

Musammat RAJ ROOP KUAR—PLAINTIFF—APPELLANT

versus

KANDHYA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation—Lease by widow—Reversioner's suit for possession after widow's death—Declaratory suit before suit for possession, whether necessary.

Before suing in a Revenue Court for recovery of possession of agricultural property from a tenant in possession under a lease executed by a deceased widow, it is not at all incumbent on a reversionary heir to obtain a declaratory decree in a Civil Court setting aside the lease executed by the deceased widow. [p. 240, col. 1.]

(Case-law reviewed.)

Letters Patent appeal against the judgment of Mr. Justice Stuart, dated the 22nd November 1922, printed as 75 Ind. Cas. 681.

Mr. *P. L. Banerji*, for the Appellant.

Mr. *Kamla Kant Verma*, for the Respondents.

JUDGMENT.

Walsh, Actg. C. J.—This is one of those really difficult cases where this constant conflict between the jurisdiction of the Revenue Court and the jurisdiction of the Civil Court indirectly arises. I say indirectly arises, because no objection was taken to the jurisdiction of the Revenue Court, and until this case reached the High Court, and my brother Stuart allowed the learned Vakil to argue a point which was not open to him, the difficulty was never present in the case at all. It is hoped that the approaching legislation about the Tenancy Act, or the new Act, if we ever get one, will finally get rid of this perennial difficulty. The facts of the case are quite simple as appears from my brother Stuart's judgment. It is true that a perpetual lease having been granted by a Hindu widow with a Hindu widow's estate, such questions as legal necessity, and determining her right to grant it, so as to make it operative after her death, are involved. The plaintiff sued in ejectment under section 57 of the Tenancy Act, alleging or assuming—it matters not which—that the plots were agricultural land. No point was raised either of fact or law on this point, namely, as to the nature of the land and the character of the tenancy, either in the pleadings or in the issues framed by the Assistant Collector, and both the lower Courts decreed ejectment, the Second Court slightly modifying the First Court's judgment. When the matter came before this Court in second appeal, a new point of law was taken, which the learned Judge has accepted. It was said that the suit was premature, and that the plaintiff reversioner, if he wanted to recover on the revenue side in ejectment, must first get the lease, or alienation which the widow had made, formally set aside, or declared to be void in a Civil Court. The learned Judge accepted this view. He has not said on what authority he based himself. It is a view inconsistent with the weight of authority, at any rate of this Court. If there were only one Court possessed of jurisdiction, so that two such suits would have to be brought in that Court, there is no question that the view is erroneons. The Privy Council have made that perfectly clear in the case of *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (1) where they

(1) 34 C. 329 at p. 333; 11 C. W. N. 424; 5 C. L. J. 334; 9 Bom. L. R. 602; 2 M. L. T. 133; 17 M. L. J. 154; 4 A. L. J. 329; 34 I. A. 602 (P. C.).

laid down generally that the institution of a suit for possession is sufficient to show the plaintiff's election to treat the alienation as a nullity, and that, therefore, a separate suit is unnecessary, and even a separate suit for a declaration is inoperative. Putting it into plain English, the mere bringing of a suit for ejectment challenges the right of the defendant to be in possession, and as Mr. Justice Piggott pointed out in the next case which is a clear authority for this case, and which really was binding on Mr. Justice Stuart, if his attention had been drawn to it "the defendant is forced to set up in justification of his possession the lease under which he sits, and then it is that the plaintiff can say that such lease was invalid and not binding upon him". The passage in the judgment which I have just quoted occurs at page 260 in the case of *Sher Khan* v. *Debi Prasad* (2) and is a sufficient authority for this case, and if it had been cited to the learned Judge, I have no doubt that he would have followed it.

Sulaiman, J.—I agree. The plaintiff instituted a suit in the Revenue Court for the ejectment of the defendants, treating them as non-occupancy tenants. It was alleged that they had planted trees on the land, and also made some constructions, and were, therefore, liable to ejectment under section 57, sub-clause (*b*) of the Agra Tenancy Act. The plaintiff treated the land as agricultural land, and sought relief in the Revenue Court. Defendant No. 1 set up a perpetual lease executed by the deceased widow of the last male owner, to whom he said he had succeeded as a reversioner. Defendant No. 2 claimed to be a transferee from defendant No. 1. In neither of the written statements filed in the Court below was the point specifically raised that the land in question was not agricultural land at all. Nor was any plea raised that the Revenue Court had no jurisdiction to entertain the suit. Only four issues were framed by the Trial Court, and none of these issues referred to the two points above mentioned. The Court of first instance decreed the claim. The defendants went up in appeal to the lower Appellate Court, and in their grounds of appeal they did not raise either of the two points mentioned. The decree of the First Court was affirmed with a slight modification. A second appeal was filed in this Court, and although it was not suggested in the grounds of appeal that the land really was not agricultural land, or that the lease was not for agricultural purposes, a plea was at the time of the admission of the appeal added to the effect that the lease not having been set aside by a competent Court in a proper suit brought by a person entitled to question it, it was binding on the *zamindar* for the time being. The learned Judge of this Court has allowed the appeal, and has come to the conclusion, to quote his own words: "that it was necessary for the plaintiff-respondent to set aside the alienation which the lady had made in favour of Gopal as a precedent to instituting a suit for the ejectment of the defendants appellants through the Revenue Court". He has, however, assumed that the plots in question are agricultural land.

It was laid down by their Lordships of the Privy Council in the case of *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (1) "that a Hindu widow is not a tenant for life, but is owner of her husband's property subject to certain restrictions on alienation, and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is *prima facie* voidable at the election of the reversionary heir. He may think fit to affirm it, or he may at his pleasure treat it as a nullity without the intervention of any Court, and he shows his election to do the latter by commencing an action to recover possession of the property". It is quite clear, therefore, that it is not incumbent on a reversioner to obtain a declaratory decree to set aside the lease executed by the deceased widow before seeking his substantial

(2) 28 Ind. Cas. 552; 37 A. 254; 13 A. L. J. 364.

relief. If the land were either let or held for agricultural purposes, the Revenue Court alone could order the ejectment of the defendants. A Hindu widow can certainly grant a lease to tenants or lessees, and such tenants or lessees can be ejected through the Revenue Court alone. The plaintiff reversioner, therefore, could only go to the Revenue Court for ejectment, and the defendants were entitled to set up the lease as a lease binding upon her, if they set up its validity, it would be for the Revenue Court to decide whether it had or had not been executed for legal necessity. The question of legal necessity was never raised in the Courts below, and has not been decided in favour of the defendants.

The view of the learned Judge that the plaintiff ought to go to the Civil Court in the first instance to obtain a declaration and then sue in the Revenue Court for ejectment, is contrary to the opinion expressed by Chamier and Piggott, JJ., in the case of *Sher Khan* v. *Debi Prasad* (2) following an earlier case in the same volume at page 41.

I am, therefore, of opinion that it was not necessary for the plaintiff to obtain a declaratory decree from a Civil Court before instituting a suit for ejectment in the Revenue Court.

The learned Vakil for the respondents has tried to support the decree of the learned Judge of this Court, by urging that as a matter of fact the lease in question is not one for agricultural purposes. As I have already stated this point was never raised at the trial, and has been assumed in favour of the plaintiff all along. It may be that according to the terms of the lease, it is not a lease solely for agricultural purposes. All the same it may well be that the land has been held for agricultural purposes. This new point, therefore, cannot be allowed to be raised at this stage.

By the Court.—We, therefore, allow the appeal and restore the order of the District Judge, but under the circumstances, having regard to the fact that the present appellant ought never to have allowed this point to be taken without objection, and that he failed to cite the authorities bearing upon the point, we deprive him of all costs in this Court. That is to say, he will only get the costs in the First Court and in the District Judge's Court.

S. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 358 OF 1922.

April 14, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Graham.

JITENDRA NATH SAMANTA—DEFENDANT—OPPOSITE PARTY—APPELLANT

versus

ASUTOSH DEY—PLAINTIFF—PETITIONER AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 52—Order, whether administrative or judicial.

An order passed under O. XXI, r. 52 of the Civil Procedure Code is not an administrative order but a judicial order binding upon the parties concerned. [p. 242, col. 1.]

Appeal against an order of the Subordinate Judge, Burdwan, dated the 9th August 1922.

Babus *Brojolal Chukrabarty* and *Sushil Kumar Bose*, for the Appellant.

Babus *Prokas Chandra Mitter* and *Birendra Kumur Dey*, for the Respondents.

JUDGMENT.

Suhrawardy, J.—This is an appeal by the decree-holder against an order of the Court below dismissing the execution case as against the judgment-debtor No. 2 Asutosh Dey. The facts are rather complicated but they may be briefly stated thus: The property which was a Colliery belonged originally to one Satish Chandra Mittra. Mr. J. G. Galstaun obtained a decree against him and attached this Colliery on the 20th April 1919. On the 11th September 1919 Satish mortgaged this property to the present appellant. The respondent to this appeal (the judgment-debtor No. 2 Asutosh Dey) took out several executions and attached this property. It was sold on the 4th July 1919 for Rs. 1,11,500 in

Galstaun's execution case. On the 23rd July 1921, the appellant brought a money suit in the Asansole Court and caused attachment before judgment to be levied on the balance that might be left over after payment of Galstaun's dues. On the 30th July 1921 the appellant brought a suit (No. 172 of 1921) on the mortgage executed in his favour on the 11th September 1919 by Satish and caused the sale proceeds to be attached. The matter related to several attachments and came before the Court for consideration on 8th September 1921 which passed an order to the effect that after payment of the costs of execution and the amount due to Mr. Galstaun the balance would first be paid to the respondent who held five decrees against Satish in execution of which he had attached the sale proceeds. These items together totalled Rs. 90,876. As regards the balance of Rs. 20,623 the Court passed the following order: "After paying the above amounts the balance be kept under attachment as follows: namely, Rs. 8,000 as directed by the Asansole Sub-Judge's Court and the balance in favour of the plaintiff of Suit No. 172 of 1921 as attachment before judgment." As a result of this order Mr. Galstaun was paid off in full and all the five decrees held by the respondent were also satisfied in full. The appellant obtained a decree in the mortgage suit No. 172 of 1921 on the 12th December 1921 and on the 14th December he withdrew Rs. 12,623 out of Rs. 20,000 in deposit in Court, leaving a sum of Rs. 8,000 in deposit presumably for the satisfaction of his claim in the money suit which was decreed in February 1922. On realising Rs. 12,623 on the decree in the mortgage suit there was a small balance of Rs. 1,400 left unpaid. The present execution case relates to that amount of Rs. 1,400 which has been levied against the respondent under the following circumstances. The appellant brought the suit as aforesaid on the mortgage against the mortgagor Satish and in that suit he alleged that as the respondent was one of the attaching creditors of Satish and had attached the money in the hands of the Court over which the appellant had prior lien he was a necessary party to the mortgage suit and, therefore, he also was made a defendant. At the hearing of this suit the respondent did not appear and the decree that was passed against him was in these words: "If the surplus sale-proceeds in deposit in Court are not found sufficient to satisfy this decree, the defendant No. 2 shall have to pay to plaintiff for the satisfaction of this decree so much of the surplus sale-proceeds unlawfully appropriated by him." The appellant contends that he is entitled to recover Rs. 1,400 as balance of his mortgage decree from the respondent as he has unlawfully appropriated this money. The learned Subordinate Judge, however, who, by the way, is the officer who had passed all the orders in the case including the decree in the appellant's mortgage suit overruled the appellant's contention and dismissed the execution case.

It is argued by the appellant that the view taken by the learned Subordinate Judge of law and facts is wrong. It is said that the order passed by the Subordinate Judge on the 4th September 1921 was one passed under section 73, Civil Procedure Code. That order was wrongly passed in as much as the appellant was an encumbrancer and ought to have been given preference over the respondent who was merely money decree-holder. As that order was not appealable the appellant could not challenge it, but it may be revised and the rights of the parties determined in a separate proceeding as has been laid down by the Judicial Committee in the case of *Shankar Sarup* v. *Lala Ful Chand* (1). It is argued that the appellant is not bound by that order and that by virtue of his being an encumbrancer he ought to have preference over the respondent. In our judgment this contention is not sound. The order that was passed by the Court on the 8th September 1921 was not one on the face of it, under

(1) 28 A. 203; 5 C. W. N. 649; 3 Bom. L. R. 713; 23 A. 313; 8 Sar. P. C. J. 72 (P. C.)

section 73, Civil Procedure Code. It is not a case where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor. In the present case, there were only two decree-holders, Mr. Galstaun and the respondent. The appellant had not obtained any decree at that time. He had two suits pending, one in respect of his claim for money pending in the Court at Asansole and the other was a mortgage suit. Besides the order that was passed by the Court was not distributing rateably the assets in its hands between the several decree-holders but direction was given how the assets which were at that time fully sufficient to satisfy the claims had to be applied. This order may be said to have been passed under O. XXI, r. 52. By that order the Court indicated how the money had to be paid between the different claimants, namely, fixed the question of priority between the decree-holders and any other person such as the appellant in this case, "claiming to be interested in such property by virtue of any assignment, attachment or otherwise." In my opinion the order passed under O. XXI, r. 52, is not an administrative order but a judicial order which is binding upon the parties concerned. The appellant, therefore, cannot now complain that the order that was passed by the Court was bad.

The next point which has been put forward by the learned Judge in support of his finding is that by the appellant's own conduct his decree was not fully satisfied and, therefore, he cannot claim any damage from the respondents. As I have observed the appellant obtained his decree on the 12th December 1921. On the 14th December he withdrew the sum of Rs. 12,000 leaving about Rs. 1,400 due on his decree. On the 6th January 1922 one Jangilal obtained a decree and attached Rs. 8,000 that was left in the hands of the Court to satisfy the appellant's decree and withdrew Rs. 1,482 out of that sum. On the 7th February, 1922, the appellant withdrew the balance Rs. 6517 after he had obtained a decree in the money suit. But he could have withdrawn the full amount of his decree in the mortgage suit out of Rs. 20,000 which was then in the hands of the Court. There was no justification for his not having withdrawn the entire amount of his decree. In my opinion, the view taken by the lower Court on this point is right.

Then again the decree that is passed against defendant No. 2 makes him liable for any amount that he may have unlawfully appropriated. It is difficult to hold that the respondent has unlawfully appropriated money which ought to have gone to the appellant. It is said that because the appellant as mortgagee had prior right over the sale proceeds, therefore the act of the respondent to pay himself out of the sale proceeds before the appellant's claim was fully satisfied was bad. As I have observed, what the respondent did was under the order of the Court and in exercise of his legal right and there is no reason to suppose that he acted in any way unlawfully or wongfully so as to give a cause of action to the appelant against him. I may mention in conclusion that the learned Subordinate Judge who passed the order under appeal as well as the decree in the mortgage suit is of opinion that it was by misrepresentation that the decree was passed. On the merits I do not think that there is any case for the appellant.

The result is that this appeal is dismissed with costs. We assess the hearing-fee at three gold *mohurs*.

Graham, J.—I agree.

K. S. D. *Appeal dismissed.*

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 874 OF 1920.
November 26, 1923.

Present:—Mr. Justice Broadway and Mr. Justice Abdul Raoof.

Musammat BHAGWANI—PLAINTIFF—APPELLANT

versus

NET RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Land Revenue Act (XVII of 1887), s. 117 (2)—Order determining title—Appeal, where lies.

An appeal from an order passed by a Revenue Officer acting under section 117 (2) of the Punjab Land Revenue Act would lie to the District Judge or to the High Court according to the value of the subject-matter.

Sadda Singh v. *Kirpala*, 58 Ind. Cas. 768; 1 L. 387, followed.

First appeal from a decree of the Munsif, First Class, Delhi, dated the 10th October 1919.

Mr. *B. D. Kureshi* and *Lala Sardha Ram*, for the Appellant.

Mr. *Shamair Chand*, for the Respondents.

JUDGMENT.—This appeal has arisen in the following circumstances:—

One *Musammat* Bhagwani on the 1st December 1917 applied for partition of her husband's land, the application being made in the Court of the Revenue Assistant at Delhi who sanctioned a mode of partition in February 1918. An appeal was filed by *Musammat* Bhagwani's opponents to the Chief Commissioner, Delhi, who directed the Revenue Assistant to proceed under section 117 of the Land Revenue Act. *Musammat* Bhagwani thereupon filed a regular plaint specifically mentioning that this had been made under section 117 of the Land Revenue Act, and the Revenue Officer proceeded to dispose of the point sitting as a Civil Court, the question involved being one as to title. The Revenue Officer's decision resulted in the dismissal of the plaintiff's suit who thereupon preferred an appeal to the District Court at Delhi. An objection was taken to the jurisdiction of that Court by the respondent, it being contended that having regard to the provisions of section 117 (2) of the Land Revenue Act the appeal in the suit lay to the High Court. This objection was given effect to by the learned District Judge and the memorandum of appeal returned for presentation to this Court on the 10th February 1920. The appeal was filed here on the 20th February 1920.

Mr. Shamair Chand for the respondents contends that the appeal was not presented in this Court within time. In our opinion the time taken by the appellant in filing this appeal in this Court, namely ten days, was reasonable and we, therefore, overrule the objection. As to the appeal itself the law is perfectly clear and *Sadda Singh* v. *Kirpala* (1) is in point. An appeal from an order passed by a Revenue Officer acting under section 117 (2) would lie to the District Judge or to the High Court according to the value of the subject-matter. In the present case the value is Rs. 1,500 and the appeal was, therefore, rightly presented in the Court of the District Judge. We, therefore, accept this appeal and setting aside the order of the learned District Judge returning the memorandum of appeal, direct that Court to receive the said memorandum of appeal and to dispose of the case in accordance with law. The memorandum of appeal will be returned to the appellant for presentation in the Court of the District Judge. Costs of this Court will follow the event.

K. S. D. *Appeal accepted.*

(1) 58 Ind. Cas. 768; 1 L. 387.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 388 OF 1921.
May 12, 1924.

Present:—Mr. Justice Mukerji and Mr. Justice Dalal.

DURGA PRASAD SAHU—DEFENDANT—APPELLANT

versus

TAMESHWAR PRASAD NAIK AND ANOTHER—PLAINTIFFS AND GANGA DAYAL NAIK AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 28—Sale-deed—Inclusion of property for obtaining registration at particular place—Jurisdiction—Precedents, value of—Guardians and Wards Act (VIII of 1890),

DURGA PRASAD *v.* TAMESHWAR PRASAD.

ss. 29, 31—Permission to guardian to transfer minor's property—Presumption as to enquiry by Court.

Where a transaction is a *bona fide* one, the inclusion of a property for the sake of obtaining the registration of the document at a particular place will not oust the jurisdiction of the Sub-Registrar to register the document. [p. 247, col. 1.]

Pahladi Lal v. *Laraiti*, 48 Ind. Cas. 200; 16 A. L. J. 871; 41 A. 22, referred to.

A case is an authority only for what it decides and is no authority for what may seem to follow from the reasonings adopted in the case. [p. 246, col. 1.]

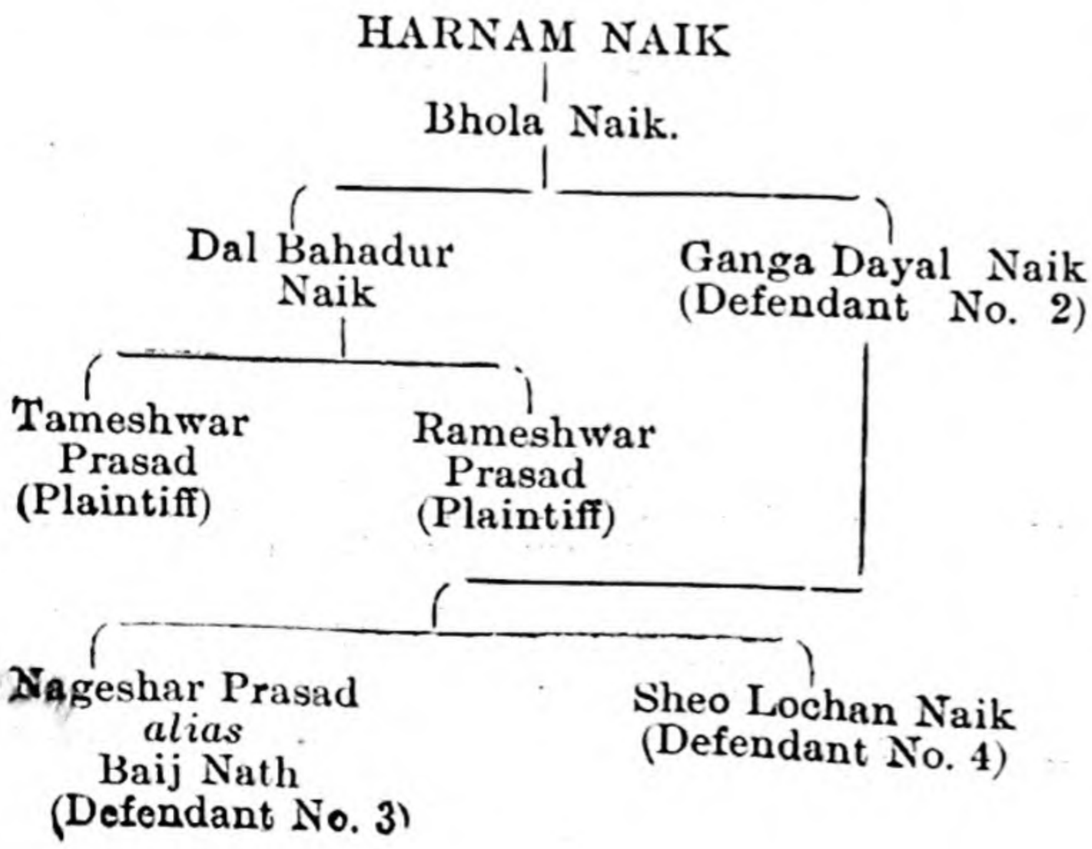
When a District Judge gives sanction to the guardian of a minor to sell or mortgage the property of the minor it shall be presumed that he made an enquiry in the interests of the minor as to the value of the property and sanctioned the transaction only when he found that it was beneficial to his interests. [p. 248, col. 2.]

First appeal from a decree of the Subordinate Judge, Gorakhpur, dated the 30th of August 1921.

Messrs. *Jang Bahadur Lal* and *Iqbal Ahmad*, for the Appellant.

Sir *Tej Bahadur Sapru*, Messrs. *Haribans Sahai* and *S. S. Sastry*, for the Respondents.

JUDGMENT.—The appellant in this Court was the defendant No. 1 in the Court below. He purchased on the 17th of January 1908 a four annas share in each of the two villages Lachhmipur and Harnampur and one *dhur* area land out of plot No. 95 in the village of Belaura for a consideration of Rs. 25,100. The vendor was one Ganga Dayal Naik. The pedigree of the family will be found at page 1 of the plaint and is as follows:—



The plaintiffs who are sons of Ganga Dayal's brother Dal Bahadur brought the suit, out of which this appeal has arisen, to have the sale set aside. The suit was instituted on the 14th of January 1920, that is to say, just two days less than twelve years after the sale. Various grounds were taken to impeach the sale. The Court below set aside the sale on two grounds. It held that the registration of the deed was illegal and no title passed to the appellant. It also held that the property was worth at least Rs. 30,000 and the sale of it by the managing member of the family for Rs. 25,100 was not justified.

These are the two points which have been controverted in this appeal and we need not try any other question that was before the Court below.

The question of registration arises in this way. The property of Belaura was a very insignificant one. One *dhur* is equal to 1/400th part of a *bigha*. The argument that found favour with the Court below on this question was that, the property being so insignificant neither party intended that any transfer of title to it should take place. It was owing to the inclusion of this property in the sale-deed that the deed became registerable by the Sub-Registrar of Gorakhpur. If this property had been excluded the Sub-Registrar of Maharajganj alone would have had the jurisdiction to register the document.

The fact that at the date of sale the property in plot No. 95 in Belaura belonged to Ganga Dayal has not been disputed. Indeed, the copies of the village records filed do go to show that the vendor had title to this property. It is, however, urged that the vendee never wanted this property and it is pointed out that he never asked the Revenue Court to enter his name with respect to it and further that he never took possession of the property. The village records, the copies of which are to be found at pages 85 and 91 of the printed record go to show tha in spite of the transfer, the name of the transferor Ganga Dayal continued to

be recorded over the land in Belaura and it was actually held by a tenant. The evidence of the appellant's son Ganesh Prasad does indicate that the vendee never cared to take possession over the property, although Ganesh Prasad insists on stating that he is in possession of the property and gets one anna as the rent for it. The admitted fact, therefore, is that in spite of the transfer, the vendee never took possession of it. On the other hand, there are circumstances to show that the vendor believed that the property had been sold and that he had no longer any title left to it. No direct evidence has been adduced to show what was the exact amount of share held by Ganga Dayal and his family in Belaura at the date of the sale. But copies of the decrees that were passed against the family and which record the properties mortgaged show (see pages 42 and 43 of the printed record) that a 4 pies share was held by the family in Belaura. Five years after the sale on the 27th of August 1913 Ganga Dayal sold the property in this village to one Chandi Prasad Pande. The sale-deed is printed at page 81 of the record. He described the property possessed by him as "a 4-pies share less by a fraction." It is quite within the range of probabilities that the fraction which he deducted out of the property which he wanted to sell was the fraction represented by the one *dhur* land which he had already sold to the appellant. This conduct on the part of Ganga Dayal goes to show that at least, so far as he is concerned, he never regarded himself as the owner of one *dhur* land which he had sold. Further, it appears that Ganga Dayal as a certificated guardian of his nephews, the plaintiffs in the suit, made an application to the District Judge for permission to sell the property, now in suit, in order to pay off certain debts of the family. In the application that was presented to the Court (Exhibit K. printed at page 65) he expressly mentioned the one *dhur* land in plot No. 95 situate in Belaura as one of the items of property he intended to sell. In the draft sale-deed that was presented to the District Judge for his approval the plot No. 95 was again specifically mentioned. It is clear, therefore, that Ganga Dayal did mean to transfer this property and took the trouble of obtaining the sanction of the District Judge for the transfer. On the question of fact, therefore, our finding is that the plot No. 95, a portion of which was sold by the sale-deed in suit, was intended by Ganga Dayal to be sold and was meant to be purchased by the appellant although it is a fact that after the purchase the appellant did not care to take possession of the property.

It has been urged that as a matter of fact neither the vendor nor the vendee wanted to transfer and purchase this property of Belaura and it was included in the sale-deed for the sole purpose of getting the deed registered by the Sub-Registrar of Gorakhpur. In view of our finding on the question of fact, this question does not really arise. But the question has been very well threshed out before this Court and we owe it to the learned Counsel for the respondents and to the Court below to discuss it.

The learned Counsel for the respondent has taken his stand on two Privy Council judgments, viz.: *Harendra Lal Roy Chowdhury* v. *Hari Dasi Debi* (1) and the case of *Muthra Prasad* v. *Chandra Narayan Chowdhury* (2). As we understand him, he has argued that the Court has to look to the intention of the parties and where neither of the parties intended that the transfer of a certain property should take place the inclusion of that property in the deed would not give jurisdiction to the Sub-Registrar to register the document. The cases cited must be taken to have been decided only with reference to the particular facts dealt with by them.

(1) 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A. L. J. 774; 1 L. W. 1050; 41 I. A. 110 (P. C.).

(2) 60 Ind. Cas. 833; 19 A. L. J. 385; 40 M. L. J. 489; 33 C. L. J. 440; 23 Bom. L. R. 629; (1921) M. W. N. 370; 14 L. W. 1; 29 M. L. T. 413; 25 C. W. N 985; 2 P. L. T. 397 (P. C.).

We need hardly mention that, a case is an authority only for what it decided and is no authority for what may seem to follow from the reasonings adopted in the case. In the case of *Harendra Lal Roy Chowdhury* v. *Hari Dasi Debi* (1) the property which was in question was a house No. 25 in Gurudas' Street in Calcutta. It was found as a fact that there was no house in existence within the ambit of that street. It followed that it was never intended that any such property should pass to the transferee. Their Lordships of the Privy Council said that there were two ways of looking at the thing, first, the property was non-existent, and, secondly the entry was a fictitious one. In either view the transaction was entered into only to commit a fraud on the Registration Law, that is to say to give jurisdiction to an officer who would not otherwise possess jurisdiction. There can be no doubt that their Lordships used the following language:—

"Their Lordships hold that this parcel is in fact a fictitious entry, and represents no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security."

We are of opinion that it is not open to contention that the words "the mortgagor intended to mortgage or that the mortgagee intended to form part of his security" can be taken out of the rest of the context and can be read as an independent *dictum* for guidance of the subordinate Courts. In our opinion the words are inseparable from the words "Their Lordships hold that this parcel is in fact a fictitious entry". In the latter case, the finding was that the property of one cowrie share in the village of Kolhua was the property owing to which the Sub-Registrar of Muzaffarpur had the jurisdiction to register the deed. It was found as a fact that the transferor did not possess any such property. Evidence was adduced to show that he did, and one witness was examined who said that he had sold it by an unregistered document. But it was found that there was no real delivery of the property. Their Lordships, therefore, laid down their law on the foundation of the fact that the mortgagor did not possess any such property and consequently it was never the intention of the parties that the mortgagor should offer it as security to the mortgagee and the latter should hold it as security for his money. The language that was used in connection with this case must be read with the facts involved in it.

In the case before us we have got the fact that the property entered in the deed and which gave jurisdiction to the Sub-Registrar of Gorakhpur to register did exist. We have the fact that it did belong to the vendor. Even if we concede for the sake of argument (we are really considering a case based not on the facts found by us but on the facts as put by the learned Counsel for the respondent) that this property of Belaura was entered into the deed simply for the sake of registration, we do not think that fact would not give the Sub-Registrar of Gorakhpur jurisdiction to register the deed. The appellant was purchasing two big items of property. If the parties found that by selling also a small bit of property, which it was not otherwise intended to be sold, they would have the convenience of avoiding the journey to Maharajganj, I do not see why the inclusion of that property should be treated as an act done only to commit fraud on the Law of Registration. Suppose the journey to Maharajganj costs the party a sum of Rs. 20. Suppose again the property sold is worth Rs. 10. By adding a property worth Rs. 10 and selling it, *bona fide*, the parties avoid a journey to Maharajganj at a cost of Rs. 20. Why should not the vendor be allowed to say that he has sold the property and why should not the vendee be allowed to say that he has purchased the property? The title to the property passes by the registration of the deed and the vendee becomes the owner of the property for the simple reason that the vendor was the owner of it and has chosen to sign a sale-deed with respect to it and to have it registered.

Coming to authority again, no case has been cited to us which can be taken as being on all fours with the case before

us. In this Court two learned Judges held in the case of *Pahladi Lal* v. *Laraiti*, (3) that where a property included in a deed of mortgage did exist, the fact that the mortgagor had no title to the property did not vitiate the registration, if the mortgagee was not aware of the want of title in the mortgagor and was not colluding with him in the inclusion of the property to procure registration. This case too is not on all fours with the case before us. But it lays down at least this much that where a transaction is a *bona fide* one, the inclusion of a property for the sake of obtaining the registration of a document at a particular place will not oust the jurisdiction of the Sub-Registrar to register the document. We hold therefore that the sale-deed was perfectly valid and did convey title to the appellant.

Coming to the second point. At the date of the sale the family consisted mainly of four persons, namely, the vendor Ganga Dayal, his father Bhola Naik who was a lunatic and the plaintiffs-respondents who were minors. There were two decrees for large sums of money passed against the family on foot of two mortgages executed by Ganga Dayal's grandfather Harnam Naik. The total amount due on the two decrees went up to Rs. 35,000. Ganga Dayal, the only male adult in the family who was in a position to enter into any transaction on behalf of it, has been found by the Court below to have acted to the best of his capabilities. He raised small sums of money from time to time out of the property and put off the evil day of sale by small payments. He got himself appointed guardian under the Guardians and Wards Act of 1890 of his minor nephews, the plaintiffs. He approached the learned District Judge of Gorakhpur from time to time and represented how the state of affairs was, and sought his permission as the guardian of his nephews and as a manager of his lunatic father's property to transfer family property, to avoid an auction sale of it and consequent loss. The copies of decrees which have been printed show that shares in no less than six villages had been mortgaged (see Exhibit C at pages 41-43). We find that he approached the learned District Judge first on the 16th of December 1905 by his application, printed at page 47 of the record. By an order, he was appointed the manager of his father's property. Then on the 13th of July 1906 he approached the District Judge and obtained permission to raise money by sale or by mortgage with possession of a part of the family property. The order is at page 49 of the printed record. The applications printed at pages 51, 53, 59 and 61 show how he succeeded in obtaining the good offices of the learned District Judge for staying the execution sale which was pending before the revenue authorities; (possibly the decree had been transferred to the Collector because the property was ancestral.) We have already mentioned that the learned Subordinate Judge gives Ganga Dayal full credit for doing his best in the interests of the family. On the 30th of July 1907 Ganga Dayal approached the District Judge with a definite proposal for transfer. I may mention that the order of the learned District Judge dated the 13th of July 1906 was not very definite. On the 30th of July 1907 Ganga Dayal definitely proposed that he should be permitted to sell the shares now in suit in the villages of Lachhmipur and Harnampur to one Babu Bhagwati Prasad for Rs. 21,245 and that he might be permitted to mortgage a portion of the remaining family property, namely, 4-annas share in the village Sarpataha to raise a sum of Rs. 5,000 to pay off the decrees. It appears that at that date, the two sums of Rs. 21,000 and Rs. 5,000 would have sufficed to pay off the two decrees. The order dated the 31st of July 1907 of the learned District Judge shows how diligently Gana Dayal had been acting. The learned Judge recites that the amount of the decrees was originally between Rs. 35 and Rs. 36,000 but Ganga Dayal had been able to reduce it by occasional payments to a sum of Rs. 26,000. The learned Judge sanctioned the sale of 4-annas share in the two villages in suit and an usufructuary mortgage of

(3) 48 Ind. Cas. 200; 16 A. L. J. 871; 41 A. 22.

another portion of the property But it appears that Bhagwati Prasad backed out of the transaction and the result was that the family property was put up for sale. At page 63 of the record is printed how the bids went before the Revenue Officer. Bhagwati Prasad evidently preferred to take his chance to purchase the property at an auction-sale to a purchase by private treaty. With respect to 4-annas share in Harnampur he offered Rs. 11,200 but the decree-holder outbid him by offering Rs. 100 more. Similarly in respect of the other property the decree-holder offered Rs. 11,100 as against Rs. 11,000 offered by Bhagwati Prasad. Thus, we find that at an open auction-sale the two properties fetched only the sum of Rs. 22,400. This sale took place on the 20th of December 1907. To save the property Ganga Dayal had to pay within the 30 days of sale not only the decretal amounts but also five per cent. over the purchase-money. He, it appears, had been able to persuade the appellant to pay Rs. 25,100 for the two shares in the villages of Lachhmipur and Harnampur inclusive of one *dhur* area in village Belaura. He had also been able to persuade the appellant to advance a sum of Rs. 4,500 on a simple mortgage over the share in the village of Sarpataha. The learned District Judge approved of this proposal and a draft sale-deed was filed and approved. The sale-deed was eventually executed and on the 18th of January 1908 the entire amount of Rs. 29,600 was paid into the treasury and the sale was set aside.

It has been urged that although Ganga Dayal may have done his best in the interests of the family he might have done better and if he had used more discretion he might have procured Rs. 30,000 at least for the property. It is urged that his failure to obtain the best value for the family property vitiates the sale and the Court below was right in setting it aside.

It is conceded that although the permission of the District Judge was obtained by Ganga Dayal for the transactions in which he entered, Ganga Dayal could not validly be appointed a guardian of his minor nephews who were living jointly with him and that, therefore, the permission which was obtained from the District Judge did not stand good in favour of the appellant. This point having been conceded by the learned Counsel for the appellant we do not wish to express any opinion over it. Assuming, however, that the learned Judge's permission went for nothing, the proceedings show at least this that, it was impossible to obtain a better value at the time than was really obtained. We must assume the learned Judge did his duty and he made an enquiry in the interests of the minors and the lunatic as to the value of the property and sanctioned the transaction only when he found that it was beneficial to their interests. Besides this presumption of law we have got the positive evidence of a learned Vakil of Gorakhpur who says that the then Munsif of Gorakhpur was entrusted with an enquiry into the application submitted before the District Judge. As we have said, the orders of the learned District Judge are very good evidence that the value paid at the time was a very proper value.

Coming to the evidence adduced in the Court below by the parties we find that there is no documantary evidence whatsoever to show what value the properties in the two villages of Lachhmipur and Harnampur could fetch at the time. There is no sale-deed. There is no evidence of income from the property except a certain vague statement on the part of the plaintiff No. 1. That statement is that one *bigha* of Lachhmipur could be let at Rs. 2-4 to Rs. 2-8 per annum. If this be the annual rent the price of the land could not be very high. The learned Subordinate Judge has been mainly, if not wholly, influenced by the fact that he misread the proceedings before the Revenue Officer at the auction-sale. It appears that after a 4-annas share of Harnampur had been sold, a one-anna share out of the 4-annas share of Lachhmipur was offered for being bid for, but no bids were made. The result was that the entire 4-annas share of Lachhmipur

had to be put up. The learned Subordinate Judge thought that the price fetched, namely, Rs. 11,100, for Lachhmipur was the price paid for a one-anna share and not for the entire 4-annas share. We are perfectly sure that if he had correctly read this document he would have come to a different conclusion altogether.

We have already said there is no documentary evidence by which we can judge the market value either at the date of the sale or at the date of the suit of the properties in question.

Coming to oral evidence, we have read the whole of it and we find it impossible to be guided by it. On behalf of the plaintiff-respondent the evidence of no less than eight persons has been printed. One of these Raj Bahadur Lal is a *patwari*, but he is not the *patwari* of any of the villages in question. He said that he was the *patwari* of two adjoining villages. In our opinion no sufficient reason having been shown why the *patwari* of the villages in suit could not be found it is impossible to rely and act upon the statement of Raj Bahadur. He says that the lands of Lachhmipur could be sold at the date when he was examined at Rs. 100 per *bigha* and the lands at Harnampur at Rs. 125 per *bigha*. It does not appear whether he was speaking of the cultivated land or the average value of the land. The 4-annas share sold would include lands actually under cultivation, lands which could be brought under cultivation by spending money and labour, and lands which would be absolutely unreclaimable at any expense. The evidence of the appellant's son Ganesh Prasad would go to show that there are huge areas in both the villages which are not cultivated and which are, therefore, not capable of yielding any income. Of the 8 witnesses examined by the plaintiffs the plaintiff No. 1 states that the lands in Harnampur would fetch Rs. 175 to Rs. 200 per *bigha* and the lands in Lachhmipur would fetch Rs. 150 per *bigha*. The witness Sheo Shankar Dube would not go so far as that. He does not belong to either of the two villages and his means of knowledge are extremely doubtful. He says that he never purchased any share in the two villages and that within the last 20 years, so far as he knew, no shares in those villages had been sold. The witness Dhanraj Rai brought a sale-deed which has been proved by Ram Kripal and which related to an entirely different village of Aligarh. He does not say anything about the valuation of the lands in suit. The witnesses Ramphal Panday and Mahipat do not speak anything on the value of the lands in the two villages in question. We have already commented on the statement of Raj Bahadur Lal. The witness Lalji Sahai does not speak on the point.

The appellant has examined his son to show under what circumstances the property was purchased and what value was paid for which property and why. The witness Jadunath Panday says that the price was fixed at Rs. 34 or Rs. 35 per *bigha* when the purchase was made. This price was evidently for all the lands whether good, bad or indifferent, taken as a whole.

The sale-deed having been executed under the circumstances already described it lay heavily on the plaintiffs to prove that their uncle, who did so much for them, could obtain much better value than he did obtain. We are of opinion that it has not been established that the price paid, namely, Rs. 25,100, was in any way inadequate price for the property at the time of the sale.

The result is that the appeal succeeds and it is hereby allowed, and the suit of the respondents Tameshwar Prasad and Rameshwar Prasad is dismissed with costs throughout. The costs in this Court will include Counsel's fees on the higher scale.

There is a cross-objection on the part of the respondents Nos. 1 and 2 but on it no Court-fee was paid. A sum of Rs. 800 was demanded as Court-fee. The respondents never said they would pay the Court-fee and the cross-objection might be rejected on that account. The learned Counsel for the appellant states that he was served with a copy of the cross-objection. We find on the record that on the 10th of January 1922 Mr. Jang Bahadur Lal, one of the learned

Counsel for the appellant, was served with a copy of the cross-objection. He was right, therefore, in claiming the costs of the cross-objection. The cross-objection is being rejected because no Court-fee has been paid, but the costs due on the cross-objection will be paid by the respondents Nos. 1 and 2 to the appellant. The costs will include fees on the higher scale.

S. D. *Appeal allowed.*
Cross-objection dismissed.

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL NO. 216 OF 1923.

March 17, 1924.

Present:—Mr. Justice Young.

DOO DOO MEAH AND ANOTHER—APPELLANTS

versus

KASIM ALI AND ANOTHER—RESPONDENTS.

Contract Act (IX of 1872), s. 11—Lease by minor, validity of—Lessee's position—Specific Relief Act (I of 1877), s. 41—Improvements—Compensation.

A lease by a minor is void and a lessee under such a lease is liable to be ejected but is entitled to compensation under section 41 of the Specific Relief Act for improvements done on the property on the basis of the estimated value at the time of erection, and is also entitled to remove the standing crops, if any [p. 251, col. 1].

Special second civil appeal from a decree of the District Court, Akyab, in Civil Appeal No. 5 of 1923.

Mr. *Lambert* (Junior), for the Appellants.

Mr. *Bose*, for the Respondents.

JUDGMENT.—In this appeal the plaintiffs seek to recover possession of certain lands from the defendants Nos. 1 and 2 under the following circumstances:

They allege that they bought the lands from defendants Nos. 4, 5 and 6, defendant No. 4 being the wife of plaintiff No. 1, defendants Nos. 5 and 6 being respectively the mother and aunt of plaintiff No 2, who had acquired the property on partition, it being part of the property of one Fazar Ali.

The defendants Nos. 1 and 2 claim to be in possession under a perpetual lease granted to them by the 3rd defendant on the 30th March, 1906. At this time the 3rd defendant was a minor: he gave his own age in 1922 as 29, which would have made him 13 in 1906, the date of the lease and the 1st defendant admits that he was only 15 or 16 at the time.

Such being the case the contract of lease was not voidable but void and the defendants are in under a void lease. *Mohori Bibi* v. *Dharmodas Ghose* (1), *Dattaram Govindabhai Guzar* v. *Vinayak Balkrishna Agashe* (2), and the rightful owner could eject them at any time. Are the plaintiffs the rightful owners? They claim through the 4th, 5th and 6th defendants, who themselves claim through the 3rd defendant as manager. All these defendants make common cause with the plaintiffs. The plaintiffs' case is that the land belonged originally to one Fazar Ali who died about 20 years ago leaving defendants Nos. 3, 4, 5, 6 and another daughter as heirs. Defendant No. 3 managed the estate though a minor and admittedly leased out this portion. When defendants Nos. 4 to 6 came of age in 1910-11, there was a division of the inheritance and this portion of it fell to defendants Nos. 4, 5 and 6. This partition is testified to by Sultan, the headman and Shor Ali, his uncle, neither of whom is related to the plaintiffs and both of whom seem to be independent witnesses, and I accept their evidence.

Defendants Nos. 4, 5 and 6 sold the lands in suit by a duly registered-deed of sale to the plaintiffs who have brought this suit. This sale-deed was attacked in argument, but the vendors themselves do not dispute it and they are the only persons concerned. Defendants Nos. 4, 5 and 6 might just as well have been joined as plaintiffs, and in my opinion the attacks are irrelevant.

The learned Judge of the lower Appellate Court was correct in giving the

(1) 30 C. 539; 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. C. J. 374 (P. C.).
(2) 28 B. 181; 5 Bom. L. R. 916.

plaintiffs a declaration and moreover against this portion of the judgment, there has been no cross-appeal; such being the case, I see no answer to their claim for possession, the defendants being under a void lease, and the defendants must vacate. The lease must be cancelled and under the Specific Relief Act, section 41, the defendants are entitled to remove or have the houses erected by them on the land valued and have the proceeds paid to them, also to have any *bunds* erected by them and any fruit garden raised by them valued, and the proceeds paid to them, such value in all cases being the estimated value at the time of erection and further if they have planted or sown on the property crops which, are growing at the time of eviction they are entitled to such crops when ripe and to free ingress and egress to gather and carry them.

S. D. *Order accordingly.*

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 62 OF 1923.

May 8, 1924.

Present :—Mr. Justice Sulaiman and Mr. Justice Kanhaiya Lal.

CHET RAM—PLAINTIFF—APPELLANT

versus

SITA RAM AND OTHERS—DEFENDANTS RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 79—Tenant, dispossession of, by trespasser—Suit for recovery of possession—Jurisdiction of Civil or Revenue Court—Agricultural lease—Registered lease whether takes priority—Registration Act (XVI of 1908), s. 50.

A suit against a trespasser, for damages, for recovery of possession and for perpetual injunction can only be brought in a Civil Court. [p. 252, col. 1.]

Section 50 of the Registration Act does not apply to an agricultural lease. [p. 254, col. 1.]

Section 79 of the Agra Tenancy Act does not apply to a case where the tenant is dispossessed by a trespasser. [p. 254, col. 2.]

Letters Patent appeal against the judgment of Mr. Jutice Ryves, dated the 22nd December, 1922, printed as 71 Ind. Cas. 447.

Mr. *Gulzari Lal*, for the Appellant.

Mr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal under the Letters Patent from a decree of a learned Judge of this Court setting aside the decree of the lower Appellate Court and dismissing the suit *in toto*.

The plaintiff's allegations were that the plots in suit were the tenancies of one Ghisa, deceased. The plaintiff alleged to be an heir of Ghisa and as having been in joint cultivation with him over these plots. It was stated that on the 4th February 1919 the *lambardar* had recognized the plaintiff as the tenant of these plots and had indeed attested this fact before the *kanungo*, that the plaintiff was in possession of these fields by cultivation in the year 1326F. that in *kharif* 1327 *Fasli* he actually sowed some crops but that in March 1920 the defendants wrongfully dispossessed the plaintiff by cutting away the standing crops. It is necessary to enumerate the reliefs which were claimed by the plaintiff in his plaint. They are as follows :—

(1) Rs. 100 as the value of the crops illegally cut by the defendants.

(2) Ejectment of the defendants and a decree for possession in favour of the plaintiff.

(3) A perpetual injunction restraining the defendants from ever interfering in future with the plaintiff's possession of the plots in dispute.

The defendant Sita Ram pleaded that he was holding the plots under a registered *kabuliyat*, dated the 13th February 1919, and that the plaintiff had no right to maintain the suit against him. It was also pleaded that the Civil Court had no jurisdiction to entertain this claim which was exclusively cognisable by the Revenue Court.

The Court of first instance came to the conclusion that the suit should have been filed in the Revenue Court and ordered that the plaint be returned for presentation to the proper Court. An appeal was preferred to the District Judge who came to the conclusion that the suit had been rightly instituted in the

Civil Court. Instead of, however, remanding the case for disposal on the merits he proceeded under sections 196 and 197 of the Tenancy Act and ultimately passed a decree for Rs. 80 as damages for possession of the plots and for an injunction against the defendants from interference in future with the plaintiff's possession.

The defendants preferred an appeal to this Court which has been allowed. We may note that before the learned Judge it was never urged that no appeal lay to him. The learned Judge's attention was not drawn to this question and naturally there is not adjudication on this point. The point also is not quite a clear one. This being a Letters Patent appeal we have refused the point to be raised for the first time under the Letters Patent.

We must therefore assume that the learned District Judge had passed a decree which was duly appealed against to this Court.

The learned Judge of this Court after doubting whether the District Judge was right in holding that the suit was cognizable by the Civil Court has gone on to remark that he does "not, however, intend to decide this case on the point of jurisdiction" *i. e.*, he has assumed that the suit had been rightly instituted in the Civil Court and the learned District Judge was properly seized of the appeal and was fully justified in disposing of it on the merits.

We may note here that in our opinion there can be no doubt that the plaint as drafted and the claim as brought could only have been brought in the Civil Court. It is apparent that no perpetual injunction could ever have been granted by the Revenue Court. It is clear also that the claim was one for damages against a trespasser and for the recovery of possession against him and that the landlord was not made a party to these proceedings. The suit really was at the very best one between the rival claimants and should have been disposed of by the Civil Court. The learned Judge, however, has dismissed the suit on the following ground. The plaintiff claims to hold this land under an oral agreement of tenancy whereas the defendants relied upon a registered lease executed by the *zemindars*. On the date when the suit was instituted, the plaintiff admittedly was out of possession and had in the previous month been forcibly dispossessed by the defendants. The learned Judge, therefore, thought that in a case of this kind the plaintiff had failed to prove that he had a better title than the defendant, and that, therefore, the plaintiff could not be given a decree for possession. The learned Judge further thought that it followed from that conclusion that the plaintiff could not even get a decree for damages for the crops which he had sown and which had been wrongfully cut by the defendants.

It is impossible for the Civil Court to determine the exact nature of the tenancy, but it cannot be disputed that when the plaintiff was put in possession of the plots by the *lambardar* who collected rents from him he became at the very least a non-occupancy tenant. A non-occupancy tenant is entitled to hold on and sow crops so long as he is not duly ejected. Up to March 1920 the plaintiff was in occupation of the plots and had actually sown crops in the field No. 3404. The learned District Judge has found distinctly that the crops which had been cut by the defendants were the crops belonging to the plaintiff which he himself had sown. He has also found that even subsequent to the registered lease of the 13th February 1919 granted in favour of the defendant No. 1, the *lambardar* had received rents from the plaintiff on account of the plots in question. It is, therefore, clear that in March 1920 the plaintiff certainly had a right to retain possession of the plots until he was duly ejected by the landlord. A Revenue Court could not have entertained a suit for ejectment with effect from March 1920. Such a suit could under section 60 of the Agra Tenancy Act have been filed only between the 30th of June and the 1st of October following. The plaintiff however, was forcibly dispossessed by the defendants in the middle of the agricultural year at a time when the plaintiff's

crops were standing. Had the plaintiff's dispossession been effected by the landlord himself the question as to whether the plaintiff should be restored possession or not under the proviso to section 79 would then have arisen. As matters stand, however, the landlord did not give possession to the defendants and the plaintiff was not dispossessed by the landlord but by the defendants. It is the defendants who cut away the crops and who apparently have appropriated these crops and it is against the defendants that the plaintiff seeks relief. It is, therefore, difficult to hold under the circumstances of this case that the dispossession complained of was a dispossession by the *lambardar*.

Our attention has been drawn by the learned Counsel for the defendants to three cases of this Court and it has been contended that inasmuch as the defendants were claiming title under a registered lease granted by the *zemindar* the dispossession by them must be deemed to have been the dispossession by the landlord. The first case relied upon is that of *Ram Lal* v. *Chuni Lal* (1). It will be noticed, however, that in that case although the heir of the original tenant had got her name recorded yet neither she nor her sub-tenants who claimed under her had ever been in actual possession of the holding.

In the same way in the case of *Sokhai* v. *Ram Prasad* (2), it was the landlord who had let out the land in the occupation of a tenant to a third party. The learned Judge understood the finding of the lower Appellate Court to be that if the plaintiff was ever in possession he was dispossessed by the landholder who *thereafter* let the land to the defendant.

Similarly in the case of *Balbhaddar Chaube* v. *Somarau Rai* (3) a learned Judge of this Court had distinctly held that in that case the dispossession of the plaintiff was a dispossession by the *zemindar* which was manifest from the fact that in the plaint it was stated that the *zemindar* brought suits for rent against some tenants holding the plots in question and obtained decrees and that the plaintiff himself regarded this as amounting to his dispossession. Furthermore in that case the relief claimed by the plaintiff was not only against the principal defendant but also against the *zemindars* who were impleaded.

It will, therefore, be apparent that in all the three cases the *zemindar* had been understood to have actually dispossessed the occupying tenant and then let the land to a third person. In the present case, on the other hand, the learned District Judge was of opinion that, in spite of the registered lease granted to the defendant, the *lambardar* acknowledged the plaintiff as the tenant, and, in fact, realised the rents from him. It is also clear that it was not till more than a year after that registered lease that the defendants purported to take possession of the field, and that they tried to do this in the middle of the agricultural year at a time when the plaintiff's crops were standing. The defendants must be deemed to have, therefore, forcibly taken possession of the plots, and the dispossession of the plaintiff cannot be deemed to be an ejectment by the *zemindars*. The *zemindars* are not made parties to the suit and the defendants are merely trespassers. Even the learned Judge of this Court at the end of his judgment remarked that the arguments before him proceeded on the basis that this was a purely civil suit properly instituted in the Civil Court. Under the circumstances the principle underlying the cases referred to cannot apply to this case. Treating the suit as a suit against trespassers it is apparent that the suit was maintainable. We may also note that the suit was instituted within six months of the plaintiff's dispossession and furthermore the matter went up in appeal before the learned District Judge, who having all the materials on the record proceeded under sections 196 and 197 to dispose of the matter finally. Under the circumstances the question as to which was the proper forum for the suit has lost its import-

(1) 2 A. L. J. 69; 27 A. 372; A. W. N. (1904) 281.
(2) 7 Ind. Cas. 486.
(3) 27 Ind. Cas. 914; 13 A. L. J. 295.

ance. The case must, therefore, be disposed of on its actual merits.

It has been contended on behalf of the defendant that the plaintiff had no right to retain an absolute possession of these plots and that in view of the provisions of section 50 of the Indian Registration Act the registered lease, though subsequent to the oral lease, must have priority. It is urged that at the time when the suit was brought the plaintiff was not in possession, and that inasmuch as the registered document has priority over all unregistered documents the plaintiff has not a better title, and, therefore, his claim for possession must be dismissed.

We are unable to accede to this contention. In the first place section 50 of the Indian Registration Act (XVI of 1908) does not apply to leases exempted under the proviso to sub-section (1) of section 17 of that Act. A reference to the notification published in the *U. P. Gazette*, dated the 3rd December 1885, shows that agricultural leases have been exempted from the operation of section 17. It would follow, therefore, that section 50 also would be inapplicable to such agricultural leases. The lease in favour of the defendants is not a lease of proprietary interest but is a mere agricultural lease though it purports to be in perpetuity. Furthermore on the date when the defendants took possession of the field they knew that the plaintiff was in possession and that his crops were actually standing on the land. They, therefore, had clear notice of the plaintiff's oral tenancy, if not of the fact that it had been attested before the *kanungo*. Under all these circumstances it is impossible to hold that the registered document superseded the tenancy of the plaintiff. The plaintiff even if he was a mere non-occupancy tenant at any rate had a right to remain in possession till duly evicted. The mere fact that a registered document was executed in favour of the defendants did not *ipso facto* put an end to his tenancy or extinguish his right. We are, therefore, of opinion that on the date of dispossession *i.e.*, March 1920, he had a right to remain in possession and the defendants had no right to take forcible possession of his lands. The plaintiff accordingly would be entitled to be restored to possession as against the defendants. The learned Counsel for the defendants-respondents has as a last resort contended that the plaintiff being at best a mere non-occupancy tenant had no right to be restored to possession in view of the provisions of section 79 of the Agra Tenancy Act. When we have held that this is not a case of dispossession by the landlord but of a dispossession by trespassers section 79 of the Agra Tenancy Act does not apply. In any view of the matter the plaintiff would be entitled to a decree for compensation for the crops forcibly cut away by the defendants.

As regards the relief for injunction we are of opinion that this should not be granted in the absolute terms asked for. It is clear that the defendants hold a registered lease from the *zemindar* and he may have the right to get the plaintiff ejected in the ordinary way from the holding and to put the defendants in possession. A perpetual injunction, therefore, is out of the question.

We accordingly allow this appeal and setting aside the decree of the learned Judge of this Court, modify the decree of the learned District Judge by directing that the decree for possession and for injunction will hold good till such time as the plaintiff is ejected in due course of law. The rest of the decree of the District Judge will stand confirmed. The plaintiff will get his costs here and hitherto from the defendants including cost in this Court on the higher scale.

K. S. D. *Appeal allowed.*

SRINATH CHATTERJEE *v.* KEDAR NATH RAI.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 203 OF 1922.

May 8, 1924.

Present :—Mr. Justice Pearson and Mr. Justice Graham.

SRINATH CHATTERJEE AND ANOTHER —JUDGMENT-DEBTORS—APPELLANTS

versus

KEDAR NATH RAI—DECREE-HOLDER AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Execution of decree—Inquiry into validity of decree.

Every order or judgment, however erroneous, is good until discharged or declared inoperative. An enquiry into the validity of a decree is outside the functions of an Executing Court subject to the proviso that there is a valid decree in existence which can be executed. [p. 255, col. 2.]

Appeal against an order of the Subordinate Judge, Nadia, dated the 8th of May 1922.

Babu *Tarakeswar Pal Choudhri*, for the Appellants.

Babus *Sarat Chandra Choudhuri* and *Indu Bhusan Ray*, for the Respondents.

JUDGMENT.—This is an appeal against an order of the Subordinate Judge of Nadia, disallowing objections filed by the judgment-debtors in an execution case under section 47, Civil Procedure Code.

A suit in ejectment had been brought against the owners of certain properties represented by one Charu Chandra Ganguli, the common manager appointed under section 95 of the Bengal Tenancy Act. The suit was eventually compromised and decreed accordingly on the 4th February 1921. Upon execution being taken out, objection was taken by the judgment-debtors that the decree could not be executed because Charu Chunder Ganguli did not represent the estate on the date of decree and also because the leave of the District Judge was not obtained for the compromise.

On behalf of the decree-holders a preliminary objection was raised in the Court below that the application was not maintainable under section 47, Civil Procedure Code, in the execution stage the contention being that a separate suit might lie for the purpose of questioning the validity of the decree, but that the Executing Court could not go behind the decree. The learned Subordinate Judge on a consideration of the authorities held that the objections could not be determined in an execution proceeding, and that only those questions which would render a decree void *ab initio*, so as to affect the jurisdiction of the Court, could be gone into. He accordingly upheld the preliminary objection.

It has been urged on behalf of the appellants that the learned Subordinate Judge erred in so deciding, and that if the decree was a nullity, as it is maintained it was, the Executing Court was entitled to go behind it and to refuse to execute it. In support of this view reference has been made to the cases of *Narendra Bahadur Chand* v. *Gopal Sah* (1), and *Jungli Lall* v *Laddu Ram Marwari* (2). Those cases are however distinguishable from the present one inasmuch as in both instances the decree was held to be a nullity by reason of the fact that one of the judgment-debtors had died and his representatives had not been brought on the record so as to render the decree incapable of execution. That however is not the position here. The point whether an Executing Court can question the validity of a decree was considered in the case of *Kalipada Sirkar* v. *Harimohan Dalal* (3), and the view taken was that every order or judgment, however erroneous, is good until discharged, or declared inoperative, and that the Executing Court cannot inquire into the validity, or propriety of the decree. It was pointed out by Mookerjee, J., that a proceeding to enforce a judgment is collateral to the judgment and that therefore no enquiry into its regularity, or validity can be permitted in such a proceeding. At the same time it may be conceded that the proposition, that an enquiry into the validity of a decree is outside the functions of an Executing Court, is subject to the proviso that there is a valid decree in existence which can be executed. It cannot be said in this instance that there was not a valid decree, or that it was incapable

(1) 20 Ind. Cas. 506; 17 C. L. J. 634.

(2) 50 Ind. Cas. 529; 4 P. L. J. 240; (1919) Pat. 105 (F. B.).

(3) 35 Ind. Cas. 856; 24 C. L. J. 375; 44 C. 627; 21 C. W. N. 1104.

of execution. The common manager was not dead, and the decree was obviously capable of execution. The only objections taken were :

(1) That Charu Chandra Ganguly had ceased to be the common manager at the date of the compromise decree

and

(2) That under the law the common manager had to obtain the permission of the District Judge to the compromise, and that he had failed to do so.

In our judgment these matters were outside the province of the Execution Court and the learned Subordinate Judge was right in the view taken by him, and in giving effect to the preliminary objection.

Coming to the merits of the case it is argued that Charu Chandra Ganguly did not represent the estate at the date of decree. Two orders of the District Judge have been placed before us. One is dated the 3rd May 1919 and contains a direction that Charu Chandra Ganguli should make over charge to one Dwijraj one of the estate *amlas*, who was to look into the former's accounts and himself furnish security for Rs. 1,000, within two months. Probably what was in prospect at that time was that Dwijraj should be appointed as common manager in place of Charu Chandra Ganguli, but however that may be there is nothing in that order from which it can be said that Charu Chandra Ganguli was thereby discharged : it was at most a step preparatory to his discharge contemplated in the future. There is nothing to show even that any action was taken upon that order by the persons concerned, and matters therefore remained in that position up to the compromise decree on the 4th February 1921. So far there is nothing to show that Charu Chandra Ganguli could not represent the defendants on that date as common manager. Subsequently, however, on the 14th September 1921, another order was passed by the District Judge. He refers to the last order of 3rd May 1919, to the fact that nothing has been done under it, and that Charu Chandra Ganguli has never been properly discharged though he may have ceased to deal with the properties, and he makes a declaration that the common management should be deemed to have come to an end since the 3rd May 1919, and that date is to be treated as the dividing line between the responsibility of Charu Chandra Ganguli on the one hand and Dwijraj on the other. It is argued that this order, therefore, invalidates the decree of the previous February because in terms of the order Charu Chandra is to be taken as having ceased to be common manager in 1919, and, therefore, could not properly be said to represent the defendants at the time of decree. In my opinion this argument can not be supported, because in a matter of this kind I think that it has to be determined by the position at the time of the decree itself, and that that cannot for the present purpose be said to be affected by the subsequent order of September, which was not directed to the matter of the decree at all.

Then it is argued that the permission of the District Judge was not given to the compromise. In point of fact permission was given, but upon a petition not of Charu Chundra but of Dwijraj, dated 19th January 1921. The whole matter was before the Court, the learned Judge applied his mind to it, and passed the order. The evidence moreover shows, and there is no reason to disbelieve it, that Srinath Chatterjee, the principal *malik* among the judgment-debtors, himself took an active part in effecting the compromise. In the circumstances I do not think it can be said that the permission which was actually granted is now to be treated as invalid because the application was made in the name of Dwijraj instead of Charu Chandra.

The appeal is dismissed with costs. Hearing-fee two gold *mohurs*.

M. B. *Appeal dismissed.*

S. D.

KUMLI *v.* EMPEROR.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 307 OF 1924.

June 17, 1924.

Present:—Mr. Justice Boys.

Musammat KUMLI—APPLICANT

versus

EMPEROR THROUGH MR. GARDINER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 488—Application on behalf of child, in whose name should be made—"Maintenance," meaning of—"Educational expenses", whether come within "maintenance".

An application, under section 488, Criminal Procedure Code, by the mother of a child against the father of the child for the "educational expenses" of the child, should be made by her in the name of the child as the guardian of the child and not in her own name. [p. 258, col. 2.]

The "educational expenses" of a child do not come within the term "maintenance", as used in section 488, Criminal Procedure Code. [p. 259, col. 1.]

Obiter.—The object of proceedings for maintenance is to prevent vagrancy, and that object is attained by the provision of lodging, food and clothing. A husband is bound to "maintain" his wife but he is not bound to do more than supply her with lodging, food and clothing, he is not bound to maintain her "as his wife." [p. 259, cols. 1 & 2.]

Criminal revision against an order of the Sessions Judge, Kamaun, dated the 12th of April 1924.

Mr. *Sarkar Bahadur Johri*, for the Opposite Party.

JUDGMENT.—This is an application in revision from an order of the Sessions Judge, Kamaun, upholding an order of a First Class Magistrate refusing to make an order under section 488 at the instance of a woman called *Musammat* Kumli for the payment by one Gardiner of Rs. 15 a month for the eduction of a child, whom the woman alleges to be her illegitimate child by Gardiner.

The narrative of the case is briefly as follows:—*Musammat* Kumli was engaged by Gardiner, whose wife was dead, to look after his children some time at the end of 1910 or beginning of 1911. Her husband was in Jail, and was released in 1913, in about July as the woman says. She belongs or belonged to the *Dom* caste. She gave birth to a child, the date as alleged by her being November the 15th, 1913. She apparently used to look after Gardiner's children during the winter months and, usually if not always, return to her home a village three miles outside Naini Tal, during the hot months, when the children were at Naini Tal. She left Gardiner's service in 1919, according to her own account, but more probably in the first half of 1916, as alleged by Gardiner. She at least is certainly wrong about the date because she admits that settlement was made with her at the end of 1918, admittedly also a long while after she was turned out. She says she was turned out because as Gardiner said she was now beginning to have children and she admits that not long afterwards she had a four months miscarriage. Towards the end of 1918 Gardiner paid her Rs. 300 in settlement of her claims. Four and a half years later she has lodged the present application, asking for payment of Rs. 15 a month to be made by Gardiner to some body she calls the "Rector of the school" for the education of the child. She has informed me in this Court that she is now a Roman Catholic and that the "Rector of the school" to whom her application refers is the Roman Catholic Bishop of Lucknow. Both Gardiner and the woman are agreed in asserting, whether truly or falsely, that the settlement made at the end of 1918 by the payment of Rs. 300 did not concern the child. Gardiner denies paternity and, therefore, as must follow, denies that any settlement was made for the child. He denies that he ever had or accepted responsibility for it. The woman declares that the settlement did not include the child but was a payment to herself and that Gardiner said he would be responsible for the future of the child.

The Magistrate disbelieved very much of the woman's story and came to a definite finding that "in such surroundings it is impossible to say who may or may not have had sexual intercourse with *Musammat* Kumli who is a woman of loose character." In other words, he found it impossible to attribute paternity to Gardiner. He further appears to have attached some weight to the fact that if the woman got Rs. 300 "it is fairly obvious that this must have been done to prevent her making

any sort of claim whatever again for maintenance." The learned Sessions Judge held:

(*a*) that section 488 does not provide for education expenses,

(*b*) that the payment of Rs. 300 "appears to have satisfied all *Musammat* Kumli's claims."

(*c*) that the payment of Rs. 300 and the letters filed "strongly support her allegation of intimacy with Gardiner,"

(*d*) and that he "would consider that the preponderance of probabilities strongly favours *Musammat* Kumli's claim that Mr. Gardiner is the father of the boy Harry."

He has not found definitely whether or not Gardiner is the father of the child.

Both Courts in dismissing her claim ordered the payment of Rs. 300 costs to Gardiner. The woman has applied in revision to this Court.

The learned Acting Chief Justice issued notice to Gardiner to show cause:—

(1) why the case should not be remitted to the Magistrate to hear accordin to law,

(2) under what circumstances he alleges that any previous payment of gift of a house in 1918 was accepted by the lady as a composition for her claim under section 488.

The only issues in the case really were :—

(1) Has the woman, *Musammat* Kumli, any right to make the application in her own name.

(2) Do "Educational expenses" (for which alone she asks) come within the term "maintenance" in section 488 so as to permit of an order being made for the payment of such expenses?

(3) Is the child proved to be the child of Gardiner?

As to the first question, it is clear that section 488 contemplates applications by a wife or a child. In this case there is no question of a wife. *Musammat* Kumli only alleges herself to be a discarded mistress and the application should have been made by the woman as guardian of the child and for the child. This would only have called for a formal amendment which could have been rightly permitted had the point been noticed in the Courts below, and I have in fact here treated the application as if it had been made by the woman not in her own name but as guardian of and for the child. This is not a mere technicality, for, had the point been noticed the lower Courts would not have fallen into the error of speaking of the payment of Rs. 300 by Gardiner as if it was a composition of the claims of the child and further the second portion of the rule issued to Gardiner by the learned Acting Chief Justice would not, as I think, have been issued in its existing form. Properly regarded the payment of the Rs. 300 could be weighed as evidence of an intimacy between Gardiner and the woman, but in no sense could it be regarded as a binding composition of the claims of the child. It is to be noted, however, that neither of the lower Courts actually dismissed the application on the ground that there had been a final composition. The First Court dismissed it on the ground that it was impossible with any certainty to attribute the paternity to Gardiner. The learned Sessions Judge upheld the dismissal but on the actual ground that section 488 does not provide for ordering payment of educational expenses.

With any claim of the woman, then, in her own right we are not concerned. She has no claim. I deal with the claim as if it had been made by her as guardian of the boy for the boy. For the child, if he is in fact an illegitimate child disowned by his father every body must feel sympathy, but whatever it may be possible to do for him. in other ways that sympathy must not be allowed to have the smallest influence in determining the weight to be attached to the evidence produced by the woman who claimed to be his mother as against the alleged father. And similarly an appreciation of the unpleasantness of the position of the alleged father in such a case as this must be allowed no weight as against the child.

In this case the opposite party happens to be an Inspector or retired Inspector

of Police, but it is right to say at the outset that that fact has had, so far as the record indicates, no bearing whatever on the facts of this case either before or after it came into Court. There is nothing before me to show that Gardiner has in any way abused his position as a Police Officer.

I have gone into the facts with very great care. The child was unrepresented here by any Counsel and the burden thrown on me was very much heavier in consequence.

I have exmined more than once every word of the record and if the issue of paternity had to be decided, I should have been compelled to order the matter to be re-heard after taking further evidence on the ground that evidence was produced in the Sessions Court which was not fully sifted and that certain other points needed further inquiry, before the issue of paternity could be decided, particularly in reference to the evidence of 1913 and 1918. I will proceed to state my reason for not adopting that course. As I have said the fact that the application is made in the name of the woman is a matter of form. The second point, *viz.*, whether such an application as the present can be made for the payment of educational expenses requires deeper consideration. Section 488 of the Code of Criminal Procedure says: "If any... person neglects...to maintain his...legitimate or illegitime child unable to maintain itself,...the Magistrate...may, upon proof of such neglect...order such person to make a monthly allowance for the maintenance of such...child". It was on the ground that 'maintenance' does not include educational expenses that the learned Sessions Judge dismissed the case. He quoted no authority and gave no reasons in support of his opinion.

The object of proceedings for maintenance is to prevent vagrancy [compare *In re Shaik Fakrudin* (1)] and that object is attained by the provision of lodging, food and clothing. A husband is bound to "maintain" his wife but he is not bound to do more than supply her with lodging, food and clothing, he is not bound to maintain her "as his wife". See *In re Gulabdas Bhaidas* (2). The specific question of schooling fees was very fully considered in case of *Nga Hla* v. *Mi Hla Kyu* (3), a case of the Upper Burma Report, decided on the 5th of January 1909. In that case an application was made for an increase in the amount of the maintenance that had already been allotted on amongst other grounds "that costs of schooling fees and clothing will be increasing", as the child grew older. Mr. Shaw, J. C., who had made research among English and Indian authorities also came to the definite conclusion that maintenance "is not intended to go further than to insure to the wife or children food, clothing and lodging". I need not detail at greater length his reasons, which are set forth fully in the report for holding that maintenance does not include education. From those reasons I see no reason to differ and to that extent uphold the order of the Sessions Judge in this case.

A question that might arise is as to whether I should in any way facilitate, if I can do so, the amendment of the application so that it might take the form of an application for maintenance proper. I should at any rate have grave doubts as to whether I had any power to allow such a material alteration, but of one thing I am quite certain and that is that I ought only to allow it if I was satisfied that the application as framed was framed in error, that what the woman really wanted on behalf of the child was maintenance. But there are facts in this case which make it perfectly clear beyond the shadow of a doubt that the application was framed as it was deliberately after advice being taken and in no way at all owing to ignorance.

It is only necessaay to refer to the fact that on October 19th, 1919, *Musammat* Kumli on behalf of herself and the child purchased a house in Almora for

(1) 9 B. 40; 5 Ind. Dec. (N. S.) 27.

(2) 16 B. 269; 8 Ind. Dec. (N. S.) 658.

(3) 4 Ind. Cas. 758; U. B. R. (1907-09) Cr. P. C, p. 17; 11 Cr. L. J. 40.

the sum of Rs. 150. At first she told the Court that she had expended the Rs. 300 given her by Gardiner in settlement of her domestic expenses and said nothing about this purchase. Later when cross-examined further she said that she had purchased this house out of the sum of Rs. 300. When asked to produce the sale-deed she said she had none. Pressed again on the point she admitted that there was a sale-deed, but said that it was with her brother. Gardiner applied for and obtained a copy of the sale-deed. It showed that the purchase was made in her name and that of the boy "Harry, son of Jogia". She says now in explanation of that that she never saw the sale-deed or had anything to do with it and that Gardiner got the name of Jogia entered in the sale-deed. She had, however, further to admit that one Jogia Mistri was endeavouring to get her to become his mistress.

I need not enter now into the question of whether the settlement which was made at that time was a settlement intended to include the claims of the child or not. Whether Gardiner at that time was admitting, at any rate to the woman the paternity of the child and the settlement was made on that basis, or whether he was denying it, or whether she was in fact then making no claim, one thing is certain and that is that she considered at that time that all claims of whatever sort or on whatever basis were being settled at that time, and so did Gardiner. This is clear for two reasons. No man would have settled the woman's claims and, if claims, true or false, were being made as regards the child, would have left those open. Similarly, if those claims as to the child were being made, truly or falsely, and if they were not settled, but, as the woman says, Gardiner promised to be responsible for the child, it is incredible that the woman should have waited for four and a half years to make any claim for the child. Therefore, it is certain that whatever claims may have been made in 1918 and whether they were admitted or not the woman thought that all claims to maintenance even on behalf of the child had been settled. That the child's claims, if he was Gardiner's child, could not be legally so concluded is immaterial. That is what she thought and what her advisers thought and that is why her application was deliberately framed by her and her advisers to ask for schooling expenses only and for those to be paid not to her but to the "Rector of the school". In these circumstances, I should feel wholly unjustified, even if I had the power, in suggesting or permitting any amendment. The result is that so far as this application asks for Rs. 15 for schooling fees to be paid to the "Rector of the school", it must be dismissed.

The remaining question for consideration is the question of the costs allotted to Gardiner. I do not wish to say anything that may seem in any way to suggest any opinion of mine on the main question which was at issue and which, as I have already said, I am of opinion, could not be satisfactorily determined without further enquiry. But in deciding the question of costs I have to consider the responsibility of each of the parties in connection with these proceedings and also the question whether the parties have put their cases frankly before the Court. For the reasons, I have already given, it is undesirable to enter into particulars of some of the matters on which evidence was given. But as regards Mr. Gardiner's want of frankness I may instance the incident of the photographs. When he was shown two photographs, he denied having taken them, with the result that a Commission had to be executed to the Magistrate at Saharanpur to ascertain whether or not the photographs had been taken in the compound of the bungalow, at that time occupied by Gardiner in Saharanpur. It was proved that the building appearing in the photograph was an out-house in that compound.

On the other hand I am satisfied that there was at least one most discreditable incident in the case of the applicant. The Sessions Judge, before whom the photographs were first produced, asked the child whether he knew anything about them. The child is

now 10½ years of age. He was born, if we are to believe the woman, on November 15th, 1913. The woman said, in November 1923, that the photographs were taken eight years previously; in other words in the cold weather of 1915. I have no doubt that the learned Sessions Judge would not have asked the child any question about the photographs had he realised, as it is easy for me to do with the whole record before me, that the child was at that time two years of age. The child in reply said "Kumli is my mother. I know the Sahib (Mr. Gardiner). He is my father. I remember this picture (Exhibit X). My father here took it. I do not remember the name of the dog. This Exhibit Y is a photo of me, Dorothy (one of the children of Mr. Gardiner) and my mother. I cannot make out the fourth person. My father here took the photopraph. What I have round my neck is the Miss Sahib's *chaddar*, no my mother's. The others were wearing boy's clothes, my mother too". The photograph (Exhibit X) referred to was one of a group in which this woman, *Musammat* Kumli, Gradiner's two little girls and his little boy Eric had been dressed up for fun. The boy in the photograph (Exhibit X) was, as this woman admits, not the child before the Court but Gardiner's boy Eric. Nothing is more plain than that an endeavour had been made to coach this poor child to pretend that he knew all about and remembered the photographs. It was impossible that he should do so, as he could only have been two years old, on the woman's own saying. But this fact was overlooked with the result that the poor child made a hopeless mess of his statement. Comment on this incident is superfluous. Anything more disgraceful is difficult to imagine.

Taking into consideration such facts as these both sides of the case I alter the order for costs from one for the payment of Rs. 300 to the payment of Rs. 150, the said Rs. 150 to include the Doctor's fee, which had to be paid owing to another false statement made by this woman as to Gardiner having a birth-mark similiar to that of the child. With this modification of the order as to costs I dismiss the application.

S. D. *Application dismissed.*

CALCUTTA HIGH COURT.

CRIMINAL APPEALS CASES NOS. 41 AND 92 OF 1924.

March 27, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Duval.

IN APPEAL NO. 41 OF 1924.

MAZHER AHMED—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

IN APPEAL NO. 92 OF 1924.

IMDAD MIA—ACCUSED—APPELLANT

versus

EMPEROR ON THE COMPLAINT OF MAKBUL ALI—RESPONDENT.

Penal Code (Act XLV of 1860), s. 467—Forgery—Writer of forged receipt.

The writer of a forged receipt cannot be convicted of an offence under section 467 in the absence of evidence that he was present at the execution of the receipt or that he helped any person to use it. [p. 262, col. 1.]

Empress v. *Riasat Ali*, 7 C. 352, 4 Shome L. R. 155; 8 C. L. R. 572; 3 Ind. Dec. (N. S.) 776, relied upon.

Babus *Chunder Sekhar Sen* in Appeal No. 41 and Babu *Hemendra Nath Dutta*, in Appeal No. 92, for the Appellants.

Babu *Khundkar*, for the Crown.

JUDGMENT.—This is an appeal by two persons, Mazher Ahmed and Imdad Mia. They were both tried before a Jury for an offence under section 467 of the Indian Penal Code. The Jury unanimously found them guilty and the Judge agreeing with the verdict of the Jury sentenced them to undergo rigorous imprisonment for a period of six months. The facts are shortly as follows. One Ali Mia brought a rent suit against one Makbul Ali on the 21st of May 1920 and Ali Mia obtained an *ex parte* decree in that rent suit. He realized the decretal amount by attachment on the 4th of July 1920. Makbul Ali applied to set aside the *ex parte* decree. This was done. The suit was re-heard and was dismissed on the 13th of May 1921. On the 23rd of

March 1922 Makbul Ali applied for a refund of the amount of the *ex parte* decree which had been realized by execution. Ali Mia put in a petition objecting to the application on the 10th of June 1922. He alleged that the money had in fact been re-paid by him to Makbul Ali and in support of his contention he filed with his petition what purported to be a receipt for the money. The receipt was found to be a forgery and hence these proceedings.

The accused Mazher Ahmed was the writer of the receipt and Imdad signed Makbul's name on the receipt. There is no doubt that the receipt was never signed by Makbul and we are satisfied that Imdad did not affix Makbul's name to the receipt at Makbul's request. Clearly, he was rightly convicted and we dismiss the appeal so far as Imdad is concerned.

So far as Mazher Ahmed is concerned, upon the evidence, he wrote the body of the receipt but not the date and there is no evidence to show that he knew that it had been signed. He stated that he wrote the receipt at the request of Makbul. This is clearly untrue. But we do not think that upon the materials a conviction under section 467 can follow so far as he is concerned. As we have already stated there is no proof that he was present when the receipt was in fact executed or that he helped any person to use it. He might have been charged under the provisions of section 467 read with section 109. But this was not the charge that he had to meet and having regard to the decision in the case reported as *Empress* v. *Riasat Ali* (1) we think that he cannot be convicted of an offence under section 467 in the absence of evidence that he was present at the execution of the receipt or that he helped any person to use it.

In the circumstances, the appeal succeeds so far as Mazher Ahmed is concerned and we set aside the conviction and sentence passed upon him. The bail bond is cancelled.

S. D. *Appeal allowed.*

(1) 7 C. 352; 4 Shome L. R. 153; 8 C. L. R .572; 3 Ind. Dec. (N. S.) 776.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 755 OF 1923.

(CRIMINAL REVISION PETITION No. 610 OF 1923).

March 25, 1924.

Present:—Mr. Justice Venkatasubba Rao.

ANNAVI AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), *s.* 114—*Interpretation—Charge—No proof of acts previous to commission of offence—Abetment — Prejudice to accused.*

Section 114, Penal Code, deals with a person, who would be guilty of abetment independent of any act done at the time of the offence, that is to say, a person whose abetment is complete apart from his presence. The section defines the liability of such a person if he happens to be present when the offence is committed. [p. 263, col. 1.]

Ram Ranjan Roy v. *Emperor*, 27 Ind. Cas. 554; 42 C. 422 at p. 426; 19 C. W. N. 28; 16 Cr. L. J. 170, followed.

A charge against an accused ran thus:—"You.....abetted by being present, in the commission of the offence of mischief.....and thereby committed an offence under sections 114 and 430, Indian Penal Code." No acts were alleged on the part of the accused which related to a point of time previous to the commission of the offence. At the trial the case sought to be made out against him was that he was at the place where the offence was committed and instigated the other accused to commit the offence at the time they committed it. On revision against the conviction :

Held, that the accused must be held to have been misled by the nature of the charge and that the error had occasioned a failure of justice. [*ibid.*]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional, First Class, Magistrate, Namakal, in Criminal Appeal No. 54 of 1923, preferred against the judgment of the Court of the Stationary Second Class Magistrate, Namakal, in C. C. No. 200 of 1923.

Messrs. *V. L. Ethiraj* and *P. Ramanathan*, for the Petitioners.

The Public Prosecutor, for the Crown.

ORDER.—The charge framed against the fourth accused runs thus :—

"That you.....abetted, by being present, in the commission of the offence of mischief.....and thereby

committed an offence punishable under sections 430 and 114, Indian Penal Code.

Section 114 of the Indian Penal Code implies that the abetment had been completed before the actual offence was committed. It reads thus:—

"Whenever any person who, if absent, would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence."

What is it that the section contemplates? It is dealing with a person who would be guilty of abetment independent of any act done at the time of the offence, that is to say, a person whose abetment is complete apart from his presence. The section defines the liability of such a person if he happens to be present when the offence is committed.

No acts are alleged on the part of the fourth accused which relate to a point of time previous to the commission of the offence. The case sought to be made out against him is that he was at the place where the offence was committed and instigated the other accused to commit the offence at the time they committed it. In the words of Sir Lawrence Jenkins, C J., in *Ram Ranjan Roy* v. *Emperor* (1): "The only abetment charged necessarily required the presence of (the fourth accused) while to come within section 114 the abetment must be complete apart from the presence of the abettor."

The next question is, has the fourth accused been misled by this error in the charge and has it occasioned a failure of justice? It seems to me that the fourth accused did not have notice of the matter with which he was charged. When prosecution witnesses did not allege that he committed any act previous to the commission of the offence he would be justified in believing that no evidence of his guilt was being given and it is extremely difficult to say that he has not been misled and that there has not been a consequent failure of justice.

(1) 27 Ind. Cas. 551; 42 C. 422 at p. 426; 19 C. W. N. 28; 16 Cr. L. J. 170.

On the whole I think it is safe to set aside his conviction and the sentence and I, therefore, do so and direct that he shall be re-tried on a charge properly framed. The fine, if it has been collected, shall be refunded.

As regards the rest of the accused, the sentence is reduced to the term of imprisonment already undergone. In regard to the sentence of fine, I reduce it to Rs. 20 in the case of each of the accused. And the excess fine, if collected, will be refunded. In default, each shall undergo rigorous imprisonment for a period of two weeks.

The order directing payment of compensation to P. W. No. 1 will stand.

V. N. V. *Conviction set aside, and re-trial ordered.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 93 OF 1924.
March 11, 1924.
Present:—Justice Sir John Bucknill, Kt., and Mr. Justice Adami.

JAMUNA SINGH AND OTHERS—ACCUSED—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 257—Defence witness unable to attend on account of illness—Examination on commission—Procedure.

One of the two persons stated by the prosecution to be the ring-leaders of an affray which was the subject of the trial pleaded *alibi* and asked permission to call a certain witness to prove it. This witness wrote to the Court stating his inability to attend on account of ill-health and sent medical certificate to that effect. On the date of the hearing the accused applied to the Court for the issue of a Commission to examine this witness at his house. The Magistrate was of opinion that the case being important, the witness should be examined in Court and as it was not known when the witness would be well enough to attend the Court, he dismissed the application:

Held, (1) that some effort should have been made to ascertain as to whether it would, within a reasonable time, be possible for the witness to come to Court and if not then to take the evidence on Commission; [p. 265, col. 1.]

JAMUNA SINGH v. EMPEROR.

(2) that the Magistrate, therefore, should now take this evidence, if possible, and re-consider in the light of this evidence the case of all the accused before him. [p. 265, col. 2.]

Criminal revision from a decision of the Officiating Sessions Judge, Saran, dated the 28th January 1924, affirming that of the Deputy Magistrate, Chapra, dated the 17th December 1923.

Messrs. *K. B. Dutt* and *B. P. Sinha*, for the Appellants.

The Assistant Government Advocate, for the Opposite Party.

JUDGMENT.

Bucknill, J.—This was an application in criminal revisional jurisdiction made by ten persons who were originally all convicted on the 17th December last by a Magistrate of the First Class at Chapra of various offences and sentenced to various terms of imprisonment in connection with an assault upon a man of the name of Raghunath Singh. This Raghunath Singh was the complainant in the case. From the decision of the Magistrate an appeal was preferred to the Sessions Judge of Saran but was dismissed on the 28th January last. It is unnecessary, and under the circumstances would perhaps be undesirable, that I should dilate upon the facts which led up to this accusation being made against the present applicants. The matter has now come before this Court on a very simple point in revisional jurisdiction.

The position during the trial was that one of the two persons who were stated in the story for the prosecution to be the ring-leaders of the affair was the second applicant whose name is Nageswar Prasad. This man who is said to be a petty landholder of some little importance in his neighbourhood asked permission to call a certain witness on his behalf in order to show that he (the applicant) was, at the time when the offence was alleged to have been committed, not present there at, but was actually in Calcutta. This individual whose testimony it was thus sought to be obtained was Mr. R. H. M. Rustomji of 20 Ballygunje Circular Road, Calcutta, and it is admitted that he is a mercantile gentleman of some position and importance. Now it is quite true that, apparently, in the written statement which this applicant filed in the first instance, he did not therein state that he proposed to urge in his defence a plea that he was not present at the assault; but he did mention this gentleman in his list of witnesses and it seems clear from the explanation which is now given by the Deputy Magistrate that this gentleman Mr. Rustomji could not attend the Court. On the 27th November, which was, I gather, the first day upon which the defence opened its side of the case, it is clear that this applicant put in a petition asking that this Mr. Rustomji might be examined on Commission; on the ground that he was ill. Now the Deputy Magistrate states:—

"It is true that a petition was filed on the 27th November 1923 to examine the *alibi* witness, Mr. R. H. M. Rustomji of Calcutta, of one of the accused persons, namely, Nageswar Prasad on Commission, but as the case was important I thought his attendance in Court absolutely necessary".

"The certificate about his illness did not suggest by which date he could undertake the journey of coming over to Chapra and the accused did not insist for another date to produce him. I had, therefore, no other alternative but to reject the application for his examination by Commission".

I think that perhaps the Deputy Magistrate took an incorrect view of his powerlessness. The letter which was couched in very courteous language written by Mr. Rustomji to the Deputy Magistrate was of such a character and was accompanied by a medical certificate of such a character that I should have thought it spoke for itself. It says that he regretted that he was unable owing to ill-health to undertake a railway journey and, therefore, could not attend the Court and the medical certificate stated that he was suffering from a weak heart and a painful internal malady. Under these circumstances and as the Deputy Magistrate thought that this gentleman was a very important witness, I think that the proper course would have been that some

effort should have been made to ascertain (either by telegram or by correspondence and either undertaken on behalf of the Court or undertaken by the applicant himself) as to whether it would, within a reasonable time, be possible for this invalid gentleman to come to Chapra and if not, then, reluctantly, to come to the conclusion that it was necessary that his evidence should be taken on Commission owing to his inability to be present at the place where the case was being decided. But all that the Deputy Magistrate did at that time, so far as I can gather, was simply to note in the order sheet—"Rejected. Filed". He gives no reason there for such rejection and he certainly does not indicate that he contemplated either giving the applicant another chance of ascertaining when and if, this gentleman could attend or of assisting further through the Court the applicant to ascertain those facts as to the possibility of attendance and as to the necessity of taking the evidence on Commission. I am bound to say that as the matter stands I should have felt that the applicant might consider himself somewhat hardly treated. There does occur, however, a circumstance which may be explicable but which does not seem to have been explained by the learned Counsel who appears for the applicant. It does not seem that any question about this witness was referred to at the trial, because the Deputy Magistrate does not refer to it himself in his decision. That may perhaps be, because, he having rejected the petition, there was nothing more for him to say, but what does seem noticeable and inclines one perhaps to consider that there may be something in what the learned Assistant Government Advocate suggests, namely, that the evidence of this gentleman would not be of much value, is that in the ground of appeal to the Sessions Judge this point does not seem to have been included and that the Sessions Judge himself does not in his judgment mention it at all. It is, however, put in the forefront of the application in revisional jurisdiction made to this Court. I am bound to say that on general principles I think that this man was entitled under the circumstances to have the evidence of this gentleman taken. Whether it would have been of any value to him it is impossible to hazard any confident conjecture but that he thought it was and that the Deputy Magistrate himself thought that Mr. Rustomji was an important witness appears to be quite clearly the case. The question as to how far the evidence of this Mr. Rustomji might have affected others of the applicants other than the applicant himself is one which perhaps needs at a later stage very careful consideration. It is quite obvious that, if the prosecution story which puts as the leader of an affray or of an assault an individual whose presence at the scene of the alleged occurrence is conclusively disproved it can not but throw serious grounds of suspicion upon the whole of the prosecution story; and I should not be prepared definitely to say that in the event of this witness being able clearly to show that this Nageswar Prasad, the applicant, was not present at all at the scene of what took place, but was in Calcutta at that time; that such evidence would not militate very seriously against the whole truth of the complainant's story. Under these circumstances I think that the proper course will be to set aside the decision of the Sessions Judge of the 27th January last and to set aside the judgment of the Magistrate of Chapra of the 17th December last and to order, firstly, that the evidence of this Mr. R. H. M. Rustomji shall, if possible, be taken on behalf of the accused Nageswar Prasad Singh. I do not pretend to be able to foresee in what way this evidence can be taken. It may be that this gentleman is now in a position in which he can and will come from Calcutta in order to give his testimony; on the other hand he may be still in such a state of health that a Commission will have to be issued to take his evidence in the case at his own home. Secondly, that the Magistrate shall, after, if possible, having taken this evidence, re-consider in the light of that evidence (if it throws any light at all upon the matter) the case of all those accused who were before him. If he is unable for any reason to take or obtain

the evidence of this Mr. Rustomji I think that it is necessary that his report to that effect and the reason for his failure should be submitted to his Court.

Adami, J.—I agree.

K. S. D. *Case remanded.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 483 OF 1923.
August 3, 1923.
Present :—Mr. Justice Newbould, Mr. Justice C. C. Ghose and Mr. Justice Cuming.

NRIPENDRA BHUSAN RAY—ACCUSED—PETITIONER
versus
GOBINDA BANDHU MAJUMDAR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 439—Revision—High Court, power of, to quash pending proceeding, exercise of—Penal Code (Act XLV of 1860), s. 154—Owner of land failing to give information of riot—Ingredients of offence.

The High Court has power to quash a criminal proceeding in its early stages before any evidence has been recorded, but this is a power which will be only exercised in exceptional cases. [p. 271, col. 1.]

Per *Cuming, J.*—The High Court has the power of interfering with criminal cases whilst they are still pending before the subordinate Courts, but the exercise of this power is sometimes fraught with considerable danger to the due administration of criminal justice. If parties are to be allowed to come up at every and any stage of a criminal prosecution to challenge the order of the Magistrate, a very powerful weapon is at once placed in the hand of the well-to-do to defeat the ends of justice and to protract indefinitely a criminal trial. [p. 270, col. 2; p. 271, col. 1.]

It is for the Magistrate before whom the case is pending to determine whether the facts proved or the facts alleged do or do not constitute a criminal offence. The accused party has then his remedy by way of appeal or revision, when the case has been finally decided. [p. 271, col. 1.]

Per *C. C. Ghose, J.*—The ingredients necessary for a prosecution under section 154 of the Penal Code are the following :—

(*a*) Unlawful assembly or riot.

(*b*) Accused is the owner or occupier of the land or has or claims to have an interest in the land.

(*c*) Either the accused or his agent or manager knew that the offence was being or had been committed or had reason to believe that it was likely to be committed.

(*d*) With such knowledge that the offence was being or had been committed, or having reason to believe that it was likely to be committed the accused did not give notice to the nearest Police Station.

(*e*) The accused having reason to believe that the offence was about to be committed, did not use all lawful means in his power to prevent the offence or in the event of its taking place, did not use all lawful means in his power to disperse or suppress the riot or unlawful assembly. [p. 269, cols. 1 & 2.]

It is not necessary, however, in order to render the owner of land on which a riot takes place criminally liable that he should be aware of the likelihood of such an occurrence and it is enough that his factor or agent should have taken an active part in the riot to warrant the conviction of the owner under section 154, Penal Code. [p. 270, col. 1.]

The very greatest caution is required before proceedings are started against a person under section 154 of the Penal Code. [p. 270, cols. 1 & 2.]

It is the bounden duty of the High Court to interfere with a proceeding pending in a subordinate Court when it is brought to its notice that a person has been subjected, or is about to be subjected, to the harassment of an illegal prosecution. [p. 270, col. 2.]

Case-law discussed.

Criminal revision against an order of the District Magistrate, Jessore, dated the 21st April 1923.

Babus *Dasarathi Sanyal*, *Manmatha Nath Mukherjee* and *Nakuleswar Mukherjee*, for the Petitioner.

Mr. *Orr*, for the Crown.

JUDGMENT.

Ghose, J.—The facts connected with this Rule are as follows:—The petitioner, Nripendra Bhusan Ray, is a non-resident *zemindar* of Narail in the district of Jessore. It is stated that he resides at Madhupur in the Sonthal *Parganas* and that all the affairs of his *zemindari*, which lies in several districts, are managed by one Bepin Behari Dutt, who is his manager and who resides at his *sudder cutchery* in Narail. There is a *hat* at a place called Simakhali, 17 or 18 miles distant from Narail, which is owned by the petitioner and others. This *hat* is let out to various persons under leases for a term. In 1327 *B. S.* the *hat* in question was leased out to one Ibrahim Sikdar for a period of three years at an annual rental of Rs, 575 and during the pendency of this lease a rival *hat* was

started in or about January 1922, at a place called Kholabari, which is within a mile of Simakhali. On the 17th September, 1922, a riot occurred at Kholabari. Certain persons, namely, Forman, Izatulla, Wares Sikdar, Basiruddin and Khodai Mulla, were convicted of rioting at Kholabari by the Additional Sessions Judge of Jessore on the 8th February 1923. Thereafter a case was started under sections 150 and 157, Indian Penal Code, against one Hemant Kumar Banerjee, who was the petitioners' former local agent at Narail, and some other persons on the ground that they collected and engaged various persons to commit the aforesaid riot at Kholabari. It has been stated before us that the said case ended in an acquittal of the accused therein. On the 12th March, 1923, an application was made before the Sub-Divisional Officer, Sadar, for drawing up proceedings against the petitioner under section 155, Indian Penal Code, and against the said Bepin Behari Dutt under sections 150 and 156, Indian Penal Code. The Sub-Divisional Officer held that he could not entertain the application. Thereafter the Inspector of Police of the Magura Sub-Division filed a formal complaint before the District Magistrate of Jessore, charging the petitioner and the said Bepin Behari Dutt with having committed offences punishable under sections 155 and 156, Indian Penal Code, respectively. In his complaint before the District Magistrate the Inspector of Police stated that the *ijaradar* of the Simakhali *hat* began to oppress the traders and dealers at Simakhali *hat* by realising enhanced rents and excessive *tolas* and by exercising other acts of highhandedness over them. It was further stated by the Inspector of Police that on account of the oppressions of the *ijaradar* of Simakhali *hat*, a rival *hat* had been started at Kholabari and that both the *hats* began to sit on the same days, *viz.*, on Sundays and Wednesdays, and that the result was that the old *hat* at Simakhali lost its importance and the new *hat* at Kholabari flourished. He further stated that owing to the rivalry of the two *hats* breaches of the peace were apprehended and proceedings under sections 107 and 144, Criminal Procedure Code, were instituted from time to time in the Court of the Sub-Divisional Officer of Magura. He then referred to the riot which took place on the 17th of September 1922, and to the conviction of some of the rioters by the Additional Sessions Judge of Jessore in February 1923. He went on to refer to the case against the local agent, Hemant Kumar Banerjee, and stated that in the course of the investigation of the case against Hemant Kumar Banerjee, 16 letters were produced by Bepin Behari Dutt, the manager of the petitioner, before one Ajit Mohan Chowdhury, Inspector of Police. It was alleged that from the letters and from other evidence it would appear that the said Bepin Behari Dutt was guilty of an offence punishable under section 156, Indian Penal Code and that the petitioner was liable for an offence under section 155, Indian Penal Code. The petition of the Inspector of Police contained also the following paragraphs :—

"That the said riot at Kholabari *hat* on the 17th September, 1922, was committed for the benefit of the above named Babu Nripendra Bhusan Ray, *zemindar*, who was interested in the subject-matter of the dispute which gave rise to the riot and the accused, Babu Bepin Behari Dutt, manager, had reason to believe that such riot was likely to be committed and did not use all lawful means in his power to prevent such riot or unlawful assembly from taking place, and that the said Babu Bepin Behari Dutt has thereby committed an offence under section 156, Indian Penal Code.

"That it will further appear from the letters above mentioned that Babu Bepin Behari Dutt connived at the engagement of persons to become members of the unlawful assembly.

"That the said riot at Kholabari on the 17th September 1922, was committed for the benefit of Babu Nripendra Bhusan Ray, owner of the Simakhali *hat*, and the said Babu Nripendra Bhusan Ray was interested in the subject-matter of the dispute which gave rise to the riot, and his agent or manager having reason to believe that the riot was likely to be

committed, or that the unlawful assembly, by which such riot was committed, was likely to be held, did not use all lawful means in his power to prevent such riot or unlawful assembly and that the said Babu Nripendra Bhusan Ray has thereby committed an offence under section 155, Indian Penal Code."

The Inspector of Police, Govinda Bandhu Majumdar, was examined on oath by the learned District Magistrate. The Inspector of Police stated, among others, the following matters:—

Q. Did accused No. 2 know or have reason to belive that an unlawful assembly was being held or would be held at Simakhali?

A. So far as I enquired, I could not find that there was such knowledge on the part of accused No. 2.

Q. Where was accused No. 2 at the time of the unlawful assembly?

A. At Narail, about 15 or 16 miles, I think, from Simakhali.

Q. Who was the agent of the *zemindar* on the spot at the time of the unlawful assembly at Simakhali?

A. At the time of the unlawful assembly at Simakhali which led to the riot at Kholabari, the *zemindar's* local agent, *i. e.* Hemant Kumar Banerjee, was not there, but his dependant, Surendra Nath Bhattacharjee, was there.

Q. At the time of unlawful assembly leading to the riot, where was Babu Hemant Kumar Banerjee *i. e.*, on the 17th September 1922?

A. He was at Bunaganti Cutchery, 12 miles from Simakhali, on 17th September 1922 afternoon.

Q. Did the unlawful assembly take place in the afternoon.

A. Yes.

Q. Then so far you know, there was no agent or manager of the *zemindar* present at Simakhali just before or at the time when the unlawful assembly assembled on 17th September 1922.

A. No, none.

Q. Do you complain of any other unlawful assembly besides that of 17th September 1922.

A. No, no other.

Q. Did you find from any reliable evidence that accused No. 2 had reason to believe that an unlawful assembly such as was actually held at Simakhali on 17th September 1922, would be so held?

A. In the course of investigation of case No. 3 of October 1922, I seized some letters which accused No. 2 produced to me; in one of them I find that the accused No. 2 enjoined or entreated his agent, Hemant Banerjee, to cause demolition of the new *hat*.

Q. What was the date of that particular letter?

A. (Refers to papers) 23rd *Savan*, 1329 (8th August 1922).

Q. What is the language of the letter?

A. *Shattwar bad hata jahate dhansa hoy tahar byebasta kariba.*

Q. How do you know that the accused wrote that letter?

A. From signature.

Q. To whom is the letter addressed?

A. To Superintendent Rakra Mokam Simakhali.

Q. Is it quite clear that that letter refers to the Kholabari *hat*?

A. Yes.

The learned District Magistrate by his order dated the 21st April, 1923, held that sections 155 and 156, Indian Penal Code, were not applicable to this case, but that a case under section 154, Indian Penal Code, against the petitioner Nripendra Bhusan Ray had been made out. The following is the text of the order made by the learned District Magistrate,—"In my opinion sections 155 and 156, Indian Penal Code, are not applicable in this case; for (*i*) neither of the accused is owner or occupier of the land of Kholabari *hat*, respecting which the riot took place; (*ii*) neither accused claims any interest in the land of the Kholabari *hat*; (*iii*,) neither accused claims any interest in the Kohlabari *hat*, *i. e.*, the subject-matter of the dispute which gave rise to the riot—their desire being merely to destroy that *hat*, which I hold not to be the sams as "claiming an interest in the *hat*"; and (*iv*) the last answer (before the supplementary questions) of complainant to my questions, shows that accused No. 1 has not accepted or derived actual benefit from the riot.

"But it appears from the complainant's statement on S. A. that so far as the forming of an unlawful assembly at Simakhali on the land of accused No. 1 is concerned, a case under section 154, Indian Penal Code, is made out against the *zemindar* Babu Nripendra Bhusan Ray (*vide*, especially the last few answers to the supplementary questions to complainant). Summon Babu Nripendra Bhusan Ray of Narail, *Zemindar*, under section 154, Indian Penal Code, for 12th May 1923. I transfer the case to Sub-Divisional Officer, Sadar, for favour of disposal. The complaint against accused No. 2, Babu Bepin Behari Dutta, is dismissed, section 203, Criminal Procedure Code."

The present Rule is directed against the said order of the learned District Magistrate. It is argued on behalf of the petitioner that having regard to the language of sections 154, Indian Penal Code, and to the facts elicited in the examination on oath of the Inspector of Police, the present proceedings are wholly unjustified. Section 154, Indian Penal Code runs as follows:—"Whenever any unlawful assembly or riot takes place, the owner or occupier of the land upon which such unlawful assembly is held, or such riot is committed, and any person having or claiming an interest in such land, shall be punishable with fine not exceeding one thousand rupees if he or his agent or manager, knowing that such offence is being or has been committed, or having reason to believe it is likely to be committed, do not give the earliest notice thereof in his or their power to the principal officer at the nearest Police Station, and do not in the case of his or their having reason to believe that it was about to be committed, use all lawful means in his or their power to prevent it, and, in the event of its taking place, do not use all lawful means in his or their power to disperse or suppress the riot or unlawful assembly."

The ingredients necessary, therefore, for a prosecution under section 154, Indian Penal Code, are the following:

(*a*) Unlawful assembly or riot.

(*b*) Accused is the owner or occupier of the land or has or claims to have an interest in the land.

(*c*) Either the accused or his agent or manager knew that the offence was being or had been committed or had reason to believe that it was likely to be committed.

(*d*) With such knowledge that the offence was being or had been committed, or having reason to believe that it was likely to be committed, the accused did not give notice to the nearest Police Station.

(*e*) The accused having reason to believe that the offence was about to be committed, did not use all lawful means in his power to prevent the offence or in the event of its taking place, did not use all lawful means in his power to disperse or suppress the riot or unlawful assembly.

In the present case it is argued that the charge is not that subsequent to a riot or unlawful assembly, no information had been given to the Police, but that with the knowledge or having reason to believe that such an offence was about to be committed, steps were not taken to prevent a riot. It is pointed out on behalf of the petitioner that on the petition of complaint of the Inspector of Police and on the answers to the supplementary questions, it is clear that there is no allegation that the petitioner or his agent or manager knew or had reason to believe that the offence was being or had been committed and that, therefore, the ingredients required by section 154, Indian Penal Code, had not been satisfied. Knowledge of the landholder or of his agent is the first essential element of an offence under this section.

I have very carefully examined the record and I am of opinion that on the materials on record I am bound to give effect to the contentions urged on behalf of the petitioner. The Inspector of Police, who was examined before the Magistrate, does not allege that the petitioner, who is the *zemindar*, had any knowledge or had any reason to believe that a riot was likely to be committed. Further, the allegation of knowledge on the part of the agent or manager of the

zemindar is not substantiated on the examination of the complainant on oath. It is true that the Inspector did refer to certain letters alleged to have been written by the accused No. 2. but the implication involved therein is plainly inconsistent with what the Inspector himself has stated, *viz.*, that as far as he could find, there was no knowledge on the part of the accused No. 2 that an unlawful assembly or riot was going to take place at Simakhali. It is not necessary to lay particular stress upon the fact that at the time of the unlawful assembly or riot the agent or manager of the *zemindar* was at Narail, which is about 15 or 16 miles from Simakhali, or that the *zemindar's* local agent, Hemant Kumar Banerjee, was at a *kutchery* which is 12 miles distant from Simakhali, but stress must be laid upon the facts elicited in the examination of the complainant on oath, which have been referred to above.

I am not unaware that it has been held that it is not necessary in order to render the owner of land on which a riot takes place criminally liable that he should be aware of the likelihood of such an occurrence and that it is enough that his factor or agent should have taken an active part in the riot to warrant the conviction of the owner under section 154, Indian Penal Code. This Court has held that knowledge on the part of the owner or occupier of the land of the acts or intentions of the agent is not an essential element of an offence under this section and that he may be convicted under it, though he may be in entire ignorance of the acts of his agent or manager. The facts, however, in this case show that the agent or manager had no knowledge and had no reason to believe that an unlawful assembly or riot would be held or committed at Simakhali; this, in my opinion, is really the most important point in this case as far as the petitioner is concerned. On the present record, I am of opinion, that there are no materials justifying the initiation of proceedings under section 154, Indian Penal Code, against the petitioner, Nripendra Bhusan Ray. In my opinion the very greatest caution is required before proceedings are started against persons under section 154, Indian Penal Code. I would, therefore, quash the present proceedings and make the Rule absolute.

This Court has undoubted power to quash proceedings in subordinate Courts. [See *Chandi Pershad* v. *Abdur Rahman* (1) *Choa Lal Dass* v. *Anant Pershad Misser* (2); *Jagat Chandra Mozumdar* v. *Queen Empress* (3) and *Hari Charan Gorai* v. *Srish Chandra* (4)] and in this connection I adopt respectfully what has been said by Woodroffe, J., in *Lekhraj Ram* v. *Debi Pershad* (5). I am fully sensible of the danger of interfering with cases while they are still pending in the subordinate Courts, but I am equally alive to the danger of this Court not being able to say that it is its bounden duty to interfere when it is brought to its notice that a person has been subjected, or is about to be subjected to the harassment of an illegal prosecution.

As my learned brother does not agree to the Rule being made absolute, the case will therefore be laid before the Chief Justice for reference to a third Judge.

Cuming, J.—The facts of the case out of which this application has arisen are set forth in the judgment which has just been delivered by my learned brother and it is unnecessary for me to re-capitulate them.

I would discharge the Rule. While admitting that this Court has the power of interfering with criminal cases whilst they are still pending before the subordinate Courts, I am still of opinion that it is a power the exercise of which is sometimes fraught with considerable danger to the due administration of criminal justice. If parties are to be allowed to come up at every and any stage of a criminal prosecution to challenge the order of the Magistrate, a very powerful weapon is at once placed in the hand of the well-to-do

(1) 22 C. 131; 11 Ind. Dec. (N. S.) 89.
(2) 25 C. 233; 13 Ind. Dec. (N. S.) 157.
(3) 26 C. 786; 3 C. W. N. 491; 13 Ind. Dec. (N. S.) 1103.
(4) 7 Ind. Cas. 747; 38 C. 68; 13 C. L. J. 43; 11 Cr. L. J 525.
(5) 12 C. W. N. 678; 7 Cr. L. J. 499.

to defeat the ends of justice and to protract indefinitely a criminal trial. It seems to me that it is for the Magistrate before whom the case is pending to determine whether the facts proved or the facts alleged do or do not constitute a criminal offence. The accused party has then his remedy by way of appeal or revision, when the case has been finally decided.

The disadvantages of what can only be described as a simultaneous trial by two Courts of the same offence are so obvious that it seems to me that they outweigh any possible advantages which might be gained by following the procedure above indicated. I am very unwilling at this stage to go into the facts of the case for to do so might seriously prejudice the accused but would point out that the mere fact that one of the accused's agent was not actually present at the riot but was some 10 or 12 miles distant does not for one moment prove that he did not know of, or have reason to believe that a roit was about to be committed. I am not prepared to say that the allegations in the complaint if proved would not bring the accused within the mischief of section 154. That is a question which will be determined when evidence is gone into.

Newbould, J.—This Rule was issued upon the Disrtict Magistrate of Jessore calling on him to show cause why his order summoning the petitioner on a charge under section 154, Indian Penal Code, should not be quashed. The Rule was heard by my learned brothers C. C. Ghose and Cuming, JJ., and as they were unable to agree it has been referred to me for decision.

As regards the question of law there is no real difference between them. They both agree that this Court has power to quash a criminal proceeding in its early stages before any evidence has been recorded and they both agree that this is a power which will be only exercised in exceptional cases. The question is whether the present case is one of those exceptional cases.

The facts are fully set out in the judgment of my learned brother C.C. Ghose, J., and I only propose to re-state them very shortly. The petitioner is a *zemindar* who is one of the owners of a *hat* held in a place called Simakhali. A rival *hat* was started at Kholabari about a mile from Simakhali. According to the case for the prosecution on the 17th September 1922 an unlawful assembly was collected at Simakhali and they went from there to Kholabari where they committed a riot. After the conclusion of the trial in the rioting case on the 24th April 1923 the complainant an Inspector of Police filed a written complaint before the District Magistrate charging the petitioner and one Bepin Behary Dutt described as his manager with offences punishable under sections 155 and 156, Indian Penal Code. These offences were alleged to have been committed in connection with the riot at Kholabari. After examining the complainant the Magistrate held that offences under these sections had not been estalished against either of the accused persons but that a case had been made out which justified him in summoning the petitioner to answer a charge under section 154, Indian Penal Code, with reference to the unlawful assembly which had taken place at Simakhali prior to the riot at Kholabari. The necessary ingredients that have to be proved to establish the offence under this section are set out in the judgment of my learned brother, C. C. Ghose, J. It is not disputed that from the petition of complaint and the statement of the complainant on oath the Magistrate could have good ground for believing that all these ingredients except one were likely to be proved by the prosecution. The only question is whether on the petition of complaint and on the complainant's statement there is material for holding that a case can be made out that the petitioner's agent or manager knew or had reason to believe that the offence of being members of an unlawful assembly was likely to be committed.

On behalf of the petitioner great reliance is placed on a statement by the complainant in answer to supplementary

question. The question and answer are as follows:—"Did accused No. 2 know or had reason to believe that an unlawful assembly was being held or would be held at Simakhali. Answer:—So far as I enquired I could not find that there was such knowledge on the part of accused No. 2" But in a later part of his examination the following question and answer appear:—"Did you find from any reliable evidence that accused No. 2 had reason to believe that an unlawful assembly such as was actually held at Simakhali on 17th November 1922, would be so held? Answer:—In the course of investigation of case No. 3 of October 1922 I seized some letters which accused No. 2 produced to me. In one of them I find that accused No. 2 enjoined his agent Hemanta Banerjee to cause demolition of the new *hat*." Considering both these statements of the complainant I find it difficult to hold that there was what can be called in law "no evidence" that the complainant's agent or manager had knowledge that an unlawful assembly was likely to take place at Simakhali. Further if we turn to the written petition we find what amounts to a distinct allegation of such knowledge. It must be remembered that the petition was drafted with a view to starting a case against the accused for having committed offences under sections 155 and 156 with reference to the actual riot at Kholabari and not with a view to the prosecution which was actually ordered with reference to the occurrence at Simakhali. From paragraphs 11 and 12 we find distinct allegation of knowledge on the part of the petitioner's agent or manager. In paragraph 11 of the petition it is alleged that the agent of the Narail *zemindar* collected *lathials* at Simakhali. In paragraph 12 it is alleged that these *lathials* proceeded from the old *hat* of Simakhali and committed rioting with culpable homicide at Kholabari. It is further alleged that Hemant Banerjee, the agent of the Narail *zemindar*, colleted and engaged persons to commit the aforesaid riot. I am told that Hemant Banerjee has since been acquitted on the charge under section 150, Indian Penal Code. Althought the prosecution may not be in a position to prove that he actually collected and engaged persons to commit riot it does not follow that they will not be able to prove what is contained in that allegation, namely, that the riot took place with his knowledge, or that he had reason to believe that the taking place of the unlawful assembly was probable. My learned brother Cuming, J., remarks that it may prejudice the accused if too much is said about the strength of the case for the prosecution and with this I agree.

For the reasons I have given I hold that no sufficient case has been made out for quashing the prosecution of the petitioner at the present stage of the proceeding and I accordingly discharge this Rule.

Z. K. *Rule discharged.*

RANGOON HIGH COURT.

CRIMINAL REVISION No. 12-B OF 1924.
March 24, 1924.
Present:—Mr. Justice Heald.
MAUNG PE—PETITIONER
versus
EMPEROR—RESPONDENT.

Lower Burma Land and Revenue Act (II of 1876), Rules under, rr. 51, 69—Possession of waste land in anticipation of sanction—Liability for payment of revenue and ejectment—Trees planted by would-be grantee—Grant refused—Would-be grantee ordered to remove trees—Failure to remove trees—Occupation—Grazing ground.

A person who is given possession of some State waste land and brings it into cultivation is liable under r. 51, of the Rules made under the Lower Burma Land and Revenue Act, to pay revenue and is also liable to ejectment but he cannot be ordered by the Revenue Authorities to remove the trees planted by him on the land and the mere fact that such trees remain on the land after it is constituted a grazing ground and he is ejected therefrom does not constitute occupation of the grazing ground by him and, therefore, he is not punishable under r. 69 of the said Rules.

Criminal revision upon reference made by the Sessions Judge, Tavoy and Margui, for review of an order of the Sub-Divisional Magistrate, Margui, in his Criminal Regular Trial No. 83 of 1923.

MAUNG PE *v.* EMPEROR.

JUDGMENT.—On the 19th of May 1917, Maung Pe applied for a grant of an area of some 13 acres of State waste land for rubber cultivation.

Notice of his application was duly published and no objections were received.

In anticipation of the issue of a grant he brought part of the land under cultivation.

On the 30th of August 1918 the Township Officer recommended the issue of the grant.

On the 26th of March 1919 the Deputy Commissioner refused the grant on the ground that the land ought to be reserved as a grazing ground. At the same time he ordered that steps be taken to reserve the land as a grazing ground.

Apparently the land was notified as a grazing ground in Grazing Ground Proceedings No. 7 of 1918-19 of the Mergui District Office.

On the 8th of March 1920, Maung Pe filed an objection to the notification on the ground that he had actually been assessed to revenue on his cultivation of the land and had paid Rs. 48-9 0 as land revenue. His objection was rejected.

On the 17th of April 1920 he applied for a refund of the land revenue which he had paid for the year 1919-20. The Deputy Commissioner said that he was prepared to remit the revenue if Maung Pe vacated the land and that the only way he could vacate the land was to remove the rubber trees.

On the 20th of August 1920 the Deputy Commissioner recorded that Maung Pe must vacate the land at once and that until he had removed the rubber trees, he had not vacated. When he vacated the revenue will be refunded.

On the 6th of September 1920 the Sub-Divisional Officer was directed to see that the land was vacated.

The matter was allowed to drag on until May 1923, when Maung Pe's prosecution under r. 69 of the Rules under the Lower Burma Land and Revenue Act for occupying a finally demarcated grazing ground was ordered. It then appeared that the land had never been shown on the maps of the Land Records Department as grazing ground and a dispute arose between the Deputy Commissioner's Revenue and Land Records Offices, which suggests that even then the land had not been finally demarcated as a grazing ground.

On the 3rd September 1923 a complaint of an offence under r. 69 was filed against Maung Pe.

No evidence was offered to show that the grazing ground had ever been finally demarcated but Maung Pe was convicted on his admission that rubber trees planted by him were still on the land. He was fined Rs. 50 which he paid. He was also ordered to cut down the trees root and branch within a month.

He applied in revision to the Sessions Judge who has reported the case to this Court with a recommendation that the conviction be set aside and the fine refunded, and that the order to cut down the trees be set aside.

It is perfectly clear that the conviction cannot be justified and in my opinion the action of the Revenue Authorities was entirely misconceived. Under r. 51, Maung Pe was liable to pay revenue and was also liable to ejectment. But I see no reason to believe that that rule empowered the Revenue Authorities to order him to remove the trees which he had planted. A mere fear that he might subsequently trespass on the grazing ground and tap the trees would not justify such an order, and if he did so, after the grazing ground had been finally demarcated, he would be liable to prosecution under r. 69. The mere fact that trees, which he had planted before the grazing ground was ever constituted or ever thought of, remained on the ground after he had been ejected could not possibly constitute occupation of the grazing ground by him.

The conviction and sentences are set aside and the fine which has been paid will be refunded. The Magistrate's order that the rubber trees must be cut down root and branch within a

month is also set aside, as being made without jurisdiction.

S. D. *Conviction set aside.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 332 OF 1924.
July 10, 1924.
Present:—Mr. Justice Macpherson.
GANGA SINGH—COMPLAINANT—PETITIONER
versus
RAMBHAJAN SINGH AND OTHERS—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 439—Revision against acquittal—Interference, when justified—Police report, use of—Final report of investigating officer used without examining him, effect of—Error of law—Ground for setting aside acquittal.

The power of interference in revision with a judgment of acquittal is sparingly exercised and ordinarily only in cases where it is urgently demanded in the interests of public justice. But it is neither possible nor expedient to lay down general principles. The High Court will interfere where circumstances require it. [p. 274, col. 2.]

The final report and diary of an investigating officer, who was not called as a prosecution witness, might be used to suggest means of further elucidating points which needed clearing up but only of elucidating them by legal evidence. The use of such a report as evidence is an error in law but it is not by itself a good ground for setting aside an acquittal. [p. 276, col. 2.]

An error of procedure of a grave character would afford ground for interference but not a mere error of improper admission of evidence, which was not essential to the result which might have been come to wholly independently of it. [*ibid.*]

Dal Singh v. *Emperor*, 39 Ind. Cas. 311; 44 I. A. 137; 15 A. L. J. 475; 1 P. L. W. 661; 19 Bom. L. R. 510; 21 C. W. N. 818; 26 C. L. J. 13; 6 L. W. 71; 22 M. L. T. 31; (1917) M. W. N. 522; 18 Cr. L. J. 471; 86 L. J. (P. C.) 140; 33 M. L. J. 555; 44 C. 876; 11 Bur. L. T. 54; 13 N. L. R. 100 (P. C.), followed.

Criminal revision from a decision of the Sessions Judge, Gaya, dated the 31st March 1924, reversing that of the Magistrate, First Class, Gaya, dated the 31st January 1924.

Messrs. *G. C. Pal* and *S. S. Bose*, for the Petitioner.

Messrs. *Hasan Imam* and *Rai T. N. Sahai*, for the Opposite Party.

JUDGMENT.—This is an application in revision by the private prosecutor to set aside the acquittal of the opposite party by the Sessions Judge of Gaya on appeal.

There is no question that the High Court has power under section 439 of the Code of Criminal Procedure to set aside an acquittal by a Subordinate Court. In not a few instances this Court has exercised the power and the case of *Jitan Dusadh* v. *Domoo Sahoo* (1) is an example. But an examination of those instances appears to indicate that in practice the exercise of the power has been largely restricted to cases which have not been tried out. For instance the case cited dealt with an acquittal under section 247 of the Code of Criminal Procedure. The practice of the Court accords with the rule laid down by Jenkins, C. J., in *Faujdar Thakur* v. *Kasi Choudhuri* (2). That rule has been quoted with approval by a Bench of this Court of which I was a member in *Gulli Bhagat* v. *Narain Singh* (3), and *Rajkishore Dubey* v. *Kamto Peshwar Dubey* (4) (Criminal Revision No. 229 of 1923). Thus the power of interference in revision with a judgment of acquittal is sparingly exercised and ordinarily only in cases where it is urgently demanded in the interests of public justice.

But it is not possible nor would it be expedient to lay down a general principle. The Court will interfere where the circumstances require it. And in the present case there is a differentiating consideration which was apparently not present in previous cases and which may have induced the Division Bench to issue a rule. The acquittal of the accused in the Sessions Court consequentially nullified

(1) 37 Ind. Cas. 519; 1 P. L. J. 264; 20 C. W. N. 862; 18 Cr. L. J. 151; 2 P. L. W. 409.

(2) 27 Ind. Cas. 186; 42 C. 612; 19 C. W. N. 184; 21 C. L. J. 53; 16 Cr. L. J. 122.

(3) 77 Ind. Cas. 734; 5 P. L. T. 404; 2 Pat. 708; 25 Cr. L. J. 446; (1924) A. I. R. (Pat.) 283; 2 P. L. R. 165 and 187 Cr.

(4) 39 Ind. Cas. 311; 44 I. A. 137; 15 A. L. J. 475; 1 P. L. W. 661; 19 Bom. L. R. 510; 21 C. W. N. 818; 26 C. L. J. 13; 6 L. W. 71; 22 M. L. T. 31; (1917) M. W. N. 522; 18 Cr. L. J. 471; 86 L. J. P. C. 140; 33 M. L. J. 555; 44 C. 876; 11 Bur. L. T. 54; 13 N. L. R. 100 (P. C.).

an order of the Magistrate under section 545 granting financial compensation to the private prosecutor.

The facts necessary for an appreciation of the case for the petitioner are briefly as follows :—There is a *pind* which is plot No. 22 of Patkhaulia running north and south between the *Diwarthan ahar* (plots Nos. 10 to 21 of Patkhaulia) on the west and plot No. 23 of Patkhaulia and plot No. 483 of Majhauli on the east. Plot No. 483 is north of plot No.23. East of plot No. 483 is plot No. 484 and east of plot No. 484 is plot No. 486 of the same village. The natural flow of the water is south to north. The prosecution case was that a *gera* or embankment extended from the *pind* east-ward in the northern part of plots Nos. 483, 484 and 486, the object of which was to hold up the water so that the *dhan* fields to the north might be irrigated therefrom, and that the accused cut 25 cubits of that *gera* in plot No. 483 near the *pind*, so that the water behind the *gera* flowed away and was lost and thus the supply of water for agricultural purposes was diminished. The accused denied the existence of any such *gera* and asserted on the authority of the *fard-ab-pashi* that the surplus water of the *ahar* flowed by a *kanwah* (overflow) situated in plot No. 21 at the northern end of the *pind* eastward into plot No. 483 of Majhauli and then back southward into plot No. 23 of Patkhaulia and then eastward. The complainant's case was that that *kanwah* no longer existed, the outlet being by a *pakka bhao* (opening) in the southern end of the *pind* from the *ahar* into plot No. 23. The accused contended that the *bhao* does not affect the *kunwah*, the former being intended to drain the *ahar* and the latter to discharge the surplus water when the *ahar* is full.

The Police reported the case to be false and the complainant impugned the report of the Investigating Sub-Inspector. The Trying Magistrate made a local inspection and found a *gera* existing in plots Nos. 484 and 486, and it is now clear that the *gera* in these plots as well as a broad *bandh* north of plot No. 23 do exist, the former apparently being made after the preparation in 1914 of the Survey Map. In his judgment the Magistrate held that the *gera* had existed for some years, that half of the *gera* across plot No. 483 had been cut by the accused, and that the opening which exists therein was not due to *kanwah* water passing through. He convicted the opposite party some under section 430 and some under section 430 read with section 114, Indian Penal Code, and sentenced them to fines half of which he directed to be given to the complainant as compensation under section 545 of the Code of Criminal Procedure.

In appeal the learned Sessions Judge found that the case for the prosecution was not true, and that the appellants did not commit the offence for which they have been convicted. He accordingly allowed the appeal and directed the fines to be refunded.

It is now contended that his judgment is vitiated by an illegality patent on the face of the judgment in that he made use contrary to law of the final report of the Investigating Sub-Inspector of Police who was not examined as a witness. In support of the contention reference is made to the remarks of their Lordships of the Judicial Committee in *Dal Singh* v. *Emperor* (4). In reply Mr. Hasan Imam for the opposite party submits that the Judge had materials before him on the record and came to conculsions thereon on which he was bound to acquit and only tested them by a reference to the Police papers.

The learned Sessions Judge first considered whether the *gera* exists and found that it did not extend cross the narrow strip of land in plot No. 483 up to the *pind*. He pointed out that the Magistrate in his inspection note had merely spoken of the *gera* at this point as non-existent and continued.

"Obviously the most important witness on this point was the Sub-Inspector, who enquired into the case, and must have seen the place very soon after the occurrence. For some unexplained reason he has not been examined. If a substantial embankment, described by the prosecution witness as thigh high and three to three and a half cubits

broad, had just been removed by the appellants for a distance of twenty to twenty-five cubits, as alleged, the Sub-Inspector must have seen marks of demolition, and, as he has not been examined, I feel bound to point out that, in his final report he makes the following remarks, "the alleged *gera* 25 cubits in length which was said to have been cut, did not appear to have been freshly cut, rather it looks like a water course through which the surplus water of the villages Tekra, Madarpur and Patkhaulia *ahar* No. 22 flows." It appears therefore: that had the Sub-Inspector been examined, he would not have supported the prosecution on this important point."

It would seem, therefore, that a view adverse to the prosecution case that a *gera* existed in plot No. 483, suggested itself to the Appellate Court because the Investigating Sub-Inspector had not been examined and that the Court tested that view by reference to an opinion which the Sub-Inspector had recorded on the point at issue.

The learned Judge then considered whether the *kanwah* still existed and after pointing out that on this point also the evidence of the Sub-Inspector would have been important, he found on the evidence on the record that it did exist in plot No. 21. He proceeded:

"I find therefore that the prosecution has failed to show that any *gera* existed in plot No. 483 or that the *kanwah* had ceased to exist or that the *ahar* no longer drains through plot No. 483 as recorded in Survey; rather it appears to me that the appellants are right on all these points."

He next pointed out that the *band* north of plot No. 23 did not affect the case as the water now flows direct east from that point, and found as follows:

"It is clear therefore that although a *gera* exists in plots Nos. 484 and 486 and no doubt holds up a certain amount of water for the irrigation of paddy it is confined to those plots, and did not extend into plot No. 483."

It is obvious that on such findings an acquittal must follow. But in the final paragraph of his judgment the learned Judge went on to give further reasons for holding that the prosecution case as presented to the Court was not true. Most of them are based on the record but he also again referred to the final report in connection with certain alleged statements of prosecution witnesses to the Investigating Officer as to which they had been cross-examined, and remarked. "Here again the Sub-Inspector was a necessary witness in the case".

In referring to the final report of the Investigating Officer for the purposes mentioned the learned Sessions Judge erred in law. The final report and diary of the Investigating Officer might be used to suggest means of further elucidating points which needed clearing up but only of elucidating them by legal evidence. Thus the Sessions Judge on a perusal of the final report might well have examined the Sub-Inspector as a witness or directed him to be examined by the Trying Magistate, and in that manner his testimony as to what he saw on the spot and what was said to him by witnesses, would subject to all just exceptions have become legal evidence.

But the mere fact that there has been an error of procedure is not by itself good ground for setting aside an acquittal. An error of procedure of a grave character would afford ground for interference but not a mere error of improper admission of evidence, which was not essential to a result which might have been come to wholly independently of it. Such is the law as laid down by their Lordships of the Judicial Committee in *Dal Singh* v. *Emperor* (4) in respect of a conviction and the latter part of it is certainly not less applicable to an acquittal. In the present case it has been found that the testimony of the first independent person who visited the place of occurrence has been withheld by the prosecution so that an inference as to the non-existence of a *gera* in plot No. 483 may be drawn, that the prosecution story as to *kanwah* is false, and that of the accused true, that the entry in the Record of Rights as to the course of irrigation through plot No. 483 which is in favour of defence, has not been rebutted, that there was delay in lodging the first

information, and that there is no reference therein to the mob of 100 men mentioned in the evidence in Court, which fact leads to an inference that it is a subsequent development in the prosecution case. These findings, none of which are vitiated by an error of law, are when taken in combination at least as consistent with the truth of the defence as with the truth of the prosecution story, and clearly the acquittal might have been, and from the tenor of the judgment apparently would have been reached on these considerations independently of the inadmissible evidence. An examination of the record also satisfied me that a different result is not probable, if a re-hearing of the appeal is directed.

In these circumstances the order of acquittal ought not to be set aside in revision. The Rule is accordingly discharged.

S. D. *Rule discharged.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 678 OF 1923.

December 7, 1923.

Present:—Mr. Justice Moti Sagar.

WALU RAM—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 494 - Bigamy — Mona *Sikh*—Anand *marriage, validity of.*

A Hindu professing the Sikh religion though a *Mona* may have his marriage performed according to the *anand* rites, and such a marriage would be valid for all intents and purposes, such as an offence under section 494, Penal Code. [p. 277, col. 2.]

Petition, under section 439, Criminal Procedure Code, for revision of an order of the Sessions Judge, Mianwali, dated the 9th February 1923, affirming that of the Magistrate, First Class, with section 30 powers, Mianwali, dated the 15th January 1923.

The Hon'ble *Pandit Sheo Narain*, R. B., for the Petitioner.

JUDGMENT.—The petitioners Walu Ram and *Musammat* Kaki Bai have been found guilty by a Section 30 Magistrate at Mianwali of an offence under section 494, Indian Penal Code, and have been sentenced to three years' rigorous imprisonment each. On appeal to the Sessions Judge their conviction and the sentences have been upheld. They have now filed two separate applications for revision to this Court, Walu Ram through Pandit Sheo Narain and *Musammat* Kaki Bai through jail.

The facts are fully stated in the judgments of the Courts below, and it is not necessary to recapitulate them. It is alleged on behalf of the prosecution that *Musammat* Kaki Bai, who was originally married to the complainant Sukha Ram, re-married Walu Ram during the lifetime of her former husband, and thus committed the offence of bigamy punishable under section 494, Indian Penal Code. As against Walu Ram it is alleged that he knew that *Musammat* Kaki Bai was the wife of Sukha Ram and that in re-marrying her he abetted the offence of bigamy. It has been found by the learned Sessions Judge that the charge of bigamy has been fully established and that both the accused are guilty.

In revision the first contention raised by *Pandit* Sheo Narain on behalf of the petitioner Walu Ram is that the prosecution has wholly failed to establish a valid marriage between Sukha Ram and *Musammat* Kaki Bai, and that the conviction should consequently be set aside. It is pointed out that in the complaint lodged by Sukha Ram it was stated that his marriage had been performed according to the Dharam Shastra, while the evidence produced shows that his marriage with *Musammat* Kaki Bai was celebrated according to the *anand* rites. It is argued that Sukha Ram was an *Arora* by caste and was, therefore, incompetent to enter into an *anand* marriage. It is, however, not denied that a Hindu professing the Sikh religion may have his marriage performed according to the *anand* rites, and that such a marriage would be valid for all intents and purposes. In the present case it is clear from the statement of the complainant that though he is a *mona* yet he is a believer in the Sikh religion and that it was for this reason that he had his

marriage performed in accordance with the *anand* rites. In the Court below no objection was taken by the learned Pleader for the petitioner as regards the factum and validity of this marriage, and it was admitted that the evidence on the record clearly established a valid marriage between the complainant and *Musammat* Kaki Bai. In face of this admission and the statement made by the complainant himself in the Court below that he was a Sikh by faith, it is now idle to contend that the marriage was not valid and that the conviction is consequently illegal.

Next it is argued that a valid marriage between *Musammat* Kaki Bai and the accused Walu Ram has not been established. On this point the finding of fact arrived at by the learned Sessions Judge is that the marriage did take place, and I am not prepared to go behind this finding in revision. As regards the validity of the marriage, it is clear from the evidence produced on behalf of the prosecution that the marriage between the two accused was performed according to the Sikh rites, and that such a marriage would be valid if the husband professed the Sikh religion. The accused Walu Ram is the brother-in law of one Gurdit Shah Singh who is obviously a Sikh by religion. The marriage is alleged to have been performed in the Dharamsala owned by Gurdit Shah Singh. No evidence was produced by the defence to show that the petitioner was a Hindu and not a Sikh by faith. The presumption in these circumstances would be in favour of the validity of the marriage, and I must, therefore, hold that the second contention raised by the petitioner is equally futile. I uphold the conviction but, in view of the fact that *Musammat* Kaki Bai had been deserted by her first husband and not properly looked after by him, I also hold that at the time of her marriage with Walu Ram the latter very probably did not know that her first husband was living. In these circumstances the sentence of three years' rigorous imprisonment would be rather excessive. The accused have already been in Jail for about ten months and are now on bail. In my opinion the punishment already undergone by them would be quite sufficient to meet the ends of justice, and I order accordingly.

Z. K. *Conviction upheld; Sentences reduced.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 576 OF 1923.
July 19, 1923.
Present :—Mr. Justice Newbould and Mr. Justice C. C. Ghose.

NATABAR KHAN—ACCUSED—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 263, scope of—Summary trial of appealable case—Charge not framed—Conviction, legality of.

Section 263 of the Criminal Procedure Code is restricted in its application to cases in which no appeal lies, and exempts a Magistrate from framing a charge in such cases. But in a case tried summarily in which the sentence passed is appealable, there is no such exemption. The conviction of a person, therefore, in such a case without framing a charge is illegal.

Rule against an order of the Sessions Judge, Midnapur, dated the 4th June 1923, affirming that of the Additional District Magistrate, Midnapur, dated the 9th May 1922.

Babu *Phanindra Nath Das*, for the Petitioner.

Mr. *Orr*, for the Crown.

JUDGMENT.—The petitioner in this case has been convicted of theft and sentenced to one month's rigorous imprisonment and to pay a fine of Rs. 25. From the record and the explanation submitted it would appear that the petitioner pleaded guilty. But the Trying Magistrate and the learned Sessions Judge who heard the appeal appear to have overlooked the fact that this was a case in which an appealable sentence was passed. Section 263 applies to cases in which no appeal lies and exempts the Magistrate from framing a formal charge in such cases. But there is no such exemption in a case tried summarily in which as in the present case, the sentence passed is appealable. Further undersection 262, Criminal Procedure

Code, it is necessary that in a summary trial the procedure prescribed for warrant cases shall be followed in warrant cases with certain exceptions. One of the distinguishing points between a summons and warrant case is that in a warrant case sufficient evidence to support the charge must be recorded before a charge can be framed and the accused called on to plead. This apparently was not done in the present case.

That being so we must hold that the conviction of the petitioner was illegal. We accordingly set aside the conviction and sentence passed on the petitioner and direct that he be tried according to law. The fine, if paid, will be refunded.

W. C. A. *Rule made absolute.*

LAHORE HIGH COURT.

CRIMINAL REVISION CASE No. 698 OF 1924.
June 20, 1924.
Present:—Sir Henry Scott-Smith, Offg. Chief Justice.
ATRU—ACCUSED—PETITIONER
versus
Musammat MAHOU—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 488—Order for maintenance, form of—Magistrate, whether can direct separate residence for wife.

Under section 488 of the Criminal Procedure Code a Magistrate is not allowed to make any other order except a monthly cash allowance.

An order directing the husband to give his wife 12 maunds of grain each harvest and to provide her with a separate house is illegal.

Case reported by the Sessions Judge, Jullundur, with his letter No. 124, dated the 1st May 1924, under section 438 of the Criminal Procedure Code.

REFERENCE.—The applicant in this case, a man called Atru, was directed by the Magistrate to give his wife 12 *pucca* maunds of grain each harvest and Rs. 2 per month by way of clothing allowance and he was also directed to provide the woman with a separate house at the village of Gosal. All this the Magistrate purported to do under section 488 of the Criminal Procedure Code. According to that section a Magistrate may direct that any person who having sufficient means neglects to maintain his wife, should pay her a monthly allowance not exceeding one hundred rupees. There is nothing in the Code which allows a Magistrate to make any other order except a monthly cash allowance. The order as to a separate residence and payment of grain seems to me totally illegal and I therefore forward the proceedings to the High Court with the recommendation that the order of the Magistrate be cancelled. This will not preclude the woman *Musammat* Mahon from applying to the Magistrate for a monthly allowance as allowed by section 488, Criminal Procedure Code.

Mr. *Sagar Chand*, for the Petitioner.

ORDER.—The order passed by the Magistrate is obviously an illegal one as pointed out by the learned Sessions Judge and must therefore be, and is set aside. The finding of the Magistrate is that Atru's offer, to maintain his wife, if she lives with him, is a *bona fide* one and that the woman is not entitled to live separately and claim separate maintenance. Under the circumstances she is not entitled to separate maintenance and her application is dismissed.

K. S. D. *Application dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REFERENCE No. 20 OF 1924.
August 4, 1924.
Present:—Mr. Pullan, A. J. C.
RAM RATAN AND ANOTHER—ACCUSED—APPLICANTS
versus
RAM SAGAR—OPPOSITE PARTY.

Summons case, tried as warrant case—Accused not allowed to cross-examine prosecution witnesses on re-call—Prejudice—Procedure.

A Magistrate tried a summons case as a warrant case and framed charge against the accused who intimated their desire to further cross-examine

prosecution witnesses and produce defence. But when the witnesses were re-called, the Court discovering its mistake, cancelled the charge, refused to permit cross-examination and gave judgment against the accused:

Held, that the accused were prejudiced in their defence owing to the wrong procedure of the Court and must be given a further opportunity of cross-examining prosecution witnesses.

Case reported by the Second Additional Sessions Judge, Lucknow at Unao, by his order, dated the 14th May 1924.

Mr. *H. N. Das*, for the Applicants.

Mr. *P. C. Gupta*, for the Opposite Party.

ORDER.—This is an application in revision of an order passed by an Honorary Magistrate of the Third Class which has been referred to this Court by the Second Additional Sessions Judge of Lucknow. The applicants were put upon their trial for an offence under sections 447 and 426 of the Indian Penal Code. Prosecution witnesses were examined and a few questions were asked by the applicants who were undefended. The Magistrate framed a charge and the applicants stated that they would cross-examine the prosecution witnesses and produce defence. A date was fixed and the prosecution witnesses were re-called at the expense of the applicants. On the day of hearing the Magistrate having ascertained that this was not a warrant case but a summons case, cancelled the charge, refused to permit the cross-examination of the witnesses and ultimately gave judgment against the applicants. As the learned Second Addditional Judge points out the Magistrate's action was technically incorrect, and there is no doubt that this procedure led the applicants to suppose that they would have an opportunity of further cross-examination. This being so they can fairly say that they were prejudiced in their defence, and it is only proper that they should have a further opportunity of cross-examining the prosecution witnesses. I, therefore, accept the referrence, set aside the conviction and sentences passed by the Court of first instance and direct that the case be taken up again from the point where the Magistrate refused to give the applicants a further right of cross-examination.

S. D. *Conviction set aside.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 283 OF 1924.

May 16, 1924.

Present:—Mr. Justice Scott-Smith.

MAHNI AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Identification evidence, when should be accepted.

A witness's evidence of identification given in Court should only be accepted if he identified the same person whom he had previously picked out in the identification parade in the Jail. [p. 281, col. 1.]

Appeal from an order of the Magistrate, First Class, with powers under section 30 of the Criminal Procedure Code, Jhang, dated the 17th March 1924.

Chaudhri *Zafarullah Khán*, for the Appellant.

Mr. *Abdul Rashid*, for the Crown.

JUDGMENT.—This is a joint appeal by 13 persons who have been convicted of the abduction of an unmarried girl *Musammat* Rani, daughter of Langru, under section 366 of the Indian Penal Code and have been sentenced to seven years' rigorous imprisonment each.

A great deal of violence was used in the abduction, and the medical evidence shows that some 12 of the prosecution witnesses received more or less severe injuries. One of them Mohabata (P. W. No. 25) received a grievous injury on the head and Raju (P. W. No. 20) had his ulna bone broken. Two others received injuries from sharp-edged weapons and many other head injuries were caused by blunt weapons. The facts have been given in great detail in the judgment of the Magistrate, and it is not denied that the girl was abducted. Counsel, however, urges that the motive alleged on behalf of the prosecution is a very improbable one. He has, however, laid special stress on the cases of five of the appellants in regard to whom he urges that the evidence of identification is weak. In my opinion there is nothing very improbable in the alleged motive, and the only important question which, it appears to me, has to be decided is which of the appellants, if any, took part in the abduction. I have carefully con-

sidered the evidence of the eye-witnesses, and I find that in the case of eight of the appellants at all events there is ample evidence in support of their convictions. These are Sardara, Sohna, Majhi, Hassan Ali, Nura, Amira, Dalmir and Thoba. The cases of Manak, Nadri, Salihon, Mammin and Mahni need to be considered in detail. During the course of the Police investigation an identification parade was held in the Jail at which prosecution witnesses picked out certain persons as having taken part in the abduction. The same witnesses again identified some or all of the accused persons in Court. It is contended and I consider with force that a witness's evidence of identification given in Court should only be accepted if he identified the same persons whom he had previously picked out in the identification parade in the Jail. Now, as regards Manak I find that the only evidence against him is that of P. W. Nos. 5, 8 and 17. P. W. No. 5, however, did not identify him in the Jail, and though P. W. No. 8 identified him in the Jail, he did not specifically name him in Court but only specifically named accused Nos. 1, 2, 4 and 8. (I am adopting the numbers given in the judgment of the learned Magistrate). P. W. No. 17 also included him in the 'rest of the accused' and did not name him specifically at the trial. In my opinion the evidence against Manak is insufficient for his conviction.

I next take the case of Nadri. The only witnesses, who gave evidence against him in Court, are P. W. No. 5, P. W. No. 8 and P. W. No. 17. P. W. No. 5 did not identify him in the Jail, and the evidence of P. W. Nos. 8 and 17 is open to the same objection as in the case of Manak.

I next take the case of Salihon. He was only identified in Court by P. W. Nos. 13 and 14 who did not identify him in Jail. Counsel for the Crown admits that the evidence against Manak, Nadri and Salihon is very weak.

As regards Mammin the evidence of P. W. Nos. 8 and 9 is not sufficiently specific and the only witness whose evidence is worth anything against him is P. W. No. 21, the daughter-in-law of Langru. She admittedly knew him before and yet his name was not mentioned in the first information report. Under these circumstances I do not think it would be safe to base his conviction upon the uncorroborated evidence of one witness.

Next comes the case of Mahni. P. W. Nos. 8 and 9 gave evidence against him which is open to the objection already stated, and the only witness who gives any important evidence against him is P. W. No. 11. This man admittedly has given evidence against him on a previous occasion, and there is also the fact that Mahni belongs to a different tribe from that of the other appellants, and I do not see why he should have joined them.

I, therefore, accept the appeal so far as to set aside the convictions and sentences of Manak, Nadri, Salihon, Mammin and Mahni, and acquit them and direct that they be forthwith released from custody.

It is urged that the sentence of seven years' rigorous imprisonment passed upon the rest of the appellants is too heavy. With the exception of Dalmir who is a boy of 18 or 19 years of age, all of them are grown up men. The offence was a very serious one and they could all have been convicted of causing grievous hurt under sections 325 and 149 of the Indian Penal Code as well as of abduction and could have been sentenced separately. The abduction was committed by a large number of men and great violence was used, and under the circumstances, I cannot consider the sentence to be excessive except in the case of Dalmir. Dalmir is one of two sons of Yara who is said to be absconding and to have taken a principal part in the occurrence, and he probably acted under the influence of his father and elder brother. I, therefore, reduce the sentence in his case to one of two years' rigorous imprisonment. As regards the other appellants the appeal is dismissed.

K. S. D. *Appeal dismissed.*

PATNA HIGH COURT.

MISCELLANEOUS JUDICIAL CASE No. 67 OF 1924.

June 24, 1924.

Present:—Sir Dawson Miller, KT., Chief Justice, Mr. Justice Foster and Mr. Justice Kulwant Sahay.

MATHURA PRASAD SINGH—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Legal Practitioner—Professional misconduct—Certificate cancelled—Character reinstated—High Court's duty to give another chance after 7 years.

If a Legal Practitioner, whose certificate is cancelled for a serious offence in the course of his professional duties, realising the gravity of his offence, makes up his mind for the future to live a straightforward and honest life and the High Court is satisfied that since the cancellation of his certificate, 7 years back, he has honestly endeavoured to reinstate his character, it is the manifest duty of the High Court to give him another chance by cancelling the order debarring him from further practice. [p. 283, cols. 1 & 2.]

An application by a *Mukhtar* for cancellation of the order dated the 12th March, 1917, debarring him from practice and for his reinstatement.

Messrs. *Hasan Imam*, *K. P. Jayaswal*, *J. P. Sinha*, *L. K. Jha* and *S. Nooruddin*, for the Petitioner.

JUDGMENT.

Miller, C. J.—This is an application on behalf of Mathura Prasad Singh formerly practising as a *mukhtar* at Motihari. He was guilty of a serious offence in the course of his professional duties which I need not refer to in detail here as it has been the subject of an enquiry and was referred to again when an application was made to this Court for his reinstatement. On the 12th March, 1917, in consequence of the offence to which I have referred, his case was dealt with by a Bench of three Judges of this Court and owing to the gravity of the offence which was proved, his certificate was cancelled and he was debarred from further practice. Five years later in May 1922 he applied to this Court asking the Court to reinstate him in his practice as a *mukhtar* alleging that since he was debarred some five years earlier he had endeavoured to lead an honest and straightforward life and certain certificates from various people giving him a good character were produced before the Court. We considered, however, on that occasion, in view of the gravity of his offence, that the probationary period through which he had passed was not sufficient to enable us to arrive definitely at the conclusion that he had in fact reinstated his character so as to make it safe for the Court to reinstate him as a member of an honourable profession. The certificates produced on that occasion were not very full and did not really give the Court sufficient information upon which it could safely act. Consequently the application was at that time refused.

The present application, made some two years later is fortified by full particulars of the life which the petitioner has led since he was debarred from further practice in March 1917. It appears that in 1918 he did some work for Mr. Kailaspati, a Vakil of this Court and Mr. Kailaspati has given him a certificate of good character stating that he found him well behaved, diligent and honest in his work. In the year 1919, he was engaged as an Assistant Manager in the Cawnpore Branch of the "General Trading Company" during a part of that year. He was in charge of the stock of papers as well as of the sales and cash and the certificate given by Mr. Upadhya, a Vakil of this Court, whose family was connected with that business, states that he discharged his duties faithfully and honestly, and that subsequently in the same year he worked at Mr. Upadhya's *zemindari* at Ramnagar in the Champaran district being partly in charge of the collection work and partly in charge of Court cases, that he proved diligent and trustworthy and did his work well. Mr. Upadhya further says that he comes of a respectable *kayasth* family. In the early part of the year 1920 he obtained employment with the "Jharia Iron and Brass Works" at Jharia in Manbhum and the proprietor of that concern states that during that time he found him honest and truthful. Later in the same year he worked for about six months with the "Choudhury Coal Co." also at Jharia. He kept correspondence and

accounts and he also purchased and sold coal. The proprietor of that concern states that he found him straightforward and reliable and he left his service of his own accord when he got employment with Messrs. Dulichand-Prabhudayal of Jharia. He then entered the service of the Dulichand Prabhudayal Coal Co. at Jharia in the year 1920, the proprietor of which concern Prabhudayal Gupta states that he thoroughly satisfied himself as to his character and ability before giving him an appointment. He was appointed as manager of the firm in January 1921 and since that time he has remained in that service. His duties were to look after Court cases concerning the firm, the purchase and sale of coal and to keep accounts and also to go on occasions to the *mufassil* to realise arrears from customers and he had the management of work on a considerable scale and large sums of money passed through his hand during that time. He was getting Rs. 50 per month *plus* a commission upon the net profits, and the proprietor certified that his conduct has been quite satisfactory and praiseworthy and he has proved himself trustworthy and he strongly recommends him for any position of trust.

That shortly is the history of this young man since he was debarred from further practice in 1917. There are in addition a number of certificates from judicial and executive officers at Dhanbad, that is, in the neighbourhood in which he was residing and in which he was employed. They are all to the same effect that they have found him honest and straightforward and further that they have found him courteous and self-respecting. I need not refer to them in detail. I am glad to find also that in the petition which he himself has presented to this Court, he fully recognises the gravity of his offence and has expressed his great penitence and his determination to set himself a high standard of morality and honesty as a guide in his future life. I have no doubt that this young man whose certificate was cancelled after two years' practice as a *mukhtar* has since that time honestly endeavoured to reinstate his character. He has also realised that his offence was a grave one and has made up his mind for the future to live a straightforward and honest life. In these circumstances seeing that it was seven years ago that he was debarred I think our manifest duty is to give him another chance. I am satisfied that he is endeavouring to lead an honest and straightforward life and I hope in the future he will continue to do so. I think that his application should be granted. The order made on the 12th March, 1917, debarring him from further practice will be cancelled and he may apply in the ordinary course for the grant of a fresh certificate.

Foster, J.—I agree.

Kulwant Sahay, J.—I agree.

S. D.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 753 OF 1923.
(CRIMINAL REVISION PETITION No. 608 OF 1923).
March 26, 1924.

Present:—Mr. Justice Venkatasubba Rao.

KURUBA SANKARA CHENNA BASAPPA—ACCUSED—PETITIONER

versus

KILLI MANAPPA—COMPLAINANT—RESPONDENT.

Evidence Act (I of 1872), s. 167—Improper admission of evidence—Revision—Remand—Finding on admissible evidence.

Under section 167 of the Evidence Act, the improper admission of evidence is not ground of itself for a reversal of any decision if it appears to the Court that, independently of the evidence improperly admitted, there is sufficient evidence to justify the decision. [p. 284, col. 2.]

A Court competent to deal with facts should ignore the evidence wrongly admitted and consider whether there still remains sufficient evidence to support the judgment. [*ibid.*]

Mohur Singh v. *Ghureeba*, 6 B. L. R. 495; 15 W. R. 8; 2 Sar. P. C. J. 616; 2 Suth. P. C. J. 379 (P. C.), relied on.

If this has not been done, the High Court on revision will ordinarily remand the case for a finding with reference to admissible evidence only.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate, Penukonda, in Criminal Appeal No. 31 of 1923, preferred against the judgment of the Court of the Sheristadar, Second Class, Magistrate, Kalyandrug, in Calendar Case No. 115 of 1922.

Dr. *S. Swaminadhan*, for the Petitioner.
Mr. *T. Richmond*, for the Respondent.
The Public Prosecutor, for the Crown.

ORDER.—The Appellate Magistrate erred in treating as evidence against the first accused admissions of the second accused. Under section 167 of the Indian Evidence Act, the improper admission of evidence is not ground of itself for a reversal of any decision, if it appears to the Court that, independently of the evidence improperly admitted, there is sufficient evidence to justify the decision. If I were competent to deal with facts, I should ignore the evidence which ought not to have been admitted and then consider whether there still remains sufficient evidence to support the conviction, see *Mohur Singh* v. *Ghureeba* (1). But I am dealing with the matter in revision and I cannot adopt this course. Ordinarily in such circumstances, the case will be remanded and the Magistrate will be directed to give a finding with reference to admissible evidence only. But unfortunately there was already one remand and I do not think any useful purpose will be served by prolonging this enquiry. It further appears that in so far as the civil rights of the parties are concerned, they have entered into a compromise and that a decree has been passed giving effect to it. Dr. Swaminadhan says that he will be quite satisfied if I reduce the sentence to the period of imprisoment already undergone. I think, in the circumstances, this is quite fair and I accordingly make that order and direct that the fine if it has been collected shall be refunded. The balance of the sentence shall be remitted.

V. N. V.
S. D. *Balance of sentence remitted.*

(1) 6 B. L. R. 495; 15 W. R. 8; 2 Sar. P. C. J. 616; 2 Suth. P. C. J. 379 (P. C.).

PATNA HIGH COURT.

CRIMINAL REVISION No. 293 OF 1924.
June 13, 1924.
Present:—Mr. Justice Adami and Mr. Justice Sen.

PRAYAG GOPE AND OTHERS—ACCUSED—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 143, 144, 379—Common object—Theft—Separate sentences—Criminal Procedure Code (Act V of 1898), ss. 342, 349, 540—Examination of accused after examination of Court witnesses—Submission of case after conviction.

Section 342 of the Criminal Procedure Code cannot be brought into play after a Court witness is examined, be he the complainant or any other witness. [p. 285, col. 1.]

A case under section 349, Criminal Procedure Code, is not to be submitted after conviction but only after expression of opinion that the accused is guilty. [*ibid.*]

Where the common object of an unlawful assembly was theft, the members of the assembly cannot be sentenced separately under sections 379 and 143 or 144, Penal Code. [p. 285, col. 2.]

Criminal revision from the decision of the Officiating Sessions Judge, Muzafferpur, dated the 7th May 1924, affirming the order of the Sub-Divisional Magistrate, Sitamarhi, dated the 7th April 1924.

Mr. *C. M. Agarwala*, for the Petitioners.
The Assistant Government Advocate, for the Crown.

JUDGMENT.

Adami, J.—This case comes before the Court in its revisional jurisdiction. The petitioners have been sentenced to various terms of rigorous imprisonment under sections 379 and 144 and 143, Indian Penal Code. The first two petitioners have been sentenced to 18 months under sections 379, 75 and 6 months under section 144, the sentences running concurrently. The other three have been sentenced to three months under section 143 and a fine of Rs. 50 under section 379. The value of the properties stolen was Rs. 50.

Mr. Agarwala on behalf of the petitioners puts forward three points. The first is that after the defence had closed their case, the Court called the complainant as a Court witness and examined him and failed thereafter to examine the accused under section 342, Criminal Procedure Code. The second point is that the case was tried by a Deputy Magistrate of the Second Class who after convicting the petitioners, forwarded the case to the Sub-Divisional Magistrate for sentence because he held that the sentences which the petitioners should receive would be greater than he had power of inflicting. The third point is that though the common object of the unlawful assembly was the theft of crops, the petitioners have been sentenced separately under sections 379 and 143 or 144.

With regard to the first point I do not think that this Court will be inclined to interfere since the petitioners seems to be in no way prejudiced. The complainant was called as a Court witness and examined as such by the Court. The judgment of the lower Appellate Court shows that the Court questioned this complainant not as to occurrence but as to some matter in relation to the title of the lands. The petitioners had a chance of cross-examining him but refrained from doing so. If they were unwilling to cross-examine him as a Court witness it would be unlikely that they would have been anxious to make any statement to explain away any evidence given by the complainant as a Court witness. I do not think that section 342, Criminal Procedure Code, can be brought into play where a Court witness is examined, be he complainant or any other person.

With regard to the second point, section 349 clearly states that if the Magistrate considers a person to be guilty and to deserve a larger penalty than the Magistrate himself can impose, the Magistrate should send the case to a superior Court for imposing a fitting sentence. In the present case the Deputy Magistrate of the Second Class convicted the petitioners. This was wrong. After an expression of opinion as to the petitioner's guilt, the Magistrate should have forwarded the case without any record of conviction.

On the third point there is no doubt that the common object being such as it is described in the charge the petitioners could not be separately convicted and sentenced under the two sections—section 379 and section 143 or section 144 and the conviction and sentence under one of these two sections must be set aside. The difficulty is to know which conviction and sentence should be set aside. If the conviction and sentences under section 379 are set aside, then also, the two petitioners, who have been subjected to a heavier punishment by reason of their previous conviction, will also escape the effects of the previous convictions. Ordinarily the case is one which should go back for re-trial owing to the Trial Court not carrying out the provisions of section 349, but as pointed out by Mr. Agarwala the case has a larger element of civil nature in it and also the petitioners have already served a considerable part of their sentence.

With regard to the previous convictions it is to be remembered that those convictions were passed in 1898 and 1902 and there is nothing to show that these persons have since then led otherwise than a good life.

We set aside the convictions under section 379, Indian Penal Code and reduce the sentences to the period already undergone under sections 143 and 144. The fine under section 379, if paid, will be refunded.

Sen, J.—I agree.

S. D. *Sentences reduced.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 213 OF 1924.
May 28, 1924.
Present:—Mr. Justice Boys.
EMPEROR—PROSECUTOR
versus
BALDEO PRASAD AND ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 435 (4), 476—Court, whether includes successor-in-office—Jurisdiction—Direct reference by District Magistrate, whether competent.

EMPEROR *v.* BALDEO PRASAD.

A successor in a Court is the same Court as his predecessor in that Court and, therefore, the predecessor who has departed for another Court can no longer be held to be a presiding officer of the first Court. [p. 287, col. 2.]

Muhammad Ibrahim v. *Emperor*, 27 Ind. Cas. 145; 12 A. L. J. 1003; 16 Cr. L. J. 97 and *In the matter of Nawal Singh*, 14 Ind. Cas. 766; 34 A. 393; 9 A. L. J. 481; 13 Cr. L. J. 302, followed.

There should be no judicial action by an inferior Court by way of criticism of its superior Court. [p. 288, col. 2.]

The High Court will not ordinarily accept a reference direct from the District Magistrate. He should submit it through the proper channel, *i.e.*, the Legal Remembrancer. [p. 288, col. 1.]

Criminal reference made by the District Magistrate, Cawnpore, dated the 9th April 1924.

The Assistant Government Advocate, for the Crown.

Mr. *J. M. Banerji*, for the Opposite Parties.

JUDGMENT.—In this case one Haider Husain, an agent of two persons, Baldeo Prasad and Lachman Prasad, lodged a complaint under section 409 of the Indian Penal Code against one Nand Kishore, on the 10th of April 1923. That case was enquired into and dismissed under section 203 of the Criminal Procedure Code on the 20th of April 1923. The subsequent proceedings deal with the question of whether Haider Husain and Baldeo Prasad and Lachman Prasad should or should not be prosecuted under section 211 of the Indian Penal Code for having lodged or abetted the lodging of a false complaint against Nand Kishore. In view of these subsequent proceedings and the delay that had occurred in taking action against Baldeo Prasad and Lachman it is important to note that no new facts are alleged to have come to light since the 20th of April 1923, when the case against Nand Kishore was dismissed. This is important because there has been a tendency to lay down a hard and fast rule that delay is a ground for setting aside an order for prosecution. It may under certain circumstances be almost a sufficient ground in itself but in other cases it may be no ground at all. It is possible to imagine a case in which the commission of an alleged offence may not have actually come to light for many months or even years after it had been committed. In the present case it is clear that all the facts which justified, if they do justify, the prosecution of these men were known on or before the 20th of April 1923 when the case was dismissed.

The next step was an application on the 23rd of April 1923 by Nand Kishore to Mr. Christie, then City Magistrate, who had tried the original case for sanction to prosecute Haider Husain under section 211 of the Indian Penal Code. No attempt was then made to obtain sanction to prosecute Haidar Husain's employers Baldeo Prasad and Lachman Prasad. The sanction was granted on the 6th of July 1923. Eventually owing to the passing of Act XVIII of 1923 which came into force on the 1st of September 1923, it was thought necessary and steps were taken to alter the sanction granted by Mr. Christie to a complaint under section 476 of the Criminal Procedure Code. This apparently, so far as I am informed, brought the matter to the notice of the prosecuting Inspector who then applied on the 30th of October to Babu Prem Chand Seth who had succeeded Mr. Christie as City Magistrate, for an order under section 476 of the Criminal Procedure Code against Baldeo Prasad and Lachman Prasad, the employers of Haidar Husain. It will be noticed then that no steps whatever were taken against Baldeo Prasad and Lachman Prasad from the 20th of April when the original case was dismissed to the 30th of October 1923. The learned District Magistrate in referring the case speaks of "the obstructive tactics of the accused." It is true that Haider Husain was taking the matter of his own prosecution from Court to Court. It is probably true that that involved the record going from the Court of the City Magistrate to the Sessions Court and to the High Court, but I cannot see even if that is so, that it accounts in any way whatever for Nand Kishore not having applied to prosecute Baldeo Prasad and Lachman Prasad at the same time that he applied against Haider Husain when all the materials that he was ever going

to get were already in his possession and in that of the Court. Nor do I think that the prosecuting Inspector was justified in making an application against Baldeo Prasad and Lachman Prasad so many months afterwards. It is quite likely, and I am certainly ready to accept, that he was in no way to blame for an application in regard to these two men not having been made before. But I do think that after a lapse of nearly six months he should have declined to take any action. It is not necessary for me to determine whether this delay would or would not be sufficient in itself for setting aside the order for prosecution as there are other points which will have to be dealt with and one of which will appear by itself sufficiently strong to make it inevitable that the reference of the District Magistrate be returned and the order of the Assistant Sessions Judge quashing the complaint under section 476 of the Criminal Procedure Code against Baldeo Prasad and Lachman Prasad be maintained.

To make the next point clear it is necessary to add one or two further facts. On the 30th of October 1923, as I have already stated, the Prosecuting Inspector applied to prosecute Baldeo Prasad and Lachman Prasad in the Court of Babu Prem Chand Seth who had now become City Magistrate. On the 21st of January 1924, the Prosecuting Inspector applied again to Mr. Christie, now no longer in charge of the City, for an order under section 476 of the Criminal procedure Code against Baldeo Prasad and Lachman Prasad. It is not very clear how he came to make a second application, whether it was of his own initiative because he thought it better to apply to the Magistrate who had already granted a similar order against Haider Husain or whether it was due to some objection raised by Baldeo Prasad and Lachman Prasad in the Court of Babu Prem Chand Seth. Both suggestions are made but it is not very material to determine exactly what motives led to the filing of the second application. It was, in fact, filed and Mr. Chistie on the 8th of February 1924, passed an order under section 476 of the Criminal Procedure Code against Baldeo Prasad and Lachman Prasad. That order was appealed to the learned Assistant Sessions Judge, Mr. Ram Chander Saksena, who set it aside on the 14th of March 1924. He has referred to the delay that took place but the real point on which he based his order setting it aside is that Mr. Christie had no jurisdiction to pass the order under section 476 of the Criminal Procedure Code when he had ceased to be acting in the capacity of City Magistrate in which capacity he had decided the original case. The learned Assistant Sessions Judge refers to the cases *Chuni Lal* v. *Harbans Rai* (1) and *Mallu Khan* v. *King Emperor* (2). He remarks that authority to the contrary has been shown to him but he does not say what authority. The learned District Magistrate in referring the case says "my object in making this application is to obtain a clear ruling of the Hon'ble Court with reference to proceedings under section 476, Criminal Procedure Code, in the case of Magistrate who has been transferred to another Court before such proceedings are taken." The learned District Magistrate remarks "there appears to be a support for both the views expressing (*sic*) in the rulings of the Hon'ble High Court." He does not tell this Court wherein he finds the conflict. It appears to me beyond the shadow of a doubt that Mr. Christie had no jurisdiction whatever. It has been clearly pointed out in the case of *Muhammad Ibrahim* v. *Emperor* (3) and *In the matter of Nawal Singh* (4), that a successor in a Court is the same Court as his predecessor in that Court. The corollary to this is perfectly clear that the predecessor who has departed to another Court can no longer be held to be a presiding officer of the First Court. There have been some doubts expressed by other High Courts,

(1) 1 A. L. J. 315; 1 Cr. L. J. 596.
(2) 1 A. L. J. 388; 1 Cr. L. J. 692.
(3) 27 Ind. Cas. 145; 12 A. L. J. 1003; 16 Cr. L. J. 97.
(4) 14 Ind. Cas. 766; 34 A. 393; 9 A. L. J. 481; 13 Cr. L. J. 302.

but they have since mostly, if not all, come to this view. In any case the view of this Court has long since been clear. Mr. J. M. Banerji for the accused also rightly relies on the fact that the wording of section 476 of the Criminal Procedure Code is now different to that under the old Code, making the matter still more clear. He points out that now the offence must be one which appears to have been committed in or in relation to a proceeding in that Court. In the present case that cannot by an stretch of imagination mean anything but the Court of the City Magistrate and that it is only that Court that can pass the order under section 476 of the Criminal Procedure Code.

The last point that I have to notice is that the District Magistrate himself referred this case to the High Court through the Sessions Judge instead of through the Legal Remembrancer. Had I noticed this, when the reference was first put up, it would undoubtely have been my duty to refuse to accept the reference and to return it to be produced before this Court through the proper channel. As to what that proper channel is, a reference to the cases of *Ram Bakhsh* v. *Durjan* (5), *Emperor* v. *Jamna Bai* (6), and *Emperor* v. *Ganga* (7) will make clear. So far as this Court is concerned it is for the District Magistrate to act either through the Government-Advocate or through the Legal Remembrancer as he may be advised to be the proper course. I understand from the Assistant Government Advocate that he should act through the Legal Remembrancer but that is not for me to determine. It is sufficient for me to say that this Court will not ordinarily accept a reference direct. When the matter was brought to my attention I thought as the case was now before the Court it was best to deal with it. The object of the rule, I have stated, is sufficiently clear, for it only carries out the principle underlying section 435, clause (4), namely, that there should be no judicial action by an inferior Court by way of criticism of its superior Court.

For the reasons I have already given the order of the Assistant Sessions Judge is maintained and the reference returned.

S. D. *Reference returned.*

(5) 9 A. 392; A. W. N. (1887) 65; 5 Ind. Dec. (N. S.) 696.

(6) 28 A. 91; 2 A. L. J 589; 2 Cr. L. J. 515; A. W. N. (1905) 198.

(7) 23 Ind. Cas. 1007; 36 A. 378; 12 A. L. J. 519; 15 Cr. L. J. 107.

RANGOON HIGH COURT.

CRIMINAL REVISION No. 471-B OF 1923.

October 18, 1923.

Present:—Mr. Justice May Oung.

SYA KYAW—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 250—Compensation without examination of all prosecution witnesses.

Compensation under section 250, Criminal Procedure Code, can be awarded only after the complainant has had an opportunity of producing all his evidence.

Where, therefore, the Court refuses to examine all the witnesses produced by the complainant whether their names appear in the list filed or not, the order for compensation is illegal.

Criminal revision from an order of the Township Magistrate, Kawa, in Criminal Regular No. 10 of 1923.

Mr. *Mg Tsain*, for the Petitioner.

ORDER.—Compensation under section 250 can be awarded only after the complainant has had an opportunity of producing all his evidence. In this case, the Trial Court refused to examine two witnesses whose names did not appear in the list filed but who were brought to the Court by the complainant in order to save expense. Thus the complainant was illegally prevented from putting forward his whole case.

On the merits, also, there appears to have been a genuine dispute as to the boundaries of the land, and it is possible that the complainant acted on a mistaken belief.

Be that as it may, the failure of the Township Magistrate to comply with the law vitiates his order for compensation and I must set it aside.

S. D. *Order set aside.*

QURBAN ALI *v.* MAJID HUSAIN.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 361 OF 1923.

July 9, 1924.

Present:—Mr. Justice Kanhaiya Lal.

Meer QURBAN ALI—DEFENDANT—APPELLANT

versus

Shaikh MAJID HUSAIN AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 8, 20—Grant of heritable and transferable rights by zemindar—Validity of grant—Fixed-rate tenancy—Thekadar—*Mortgage of non-transferable rights, validity of.*

The grant by a *zemindar* of a lease in perpetuity giving the lessee heritable and transferable rights, does not create a tenancy at a fixed rate, inasmuch as a fixed-rate tenancy cannot be created by a contract with the *zemindar*; and any rights which can be granted by the *zemindars* must be consistent with the provisions of section 20 of the U. P. Tenancy Act. Such a lessee might be said to be a *thekadar* within the meaning of the said section but even in that case his interest is not transferable. Therefore if such a lessee mortgages his rights under the lease, the mortgage is void and unenforceable against the mortgagor in his lifetime, or after his death without having an heir, against the *zemindar*. All that the mortgagee would be entitled to is a simple money-decree against the assets of his mortgagor. [p. 289, col. 2; p. 290, col. 1.]

Second appeal against a decree of the Subordinate Judge, Jaunpur, dated the 23rd November 1922.

Mr. *Iqbal Ahmad*, for the Appellant.

Mr. *P. L. Banerji*, for the Respondents.

JUDGMENT.—*Musammat* Naurasi was the tenant of a certain holding from which the *zemindars* sought to eject her. A settlement was subsequently arrived at between her and her husband, Mata Badal, on the one hand and the *zemindars* on the other, whereby the latter granted a lease in perpetuity to Mata Badal of the same holding, giving the lessee heritable and transferable rights. Some time after this lease was executed Mata Badal and *Musammat* Naurasi made a possessory mortgage of the holding in favour of the predecessor-in-title of the present plaintiffs for a sum of Rs. 200, out of which Rs. 12 were taken for the payment of certain arrears of rent due to the *zemindars*. The validity of the mortgage forms the subject-matter of contention in this appeal. The Court of First Instance found that the mortgage was invalid, inasmuch as it offended against the provisions of section 20 of the Agra Tenancy Act (II of 1901). The lower Appellate Court, however, came to the conclusion that the mortgage was valid under section 20, clause 3, of the said Act. Section 20 provides that the interest of an occupancy tenant or a non-occupancy tenant, other than a *thekedar*, shall not be transferable in execution of a decree of a Civil or Revenue Court, or otherwise than by a voluntary transfer between persons in favour of whom, as co-sharers in the tenancy, such a right originally arose, or who have become by succession co-sharers therein; but the interest of a *thekedar* shall, subject to the terms of his lease, be heritable but not transferable. Both Mata Badal and *Musammat* Naurasi are dead. They left two sons who were impleaded as defendants to the present suit, but both of them died during the pendency of the suit, leaving no issue. The *zemindars* thereupon took possession of the tenancy and they resisted the claim of the plaintiffs to enforce their mortgage. In the plaint the tenancy mortgaged was described as a tenancy at a fixed rate, but the Trial Court has found that the mortgagors were not tenants at fixed rates within the meaning of section 8 of the U. P. Tenancy Act. It is immaterial whether *Musammat* Naurasi and her husband were non-occupancy tenants or occupancy tenants before they took a permanent lease of the holding from the *zemindars*. As observed in *Bachchi* v. *Bachchi* (1) a fixed rate tenancy cannot be created by a contract with the *zemindar*; and any rights which can be granted by the *zemindars* must be consistent with the provisions of section 20 of the U. P. Tenancy Act, which forbid the sale of a holding in execution of a decree of a Civil or Revenue Court, and also a voluntary transfer, except in favour of persons, who are co-sharers in the tenancy. It might be said that Mata Badal was a *thekedar* of transferable

(1) 28 A. 747; 3 A. L. J. 513; A. W. N. (1906) 76.

rights under the lease granted to him by the *zemindars*, but the interest of a *thekedar* is not permitted by law to be transferable. The *zemindars* took no step to avoid the mortgage within the time allowed by law, but all the same the holding cannot be sold in execution of a decree, and as pointed out in *Ram Sarup* v. *Kishan Lal* (2) the mortgage cannot, despite the contract contained in the lease, be enforced. The *zemindars* claim the holding by right of escheat and despite the covenant entered in the original lease, if the mortgage was void and unenforcible as against the mortgagors, it cannot be enforced against the *zemindars*, after the escheat, nor can the holding be put up to sale in enforcement of the mortgage. The mortgagees can only get a simple money-decree against the assets of their mortgagors in the hands of the defendants, if any. The appeal is therefore allowed and in lieu of the decree passed by the lower Appellate Court a simple decree for money will be prepared with costs incurred by the mortgagees in the Courts below and future interest from the date of the suit till payment at 6 per cent. per annum, against the assets of the deceased. Considering the peculiar circumstances of the case and the conduct of the *zemindars* who are seeking to deprive the mortgagees of their money after they had given the lessee transferable rights, I make no order as to the costs incurred by the defendants-appellants here or any of the Courts below.

S. D. *Appeal accepted.*

(2) 29 A. 327; 4 A. L. J. 306; A. W. N. (1907) 76.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 147 OF 1921.

March 31, 1924.

Present:—Mr. Justice Newbould, and Mr. Justice B. B. Ghose.

MUHAMMAD SAFAR JAMA KHAN *alias* JANGLU KHAN AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Raja SATYA NIRANJAN CHAKRAVARTI—PLAINTIFF—RESPONDENT.

*Co-sharer—Joint land—*Hat *started by two co-sharers—Subsequent improvement by one—Other co-sharer whether excluded from profits.*

When a *hat* is started on a joint land by two co-sharers, the fact that after the *hat* has been established one co-sharer makes improvements in the *hat* at his own expense, does not give him the right to exclude the other co-sharer from the *hat* that had been started for their joint benefit. [p. 291, col. 1.]

Appeal against a decree of the Subordinate Judge, Birbhum, dated the 17th January 1921.

Dr. *Jadunath Kanjilal* and Babu *Jyotish Chandra Sarkar*, for the Appellants.

Babu *Sitaram Banerjee*, for the Respondent.

JUDGMENT.—The facts of this case as found by the lower Court are as follows:—The land in suit about $1\frac{1}{2}$ *bighas* in area appertains to a Reveune free *Mahal* bearing *Touzi* No. 237 of the Birbhum Collectorate. The plaintiff, known as the Raja of Hetampur, is the *patnidar* of $12\frac{1}{2}$-annas share of that Estate and the defendants are owners of the remaining $3\frac{1}{2}$-annas share of the *zemindari*. On the 6th *Pos* 1320, corresponding to December 1913, a *hat* was opened on this land. It was the plaintiff's case that he alone opened this *hat*, but the finding is that it was established both by the plaintiff and the defendants. At first some thatched huts were erected from materials collected by the plaintiff's manager and the defendants from their joint tenant. About a month later it was proposed to build corrugated iron sheds in place of the thatched huts. The defendants were asked to pay their share of the expenses of erecting these iron sheds and they expressed their inability to

do so. Thereupon the plaintiff had the iron sheds built at his own cost. The plaintiff also at this time set up a marble slab describing the *bazar* as Brahma *Bazar* after his son Brahma Narain Chakravarti. In the year 1325 the defendants attempted to levy tolls and there was dispute which led to proceedings under section 145, Criminal Procedure Code, being instituted. These proceedings were dropped and to prevent future disputes the plaintiff instituted the present suit for declaration of his right to take the 16-annas share of the profits arising from the *hat*. On these findings of fact the lower Court has granted the plaintiff a decree declaring his exclusive title to that portion of the *hat* on which the corrugated iron sheds stand and to the exclusive profits arising therefrom. The remainder of the claim has been disallowed.

We are unable to agree with the learned Subordinate Judge that on the facts found the plaintiff is entitled to a decree declaring his rights to the whole of the profits arising from any portion of the *hat*. The law to be applied in a case when one co-sharer takes exclusive possession of joint land is laid down in the cases of *Watson & Co.* v. *Ramchand Dutt* (1) and *Lachmeswar Singh* v. *Manowar Hossein* (2) and our attention has also been drawn to the case of *Madan Mohan Saha* v. *Rajab Ali* (3). But the principles laid down in these cases are not applicable to the facts as found in the present case. Since the *hat* was started on joint land by both the plaintiff and the defendants, it is not a case of one co-sharer taking possession to the exclusion of the other. The fact that after the *hat* had been established the plaintiff made improvement in the *hat* at his own expense would not give him the right that he claims in this suit to exclude his co-sharer from the *hat* that had been started for their joint benefit.

(1) 18 C. 10; 17 I. A. 110; 5 Sar. P. C. J. 535; 9 Ind. Dec. (N. S.) 7 (P. C.).
(2) 19 C. 253; 19 I. A. 48; 6 Sar P. C. J. 133 (P. C.).
(3) 28 C. 223.

On behalf of the plaintiff is filed a cross-objection to this appeal and it is contended that the finding of fact should be reversed and it should be held that the plaintiff established the *hat* after purchasing the rights of the tenants in occupation of the land. In support of this he relies on the deeds of sale Exhibit I executed by one Katifan Bibi in 1903 in favour of Ishan Mudi conveying 10 *cottas* of rent free land, Exhibit 3 a deed of sale by which Ishan Mudi sold this land and an additional 5 *cottas* of rent paying land to the plaintiff on the 3rd February 1919, and also Exhibit 4 a deed of sale by which the widow of Gadadhar sold some land to the plaintiff on the 2nd March 1919. These two last deeds recite that the land was actually sold to the plaintiff before the establishment of the *hat*. But the evidence given to prove these deeds does not support the recitals in them. Ishan Mudi himself says that the land was forcibly taken from him by the *zemindar*, and it was not until he threatened to bring a suit that the sale deed was executed. The witness who proves Exhibit 4 says nothing about any purchase prior to the date of the deed. It is also suggested that the witnesses for the plaintiff who support the defendants' story that the *hat* was started by both the plaintiff and defendants have been induced to give false evidence because the defendants have considerable influence in the locality. We cannot reject the evidence of the plaintiff's own witnesses on this ground. Not one or two but practically all the plaintiff's witnesses agree that the *hat* was started by both parties. We cannot believe that if the land had really been bought by the plaintiff before the *hat* was started he would have asked his co-sharer defendants to join with him in starting the *hat*. We have no doubt that this fact is true and this is fatal to the case for the plaintiff.

The result is that the plaintiff's suit fails. We accordingly decree this appeal, reverse the decree of the lower Court and dismiss the suit. The defendants-appellants will get their costs in this and in the lower Court.

The cross-objection is disallowed. We make no order for costs in the cross-objection.

Appeal allowed.
K. S. D. *Cross-objection dismissed.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 81 OF 1924.
July 2, 1924.
Present:—Mr. Justice Boys.
MEGI MAL AND ANOTHER—PLAINTIFFS—APPLICANTS
versus
HIRA LAL AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

U. P. Honorary Munsifs Act (II of 1896), ss. 8 (2), 9—Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887), s. 21—Civil Procedure Code (Act V of 1908), s. 21—Small Cause case transferred to Honorary Munsif's Court—Appeal.

Where a case is transferred from a Small Cause Court to an Honorary Munsifs Court under section 8 (2) of U. P. Honorary Munsif's Act and not under section 24, Civil Procedure Code, the Honorary Munsif, for the purpose of hearing the case, does not become a Small Cause Court Judge and, therefore, his decision is appealable.

Civil revision from an order of the Additional Subordinate Judge, Saharanpur, dated the 12th March 1924.

Mr. *St. C. Thompson*, for the Applicants.

Mr. *P. L. Banerji*, for the Opposite Party.

JUDGMENT.—The only ground urged in this revision is the fourth ground which was added by a subsequent application. It is suggested that because this case was transferred from the Court of a Judge of Small Causes to the Court of a Honorary Munsif that therefore the Honarary Munsif for the purpose of hearing the case became a Small Cause Court Judge and no appeal lay from his decision to the Subordinate Judge. This is to assume that the transfer was under section 24 of the Code of Civil Procedure, and to ignore the effect of section 9 of Act II of 1896 under which the Honarary Munsif is appointed. He is declared by that section to be a Civil Court under the Bengal, North Western

Provinces and Assam Civil Courts Act (Act XII of 1887) and under that Act an appeal lies from his decision to the Subordinate Judge. It is only necessary to add that the case was transferred to the Court of the Honarary Munsif under the provisions of section 8, clause 2 of Act II of 1896 and not under provisions of section 24 of the Civil Procedure Code. The application is dismissed.

S. D. *Application dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 85 OF 1923.
August 2, 1923.
Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Chotzner.
RAJ RAJESWARI JIU—PLAINTIFF—APPELLANT
versus
GATI KRISHNA CHAKRABARTI AND OTHERS—DEFENDANTS—RESPONDENTS.

Contempt—Breach of undertaking given to Court—Penalty—Procedure—Undertaking to pay deficit Court-fees, failure to carry out—Appeal, maintainability of—Court Fees Act (VII of 1870), s. 12 (2)—Additional Court-fee, when to be levied—Interpretation of Statutes—Fiscal Statutes.

The breach of an undertaking given to the Court by a litigant, pending proceedings, on the faith of which the Court sanctions a particular course of action or inaction, is misconduct amounting to contempt. [p. 295, col. 1.]

When a person is guilty of such contempt he places himself in a perilous situation so as not to be heard by the Court till he has purged his contempt. [*ibid.*]

But the rule imposing such a penalty is limited to the proceedings in which the contempt occurs. [p. 295, col. 2.]

Case-law referred to.

Plaintiff's suit was held to have been undervalued and he undertook to make up the deficiency in Court-fees before the decree was drawn up. The Court, thereupon, proceeded to try the suit on the merits and it was eventually dismissed. The plaintiff failed and refused to carry out his undertaking with respect to the payment of deficit Court-fees. He preferred an appeal against the decree of the Trial Court with respect to costs:

Held, that the plaintiff was guilty of contempt and his appeal could not, therefore, be entertained. [p. 296, col. 1.]

A provision of the character of that contained in clause (2) of section 12 of the Court Fees Act should be strictly construed and additional

RAJ RAJESWARI JIU *v.* GATI KRISHNA.

Court-fees should be levied from a party litigant only in exact conformity with the precise words of the Statute, although provisions in fiscal Statutes should not be so construed as to furnish a chance of escape and a means of evasion. [p. 294, col. 1.]

Case-law referred to.

Appeal against a decree of the Subordinate Judge, Midnapore, dated the 16th September 1922.

Mr. *S. C. Maity* and Babu *Apurba Charan Mookerjee*, for the Appellant.

Babus *Hamendra Nath Sen* and *Gopendra Nath Das*, for the Respondents.

JUDGMENT.—This appeal raises a question of some novelty and of considerable importance.

The plaintiff, who is the appellant in this Court, instituted a suit for recovery of possession of land and mesne profits in the Court of the Second Munsif at Midnapur. The subject-matter of the litigation was valued at Rs. 600 and Court-fee was paid accordingly. The defendants objected that the suit had been undervalued and that if properly valued it would be found to be beyond the pecuniary jurisdiction of the Court where it had been instituted. This point was investigated and on the 1st December, 1921, the Munsif came to the conclusion that the value of the subject-matter of the litigation was Rs. 6,000. The result was that the plaint was returned to the plaintiff for presentation to the proper Court. On the 21st December, 1921, the plaint was presented in the Court of the Subordinate Judge at Midnapore; but notwithstanding the finding of the Munsif, the suit was valued at Rs. 1,125 and Court-fee was paid accordingly. The defendants objected that the suit had been undervalued. The objection was manifestly of vital importance from a two-fold standpoint. In the first place, if the value of the suit was Rs. 6,000 instead of Rs. 1,125, the forum of a possible appeal would be the High Court and not the Court of the District Judge. In the second place, if the value was Rs. 6,000 instead of Rs. 1,125, a considerable amount of additional Court-fee would be leviable from the plaintiff. The suit was taken up for trial on the 14th September, 1922. The hearing lasted for three days and on the 16th September, 1922, the suit was dismissed on the merits. The judgment of the Subordinate Judge embodied a direction upon the plaintiff to pay the deficit Court-fee. The parties are not agreed as to what happened at the trial and how this order came to be made. This much is clear that the Court-fee demanded by the Subordinate Judge was not paid. The decree dated the 23rd October, 1922, recited, first, that although the suit had been valued at Rs. 1,125 by the plaintiff, its value had been determined by the Subordinate Judge to be Rs. 6,000, and, secondly, that the deficit Court-fee had not been paid up to that date by the plaintiff. On the 3rd February 1923, the decree was amended in respect of costs. In the decree as originally drawn up, the costs had been calculated on the basis of a valuation of Rs. 1,125. The decree was amended and costs were calculated on the basis of a valuation of Rs. 6,000. The decree further directed that separate costs would be paid to the different sets of defendants. The plaintiff who was apparently satisfied with the decree as originally drawn up, now found himself in a position of embarrassment and on the 20th April, 1923, lodged the present appeal in this Court against the amended decree. The grounds were directed not to the merits but to the question of costs. The memorandum of appeal was valued at the difference between the original and amended costs and the Court-fee was paid accordingly. The Stamp Reporter did not fail to notice the note made in the decree that the deficit Court-fee had not been paid by the plaintiff; but the question could not be considered at that stage, because till the records were received, it could not be ascertained whether the amount due from the plaintiff had or had not been deposited in the lower Court. On the receipt of the records, the matter has now been placed before us for orders.

The appellant has urged that there is no provision of the law which entitles this Court to compel him to pay the deficit Court-fee. The respondent has relied upon the provisions of section 12

of the Court Fees Act, 1870. The first-clause of the section provides that the decision of the Trial Court upon the question of valuation is final as between the parties to the suit. The second clause provides for the correction of error, if any, committed in this respect by the Trial Court. The second clause is in these terms:

"But whenever any such suit comes before a Court of Appeal, reference or revision, if such Court considers that the said question has been wrongly decided, to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided and the provision of section 10, paragraph ii, shall apply."

Paragraph ii of section 10 provides that where, in the opinion of the Court, the valuation of the suit has been wrongly estimated and the plaintiff has consequently been required to pay an additional fee, the suit shall be stayed until the additional fee is paid. If the additional fee is not paid within such time as the Court shall fix, the suit shall be dismissed.

The appellant contends that section 12 is by its terms inapplicable. The question of valuation has not been wrongly decided by the Trial Court, and though there has been a detriment of the revenue, it is attributable, not to an erroneous decision of the Court upon the question of valuation, but to the failure of the plaintiff to carry out the direction of the Court. In these circumstances, it is argued that clause (2) of section 12 is of no assistance. It may be conceded that a provision of this character should be strictly construed and that additional fee should be levied from a party litigant only in exact conformity with the precise words of the Statute; although provisions in fiscal Statutes should not be so construed as to furnish a chance of escape and a means of evasion: *Inland Revenue Commissioners* v. *Oliver* (1), *Partington* v. *Attorney-General* (2), *Cox* v. *Rabbits* (3), *Pryce* v. *Monmouthshire Ry. and Canal Co.* (4), *Oriental Bank Corporation* v. *Wright* (5), *Tennant* v. *Smith* (6), *Secretary of State for India* v. *Scoble* (7), *United States* v. *Thirty-six Barrels of Wine* (8) and *Attorney-General* v. *Furness Railway Co.*, (9). But this manifestly raises the question, what is the position of a litigant who takes up such an attitude. That must be determined with reference to the facts of the particular case before the Court.

It is not disputed that in the normal course of events the question of valuation should have been decided in the first instance and an order made by the Subordinate Judge upon the plaintiff to pay the deficit Court-fee before he proceeded to try the suit on the merits. There has been a divergence of statement between the parties as to how there was a departure from the provisions of the law on the subject. The defendants maintain that the suit was tried on the merits because the plaintiff gave an undertaking that the deficit Court-fee would be paid before the decree was drawn up. The plaintiff maintains, on the other hand, that no such undertaking was given. We have examined the affidavits placed before us and we have come to the conclusion that the story narrated by the defendants should be accepted as true. It is inconceivable that an experienced Subordinate Judge would have proceeded to the trial of the suit on the merits unless an undertaking had been given that the deficit Court-fee would be paid. What the plaintiff has done in substance is that he has obtained a trial of the matters in controversy on the merits and he has

(1) (1909) A. C. 427; 78 L. J. P. C. 146; 101 L. T 140; 53 S. J. 649; 25 T. L. R. 707.

(2) (1869) 4 H. L. 100 at p. 122; 38 L. J. Ex. 205; 21 L. T. 370.

(3) (1878) 3 A. C. 473 at p. 478; 47 L. J. Q. B. 385; 38 L. T. 430; 26 W. R. 483.

(4) (1879) 4 A. C. 197 at p. 202; 49 L. J. Ex. 130; 40 L. T. 630; 27 W. R. 666.

(5) (1880) 5 A. C. 842 at p. 856; 50 L. J. P. C. 1; 43 L. T. 177.

(6) (1892) A. C. 150 at p. 154; 61 L. J. P. C. 11; 66 L. T. 327; 56 J. P. 596.

(7) (1903) A. C. 299; 72 L. J. K. B. 617; 80 L. T. 1; 51 W. R. 675.

(8) (1870) 7 Blatchford 459.

(9) (1899) 2 Q. B. 267; 68 L. J. Q. B. 623; 63 J. P. 326; 80 L. T. 710; 15 T. L. R. 289.

gone back on his undertaking because the result has proved unfavourable. In these circumstances, the question arises, what action should be taken by the Court.

It is unquestionable that the breach of an undertaking given to the Court by a litigant, pending proceedings, on the faith of which the Court sanctions a particular course of action or inaction is misconduct amounting to contempt. It is further well-settled that when a person is guilty of such contempt he places himself in a perilous situation so as not to be heard by the Court till he has purged his contempt. Lord Chief Baron Gilbert laid it down as a general rule that the contemner who is in contempt is never to be heard by motion or otherwise till he has cleared his contempt and paid the costs; as for example, if he comes to move for anything or desires any favour of the Court (Gilbert on Forum Romanum 102). The limitations of this rule were examined and explained in the case of *Dharmapal* v. *Krista Dayal* (10), where the decisions in *Clark* v. *Dew* (11), *Herring* v. *Clobery* (12), *Curtis* v. *Curtis* (13), *Chuck* v. *Cremer* (14), *Russell* v. *East Anglian Railway Company* (15), *Garstin* v. *Garstin* (16), *Cavendish* v. *Cavendish* (17), *Gordon* v. *Gordon* (18), were analysed and reviewed. Reference may further be made to the cases of *Wenman* v. *Osbaldiston* (19), *Hill* v. *Bissel* (20), *Vowles* v. *Young* (21), *Anon* (22), *Bellchamber* v. *Giani* (23), *Killing* v. *Killing* (24), *Odell* v. *Hart* (25), *Bryan* v. *Twigg* (26), *Lord Cranstown* v. *Goldshede* (27), *Wilson* v. *Bates* (28), *Crawforth* v. *Holder* (29), *Harrison* v. *Harrison* (30) *Oldfield* v. *Cobbett* (31), *Taylor* v. *Taylor* (32), *Futvoye* v. *Kenward* (33), *Burdell* v. *Hay* (34), *Gould* v. *Twine* (35), *White* v. *Bromige* (36), where the applicability of this doctrine came under consideration in diverse circumstances. It is in fact an elementary rule that one in contempt may be denied certain favours of the Court and privileges, until he has purged himself of contempt, and a useful collection of cases was brought to the notice of the Court in the course of the arguments in *Gordon* v. *Gordon* (18). The rule denying privileges is limited to proceedings in which the contempt occurs. A litigant in contempt has no standing in the Court. In the case before us, the attitude of the plaintiff has placed him entirely out of Court. He is competent to appeal to this Court, only on the assumption that a decree has been made against him in a litigation valued at Rs. 6,000. If the value of the suit is Rs. 1,125, as he pretended in the Court below, the appeal lay to the Court of the District Judge. He has adopted the view of the Subordinate Judge that the value of the subject-matter of this litigation is Rs. 6,000 in order to enable him to seek the assistance of this Court. He has, however, most inconsistently refused to pay the Court-fee leviable

(10) 4 Ind. Cas. 746; 10 C. L. J. 631.
(11) (1829) 1 Russ. & My 103; 39 E. R. 40.
(12) (1841) 12 Sim. 410; 59 E. R. 1189.
(13) (1845) 5 Moo. P. C. 252 at p. 253; 13 E. R. 487.
(14) (1846) 1 Coop. T. Cott. 205; 47 E. R. 820; 76 R. R. 4.
(15) (1850) 3 Mac. & G. 101; 6 Railw. Cas. 501; 20 L. J. (N. S.) Ch. 257; 15 Jur. 935; 42 E. R. 201; 17 L. T. (O. S.) 298; 87 R. R. 39.
(16) (1865) 4 Sw. & Tr. 73; 34 L. J. Mat. 45; 13 W. R. 503; 164 E. R. 1443.
(17) (1866) 15 W. R. (Eng.) 182.
(18) (1904) P. 163; 73 L. J. P. 41; 90 L. T. 597; 52 W. R. 339; 20 T. L. R. 272.
(19) (1719) 2 Bro. P C. 276; 1 E. R. 941.
(20) (1730) Mos. 258; 25 E. R. 383.
(21) (1803) 9 Ves. 172; 32 E. R. 567.
(22) (1808) 15 Ves. 174; 33 E. R. 720.
(23) (1819) 3 Madd. 550; 53 R. R. 35; 56 E. R. 607.
(24) (1821) 6 Madd. 68; 56 E. R. 1016.
(25) (1828) 1 Molloy 492.
(26) (1834) 3 L. J. Ch. 114.
(27) (1836) 2 Y. & C. Ex. 70; 5 L. J. Ex. Eq. 23; 160 E. R. 315.
(28) (1838) 3 My. & Cr. 197; 45 R. R. 254; 7 L. J. (N. S.) Ch. 131; 40 E. R. 900.
(29) (1840) 3 Y. & C. Ex. 718; 9 L. J. Ex. Eq. 33; 160 E. R. 891.
(30) (1842) 4 Moo. P. C. 96; 6 Jur. 899; 13 E. R. 238.
(31) (1849) 12 Beav. 91; 85 R. R. 28; 50 E. R. 995; 85 R. R. 28.
(32) (1849) 1 Mac. & G. 397; 1 H. & Tw. 437; 41 E. R. 1318.
(33) (1859) 2 Giff. 110; 128 R. R. 49; 66 E. R. 48.
(34) (1863) 33 Beav. 189; 140 R. R. 80; 55 E. R. 339.
(35) (1874) 63 L. J. Ch. 381; 30 L. T. 243; 22 W. R. 398.
(36) (1878) 26 W. R. (Eng.) 312

on the plaint in a suit valued at Rs. 6,000. We are consequently of opinion that the appeal should not be entertained.

The result is that this appeal is dismissed with costs. We assess the hearing fee at five gold *mohurs*.

Z. K. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 1201 AND 1257 OF 1922.

May 21, 1924.

Present:—Mr. Justic Daniels and Mr. Justice Neave.

NAND RAM SINGH—DEFENDANT—APPELLANT

versus

HARI SARAN DAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and Tenant—Suit for arrears of rent—Defendant in possession under oral lease—Written lease not executed—Registered Kabuliyat—*Compensation for use and occupation—Ex-proprietary tenancy—Rent less than statutory rate, whether recoverable—Agra Tenancy Act (II of 1901), ss. 10, 36—Mutation—Mortgagee entered as lessor on mortgagor's application—Presumption—U. P. Land Revenue Act (III of 1901), s. 44.*

Where there is an oral lease and a registered *kabuliyat* and rent has been paid and received for several years, the lessee is liable, even if the *kabuliyat* does not constitute a valid tenancy, to pay compensation for the use and occupation of the land, and the measure of that compensation is the amount agreed to be paid under the lease. [p. 297, col. 1.]

Sheo Karan Singh v. *Maharaja Parbhu Narain Singh*, 2 Ind. Cas. 211; 31 A. 276; 6 A. L. J. 167; 5 M. L. T. 317, followed.

If a mortgagor of land applies for mutation of names and gets himself entered as lessee and the mortgagee as lessor, the latter is entitled to rely on the presumption laid down in section 44 of the U. P. Land Revenue Act that the relation of landlord and tenant exists between the parties. [*ibid.*]

If the rent agreed on between the parties for land, in respect of which an ex-proprietary tenancy has arisen, is less than the statutory rate laid down in section 10 of the Tenancy Act, the rent is claimable even though formal proceedings under section 36 of the Land Revenue Act have not been taken. [*ibid.*]

Second appeal from a decree of the District Judge, Saharanpur, dated the 9th May 1924.

Dr. *S. N. Sen*, for the Appellant.

Dr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.—These are two connected appeals in a suit for arrears of rent under section 102 of the Agra Tenancy Act. The suit has been decreed by both the Courts below and the defendant appeals. On 6th July, 1909, the defendant executed a usufructuary mortgage in favour of the plaintiffs of an eight annas share in the village of Mirpur Gaindiwar *Mahal* Daiyan Sadarang. It is in respect of this share that the present suit for arrears of rent has been brought. On the same date the mortgagees gave a *theka* of the share to the mortgagor on a rent of Rs. 210 per annum. No written lease was executed but the defendant executed a registered *kabuliyat* stating that he had taken the *zamindari* share, the area of which was 101 *bighas*, on a lease from the plaintiffs and agreeing to pay the rent. Application for mutation was made to the Revenue Court and the defendant was duly entered in the *khewat* as *thekedar* and the plaintiffs as lessors in respect of the *theka*. It appears from the evidence of the *patwari*, who was the only witness examined, that the defendant who has admittedly been in possession, paid rent under the *theka*, up to the year 1912.

The defence to the suit which was put forward in the Courts below and is repeated in the grounds of appeal is:

1. That no tenancy was created by means of the *kabuliyat* and, therefore, the defendant cannot be sued for rent. In this written statement he declared that he had paid Rs. 210 a year now claimed up to date not by way of rent but by way of interest on the mortgage.

2. That as part of the land covered by the lease was *sir* land no rent could be claimed in respect of this portion of the area covered by the lease until rent had been determined under section 36 of the Land Revenue Act, which admittedly was not done.

3. That in any case the Courts below should have found whether a portion of the rent payable in respect of the 35 *bighas* of *sir* land is less than the

statutory rate prescribed by section 10 of the Tenancy Act.

It appears to us that it is not necessary in this case to go into the first question whether the tenancy can be created by means of a registered *kabuliyat* or not. The case is covered by the Full Bench Ruling in *Sheo Karan Singh* v. *Maharaja Parbhu Narain Sihgh* (1). The defendant took possession of land under a lease and paid rent for at least three years in accordance with it and even if the *kabuliyat* did not constitute a valid tenancy the defendant is liable under the ruling just referred to to pay compensation for the use and occupation of the land, the measure of that compensation being the amount which he agreed to pay under the lease. Moreover in this case as the defendant himself applied for mutation of names and got himself entered as *thekedar* and the plaintiffs as lessors, the plaintiffs are entitled to rely on the presumption laid down in section 44 of the Land Revenue Act that the relation of landlord and tenant does exist between the parties. There is nothing to rebut that presumption. On the contrary there is a good deal to confirm it.

To the contentions regarding the *sir* area there are two answers. In the first place, as this lease was undoubtedly a *theka* of the *zamindari* share the case is covered by the ruling in *Mithan Lal* v. *Chhaju Singh* (2) on which the learned District Judge has relied. In the second place it has been held in more than one case that if the rent agreed on between the parties for land in respect of which an ex-proprietary tenancy has arisen, is less than the statutory rate laid down in section 10 of the Tenancy Act, the rent is claimable even though formal proceedings under section 36 of the Land Revenue Act have not been taken. In the present case the Respondents' Counsel has been able to show from the evidence of the *patwari* who was the sole witness, that the portion of the rent due in respect of the *sir* area is less than the amount which could have been fixed under section 36 of the Land Revenue Act. The decree of the Court below is, therefore, correct and we dismiss these appeals with costs including in this Court fees on the higher scale.

S. D. *Appeal dismissed.*

(1) 2 Ind. Cas. 211; 31 A. 276; 6 A. L. J. 167; 5 M. L. T. 347.

(2) 45 Ind. Cas. 529; 40 A. 429; 16 A. L. J. 384.

CALCUTTA HIGH COURT.

CIVIL RULE No. 855 F. OF 1923.

September 18, 1923.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Cuming.

NANDA LAL AGRANI—PETITIONER

versus

JOGENDRA CHANDRA DATTA—OPPOSITE-PARTY.

Court Fees Act (VII of 1870), Sch. I, Arts. 4, 5—Bengal Court Fees (Amendment) Act (IV of 1922), s. 5—'Leviable', meaning of—Review, application for—Court-fee payable—Fiction, legal, when permissible—Interpretation of Statutes—Fiscal Statute—Transfer of Property Act (IV of 1882), s. 89—Mortgage decree—Error in description of property—Jurisdiction of Court to rectify error.

A legal fiction has no place where substantial justice does not require its interference, still less where substantial justice would suffer from its operation. The Court will not endure that a mere form or fiction of law, introduced for the sake of justice, should work a wrong, contrary to the real truth and substance of the thing. [p. 299, col. 1.]

The use of the term "leviable" in Article 5 of Schedule I to the Limitation Act does not justify the inference that the Legislature intended to introduce a fiction into the law, namely, an imaginary representation of the plaint or memorandum of appeal at the time when the application for review is filed. [p. 300, col. 2.]

As soon as a suit has been instituted, the amount of Court-fee payable on a possible application for review of the prospective judgment in the suit becomes fixed. [*ibid.*]

Neither under the Court Fees Act as originally framed in 1870 nor under the Court Fees Act as amended in 1922, can a petitioner for review of judgment be called upon to pay Court-fee on the basis of the fee which would be payable on the plaint or memorandum of appeal if it were to be filed on the date of the application for review. The amount must be calculated on the basis of the fee leviable (which, in the normal course of events, is the fee actually levied) on the plaint or memorandum of appeal according to the law in force when the plaint or memorandum was filed in Court. [p. 301, col. 2.]

NANDA LAL v. JOGENDRA CHANDRA.

Although provisions in fiscal Statutes are not to be so construed as to furnish a chance of escape and a means of evasion, a fiscal Statute must be strictly construed, and liability or additional liability cannot be imposed on the subject except by clear and unambiguous terms. [p. 301, col. 1.]

Under section 89 of the Transfer of Property Act, as soon as an order absolute for sale is made, the security is extinguished, and the relative rights of the mortgagor and mortgagee are thenceforth regulated by the decree. But the mortgagee is not thereby debarred from proving that the description of the property mentioned in the schedule to the decree itself was erroneous; and if that is established to the satisfaction of the Court, it has ample authority to mould the relief accordingly as between the original parties or their representatives-in-interest. [p. 305, col. 2; p. 306, col. 1.]

Case-law discussed.

Application for review of judgment in Appeal from Original Decree No. 311 of 1919.

Babus *Sharat Chandra Ray Chowdhury*, *Panchanan Ghose* and *Rama Prosad Mookerjee*, for the Petitioner.

Babus *Mahendra Nath Ray*, *Ram Chandra Mazumdar* and *Kanaidhan Datta*, for the Opposite Party.

Babu *Surendra Nath Guha* (Assistant Government Pleader), for the Secretary of State for India in Council.

JUDGMENT.—This is a Rule for the review of the judgment of this Court in *Nanda Lal Agrani* v. *Jogendra Chandra Datta* (1).

A preliminary question of considerable importance has been raised with regard to the amount of Court-fee payable on the application. We have heard the Assistant Government Pleader as the matter affects the public revenue and the point must be examined before we consider the application on the merits.

The subject-matter of the appeal was valued at Rs. 7,750, and on the 20th December, 1919, a Court-fee of Rs. 385 was paid on the memorandum in accordance with the table of rates of *ad valorem* fees embodied in Schedule I of the Court Fees Act, 1870. The appeal was thereupon registered and was heard in due course. Judgment was pronounced on the 29th August, 1922, when the appeal was dismissed with costs. On the 21st November, 1922, the appellant presented the application for review of judgment now under consideration. The application bore a Court-fee of Rs. 192-8-0, that is, one-half of Rs. 385, the amount payable and paid on the memorandum of appeal when it was lodged in this Court. The Stamp Reporter, to whom the application was presented in the first instance, made a note that there was a deficiency of Rs. 115. In the opinion of the Stamp Reporter, the amount payable as Court-fee was Rs. 307-8-0, that is, one-half of Rs. 615 which would have been payable on the memorandum of appeal, if it were lodged in this Court on the 21st November, 1922, when the application for review was filed. At this stage, it is necessary to mention that after the 20th December 1919, when the memorandum of appeal was filed and before the 21st November, 1922, when the application for review was lodged, the Bengal Court Fees (Amendment) Act, (IV of 1922 B. C.) had come into force on the 1st April, 1922. Section 5 of this amending Statute modified Art. 1 of Schedule I of the Court Fees Act, 1870, by enhancement of the rate of fee payable on plaints, written statements and memorandum of appeal. Section 9, as a corollary, altered the table of rates of *ad valorem* fees appended to the same schedule. The consequence was that from the 1st April, 1922, the amount of Court-fee payable on a memorandum of appeal valued at Rs. 7,750 was raised from Rs. 385 to Rs. 615.

The determination of the question now raised before us depends upon the true construction of clauses 4 and 5 of Schedule I of the Court Fees Act. Art. 4 provides that the proper fee for an application for review of judgment, if presented on or after the ninetieth day from the date of the decree, is the fee leviable on the plaint or memorandum of appeal. Article 5 provides that the proper fee for an aplication for review of judgment, if presented before the ninetieth day from the date of the decree, is one-half of the fee leviable on the plaint or memorandum of appeal. There is no dispute that as the application in the

(1) 70 Ind. Cas. 960; 36 C. L. J. 421; (1923) A. I. R (C.) 53.

present case was made before the ninetieth day from the date of the decree, Art. 5 is applicable, and the argument has centred round the question, what is the point of time to which the expression leviable has reference.

The Assistant Government Pleader has invited us, on behalf of the Secretary of State for India in Council, to read into the third column of Arts. 4 and 5 the following expression: "If the plaint or memorandum of appeal were presented when the application for review is made." There are two obvious objections to the proposed construction; namely, first, it requires us to read into the articles words which are not to be found there; and, secondly, the fiction that is invoked is absolutely contradictory to the actual facts because an application for review of judgment cannot be concurrent with a plaint or memorandum of appeal which must of necessity precede the judgment to be reviewed. As Lord Mansfield observed in *Johnson* v. *Smith* (2) fiction has no place where substantial justice does not require its interference, still less where substantial justice would suffer from its operation. "The Court would not endure that a mere form or fiction of law, introduced for the sake of justice should work a wrong, contrary to the real truth and substance of the thing." This is an echo of what Lord Coke had said in *Butler and Baker's case* (3), "the law will never make any fiction, but for necessity and in avoidance of a mischief."

The petitioner, on the other hand, urges that the Court Fees Act itself contains a provision which specifies when the fee is leviable on the plaint or memorandum of appeal and he invites our attention to section 6 which is in the following terms:

"Except in the Courts hereinbefore mentioned, no document of any of the kinds specified as chargable in the First or Second Schedule to this Act annexed, shall be filed, exhibited or recorded in any Court of Justice, or shall be received or furnished by any public officer, unless in respect of such document there be paid a fee of an amount not less than that indicated by either of the said schedules as the proper fee for such document."

This shows conclusively that the requisite Court-fee is leviable when the plaint or memorandum is filed: *Amjad Ali* v. *Muhammad Israil* (4). This is corroborated by the provisions of O. VII of the Code of Civil Procedure, 1908. Rule 1 requires that the plaint shall, in addition to other particulars, contain a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of Court-fees. Rule 11 ordains that the claim shall be rejected, when written upon paper insufficiently stamped, if the plaintiff has failed to supply the requisite stamp paper within a time to be fixed by the Court.

The Assistant Government Pleader urges that if the expression "leviable" refers to the time of presentation of the plaint or memorandum of appeal, the Legislature might as well have replaced it by the word "levied." This argument is fallacious and overlooks the fact that what is leviable might not have been levied. In this connection, reference may be made to sections 12 and 28 of the Court Fees Act.

"12 (1) Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit.

(*ii*) But whenever any such suit comes before a Court of Appeal, reference or revision, if such Court considers that the said question has been wrongly decided to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of section 10, paragraph ii, shall apply."

(2) (1760) 2 Burr. 950 at p. 962; 97 E. R. 647.
(3) (1591) 3 Co. Rep. 25a at p. 30a; 76 E. R. 684.
(4) 20 A. 11 at p. 17; A. W. N. (1897) 157; 9 Ind. Dec. (N. S.) 367.

"28. No document which ought to bear a stamp under this Act shall be of any validity, unless and until it is properly stamped.

But, if any such document is through mistake or inadvertence received, filed or used in any Court or office without being properly stamped, the presiding Judge or the head of the office, as the case may be, or, in the case of a High Court, any Judge of such Court, may, if he thinks fit, order that such document be stamped as he may direct; and, on such document, being stamped accordingly, the same and every proceeding relative thereto shall be as valid as if it had been properly stamped in the first instance."

Reference may also be made to section 149 of the Civil Procedure Code, 1908.

"149. Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to Court-fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such Court-fee; and upon such payment the document in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance."

It is plain that if the Legislature had, in Arts. 4 and 5 used the expression "levied" instead of "leviable," the result would have been that if by mistake a smaller amount than what is leviable on the plaint or memorandum of appeal, has been levied, the applicant for review will be entitled to the continued benefit of the mistake. Conversely, if the amount levied is in excess of what is leviable, the petitioner will be prejudiced, though he may be entitled to a refund of the sum paid in excess: *Lakhi Narain Jagdeo* v. *Kirtibas Das* (5) and *In the matter of the Petition of Prosunno Chander Roy Chowdhury* (6). There is thus ample reason why the Legislature should have used the term "leviable" and not "levied." The use of the term "leviable" does not, in our opinion, justify the inference that the Legislature intended to introduce a fiction into the law, namely, an imaginary representation of the plaint or memorandum of appeal at the time when the application for review is filed.

We are fortified in this conclusion by another circumstance of a very special character. In the case of a suit or an appeal, the litigant is required to value the relief claimed and to pay Court-fee accordingly. In the case of an application for review, the applicant is not required to value the relief claimed and to pay Court-fee on the basis of such valuation. It is immaterial whether the applicant seeks a review of the judgment in respect of the whole or a fraction of the subject-matter of the controversy. The proper fee for the application is the fee leviable on the plaint or memorandum of appeal, whether the review affects the whole or a part of the decree: *Nobin Chunder Chuckerbutty* v. *Mahomed Uzir* (7), *Imdad Hasan Khan* v. *Badri Prasad* (8), *In re Sheikh Ali Ahmad* (9), and *Husaina* v. *Sahib Nur* (10); though the decisions in *Proceedings, 16th January*, 1872 (11) and *In re Manohar G. Tambekar* (12), may perhaps point to the opposite conclusion. The policy of the Legislature is obvious. The substance of the matter is that for the purpose of ascertainment of the Court-fee payable on the application for review, the application relates back to the plaint or memorandum of appeal, as the case may be; the amount is levied in a fixed proportion, independent of the scope of the application for review. To put the matter differently as soon as a suit has been instituted, the amount of Court-fee payable on a possible application for review of the prospective judgment in the suit becomes fixed.

We may note that the Assistant Government Pleader did not formulate the point for decision accurately when he stated that the question is, whether the case before us is excluded from the

(5) 19 Ind. Cas. 971; 18 C. L. J. 133.
(6) 11 B. L. R. 372 *note*.
(7) 3 C. W. N. 292.
(8) A. W. N. (1898) 212.
(9) 1 Ind. Cas. 209; 31 A. 294; 6 A. L. J 215.
(10) 20 Ind. Cas. 3; 254 P. L. R. 1913; 159 P. W. R 1913.
(11) 7 M. H. C. R. App. 1.
(12) 4 B. 26; 2 Ind. Dec. (N. S.) 528.

operation of the amending Statute. The real question is, does the amending Statute affect the decision of the question. The answer, in our opinion, must be in the negative; and we are supported in this view by two additional considerations. In the first place, the true construction of Arts. 4 and 5 must be determined irrespective of the amending Statute which makes no reference to them. These articles found a place in the Court Fees Act as framed in 1870; and the intention of the Legislature as expressed in the language used, cannot obviously be affected by the supposed object of the framers of the amending Statute of 1922. There is nothing to show that the framers of the Statute in 1870 anticipated and kept in view the contingency which has now arisen; there is equally nothing in the amending Statute to indicate that the legislators of 1922 realised and provided for this case. Section 17 of Act IV of 1922 B. C. which was interpreted in *Thaddeus Nahapie* v. *Secretary of State for India in Council* (13) clearly does not advance the contention of the Assistant Government Pleader; on the other hand the decision in *Taraprasanna Chongdar* v. *Nrisinha Murari Pal* (14) militates against his argument. In the second place, we must bear in mind the elementary rule that, although as pointed out in *Inland Revenue Commissioners* v. *Oliver* (15) provisions in fiscal Statutes are not to be so construed as to furnish a chance of escape and a means of evasion, a fiscal Statute must be strictly construed, and liability or additional liability cannot be imposed on the subject except by clear and unambiguous terms. See *Stockton & Darlington Railway Company* v. *Barret* (16), *Partington* v. *Attorney-General* (17), *Cox* v. *Rabbits* (18), *Pryce* v. *Monmouthshire Ry. and Canal Co.* (19), *Oriental Bank Corporation* v. *Wright* (20), *Tennant* v. *Smith* (21), *Secretary of State for India* v. *Scoble*, (22); *Deputy Commissioner of Singhbhum* v. *Jagadish Chandra Deo Dhabal Deb* (23) and *Raj Rajeswari Jiu* v. *Gati Krishna Chakrabarti* (24). From whatever point the question may be viewed, there is thus no escape from the conclusion that neither under the Court Fees Act as originally framed in 1870 nor under the Court-Fees Act as amended in 1922, can a petitioner for review of judgment be called upon to pay Court-fee on the basis of the fee which would be payable on the plaint or memorandum of appeal if it were to be filed on the date of the application for review. The amount must be calculated on the basis of the fee leviable (which, in the normal course of events, is the fee actually levied) on the plaint or memorandum of appeal according to the law in force when the plaint or memorandum is filed in Court. Tested in the light of this principle, the application in the present case must be deemed to bear the correct Court-fee and must accordingly be heard on the merits.

To appreciate the ground for review, it is essential to re-call the relevant facts which are set out in the following passage of our judgment:

"The subject-matter of the litigation is a tract of land, measuring about 30 *bighas*, described in Schedule A to the plaint. The land belonged admittedly to the Sahas, who executed a mortgage

(13) 81 Ind. Cas. 751; 39 C. L. J. 209.
(14) 81 Ind. Cas. 763; 39 C. L. J. 212; 51 C. 216; 28 C. W. N. 683.
(15) (1909) A. C. 427; 78 L. J. P. C. 146; 101 L. T. 140; 53 S. J. 649; 25 T. L. R. 707.
(16) (1844) 11 Cl. & F. 590 at p. 602; 8 Scott. N. R. 641; 8 E. R. 1225; 7 Man. & G. 870; 65 R. R. 261.
(17) (1869) 4 H. L. 100; 38 L. J. Ex. 205; 21 L. T. 370.
(18) (1878) 3 A. C. 473; 47 L. J. Q. B. 385; 38 L. T. 430; 26 W. R. 483.
(19) (1879) 4 A. C. 197 at p. 202; 49 L. J. Ex. 130; 40 L. T. 630; 27 W. R. 666.
(20) (1880) 5 A. C. 842 at p. 856; 50 L. J. P. C. 1; 43 L. T. 177.
(21) (1892) A. C. 150 at p. 154; 61 L. J. P. C. 11; 66 L. T. 327; 56 J. P. 596.
(22) (1903) A. C. 299; 72 L. J. K. B. 617; 80 L. T 1; 51 W. R. 675.
(23) 62 Ind. Cas. 513; 6 P. L. J. 411; 2 P. L. T. 683.
(24) 82 Ind. Cas. 292; 39 C. L. J. 217

in favour of Malik on the 29th September, 1900. The mortgagee sued to enforce his security and obtained a decree on the 27th September, 1902. At the execution sale which followed in due course, on the 14th May, 1907, Samalka became the purchaser. He obtained a sale certificate on the 28th April 1908. Samalka, it is said, was the nominal purchaser and bought in the property, one-third for the benefit of Ramdeo and two-thirds for the benefit of Rooya. On the 3rd June, 1910, and on the 8th July, 1910, respectively, Rooya and Ramdeo, the beneficial owners, executed two conveyances in favour of Banerjee. The plaintiff Dutt alleges that he was the real purchaser, and the conveyances were taken by him in the name of Banerjee. It would be a needless digression to narrate the story of the dispute between Dutt and Banerjee as to who became the beneficial owner under the conveyances; it is sufficient to state that Dutt may now be taken to have established his title against Banerjee, who has consequently disappeared from the scene.

"The history of the title set up by the first defendant who is the rival claimant may now be stated. In 1907, the Chaudhuries, who were the 6-annas co-sharer landlords, obtained against the Sahas a money decree for arrears of rent in respect of the disputed lands. This decree was executed, and at the sale which followed on the 12th May, 1908, the right, title and interest of the judgment-debtors was purchased by one Sarkar. On the 14th October, 1908, the first defendant, Agrani, purchased the property from Sarkar on the basis of an alleged agreement for sale dated 6th July, 1908. In the interval, Sarkar had sold to Bose on the 20th July, 1908, and on the strength of the title so acquired, Bose sold to the second defendant, Dutt, brother of the plaintiff, on the 25th May, 1910. These transactions, it has been held, do not affect the purchase by Agrani from Sarkar, and were evidently attempts made by the plaintiff to perfect his title by buying in outstanding claims. The controversy between the plaintiff and the first defendant must consequently be determined on the following basis, namely, that the title of the plaintiff is traced to the mortgage sale of the 14th May, 1907 which itself rests on the mortgage of the 29th September, 1900, while on the other hand, the title of the first defendant cannot be traced beyond the execution sale of the 12th May, 1908 when the right, title and interest of the Sahas was exposed for sale. Before that date, the property had already vested in Samalka by virtue of the mortgage sale and could not again be brought to sale at the instance of the co-sharer landlords in execution of the money decree they held against the Sahas; we are consequently not called upon to consider what would have been the position, if the so-called rent-decree were not a mere money decree and had the qualities of a true rent-decree. The inference is thus irresistible, that, *prima facie*, the first defendant has no title which can be successfully set up against the plaintiff. What then is his answer to the claim? His defence, as will presently appear, is founded on a clerical error which crept into the mortgage instrument.

In the schedule to the mortgage bond, the boundaries of the hypothecated property were described as follows:

"Within District Hooghly, Sub-Registry Howrah, Station Golabari, Thana Golabari, Pergana Paikan village, *Mouza* Salikha, lies the Tantipara land measuring about 30 *bighas*:

East—A place belonging to us called Bajaldanga.

West—Jatadhari Haldar's land.

North—Biswambhar Saha's tank.

South—A place called Barabagan.

'Maliks of 10 annas share are the Raja of Dighapatia and Bibi Jarao Kumari; the annual rent of Rs. 35 is payable to both the Sarkars; and the *malik zemindar* of 6-annas share is Gurdas Kundu Chowdhury to whom Rs. 40 is payable as annual rent',

"It has now transpired that, by mistake, the north and south boundaries were interchanged; what is stated as the north boundary was in fact the south boundary, and what is stated as the south boundary was in fact the north boundary. The scribe evidently made a mistake and

wrote 'north', for "south" and 'south' for 'north'. This erroneous description of the boundaries was in due course reproduced from the mortgage-deed into the plaint, from the plaint into the decree, and from the decree into the sale certificate. The error appears to have been subsequently discovered, and in the conveyance by Rooya to Banerjee dated the 3rd June, 1910, the correct boundary is given in one portion of the deed, though the incorrect boundary is also set out in the schedule. In the conveyance by Samalka to Banerjee, however, dated 8th July, 1910, the incorrect boundary alone is reproduced. On these facts, the first defendant urges that the plaintiff has not purchased the disputed land at all, and must content himself with such land as may be found to lie within the incorrect boundaries set out in the mortgage deed. It is plain that if this contention prevails, the plaintiff takes nothing. As the result of the further enquiry, which was directed by this Court on the 9th February, 1921, it has transpired that there is no land which corresponds to the incorrect boundaries. There is no tract of 30 *bighas* which lies in Tantipara and is bounded on the east by Bajaldanga, on the west by Jatadhari Haldar's land, on the north by Biswambhar Saha's tank and on the south by Barabagan. The fact that there has been a misdescription becomes manifest on a local inspection of the place, and this is confirmed, when the map is examined. There is, further, no plot of 30 *bighas* except the disputed land which, as stated in the mortgage bond, was held by the Sahas as tenants, 10-annas under Dighapatiya and Jaraokumari and 6-annas under the Chaudhuris. There is thus not the remotest doubt as to the facts. The only question is, whether the first defendant is entitled in law to take advantage of the error in the mortgage deed and thereby to defeat the title of the plaintiff."

"It is plain that as the result of the execution sale, which was held on the 12th May, 1908, by the co-sharer landlords on the basis of the money-decree held by them, nothing could vest in the purchaser Sarkar beyond the right, title and interest of the Saha judgment-debtors. The purchaser would thus be bound by the same rule of estoppel as the judgment-debtors."

We then proceeded to point out that tested in the light of this principle, the claim of the contesting defendant could not be sustained, because the first defendant was in no better position than the Sahas would have been if they had endeavoured to defeat the plaintiff by reliance on the clerical error in the mortgage bond. In support of the view that the first defendant was in the same position as the Sahas, we referred to the decision of the Judicial Committee in *Mohammed Mozuffer Hossein* v. *Kishori Mohun Roy* (25), where it had been ruled that the purchaser at the execution sale acquires the right, title and interest of the judgment-debtor and does not consequently occupy a position of greater advantage than the judgment-debtor does on the application of the doctrine of estoppel. In support of the view that the mortgagor is bound by the rule of estoppel not to dispute the validity of the mortgage, we referred to the decision in *Debendra Nath Sen* v. *Mirza Abdul Samad* (26), where reference is made to *Goodtitle* v. *Bailey* (27), *Doed. Bristow* v. *Pegge* (28) and *Doed. Ogle* v. *Vickers* (29). To these may be added *Right* v. *Bucknell* (30), *Doe* v. *Stone* (31) and *Madell* v. *Thomas* (32). The two principles just mentioned cannot be and have not been disputed. They form the foundation of another decision whereon we also placed reliance; namely *Bepin Krishna Ray* v. *Jogeshwar Ray* (33), where a mistake

(25) 22 I. A. 129; 22 C. 909; 5 M. L. J. 101; 6 Sar. P. C. J. 583; 11 Ind. Dec. (N. S.) 602 (P. C.).
(26) 1 Ind. Cas. 264; 10 C. L. J. 150.
(27) (1777) 2 Cowper 597; 98 E. R. 1260.
(28) (1785) 1 T. R. 758*n*; 99 E. R. 1362.
(29) (1836) 4 A. & E. 782; 6 N. & M. 437; 6 L. J. K. B. 266; 111 E. R. 977.
(30) (1831) 2 B. & Ad. 278 at p. 284; 36 R. R. 563; 9 L. J. (O. S.) K. B. 304; 109 E. R. 1146.
(31) (1846) 3 C. B. 176; 17 R. R. 311; 15 L. J. C. P. 234; 136 E. R. 71.
(32) (1891) 1 Q. B. 230 at p. 238; 60 L. J. Q. B. 227; 64 L. T. 9; 39 W. R. 280.
(33) 66 Ind. Cas. 345; 34 C. L. J. 256; 26 C. W. N. 36.

was traced from the decree backwards, through successive stages of the judicial proceedings, to the mortgage instrument itself. It has now been argued that we overlooked that the decision last mentioned had no application, because in that case the rights of the parties were governed by O. XXXIV, rr. 4 and 5 of the Civil Procedure Code, 1908, and not by sections 88 and 89 of the Transfer of Property Act, 1882, which were in force when the transactions in this case took place and must consequently regulate the rights of the parties.

It is not disputed that there is a substantial divergence between section 89 of the Transfer of Property Act and O. XXXIV, r. 5 of the Civil Procedure Code. Section 89 provided that in a suit for sale, upon the failure of the defendant to pay the dues within the prescribed period, an order absolute for sale shall be made, "and thereupon the defendant's right to redeem and the security shall both be extinguished." There was much divergence of judicial opinion as to the precise effect of the concluding clause of section 89, and it was ruled by a Full Bench of this Court in *Bibijan Bibi* v. *Sachi Bewah* (34) that "thereupon" means "after sale" and not "after the order absolute for sale". This view, however, was overruled by the Judicial Committee in *Het Ram* v. *ShadiRam* (35) and the clause itself was left out by the Legislature when section 89 was replaced by O. XXXIV, r. 5. But this cannot affect the rights of litigants which accrued when section 89 was in force. The effect of that section has been considered by the Judicial Committee in *Hetram* v. *Shadi Ram* (35), *Matru Mal* v. *Durga Kunwar* (36) and *Sukhi* v. *Ghulam Safdar Khan* (37).

In *Hetram* v. *Shadi Ram* (35), a property had been twice mortgaged by way of simple mortgage, once in 1880 and again in 1881. Het Ram purchased the property from the mortgagee in 1883. In 1885 the mortgagee of 1880 obtained against the mortgagor and Het Ram a decree absolute for sale under section 89 of the Transfer of Property Act, 1882. He did not implead the mortgagee under the mortgage of 1881. He took no further steps under the decree and the property was not brought to sale. He died, and was succeeded to by Het Ram as his heir. In 1910 the mortgagee under the mortgage of 1881 instituted the suit. It was held that Het Ram could not set up the mortgage of 1880 as a shield, because the decree of 1885 was (1) barred by limitation, (2) inoperative as against the plaintiff who had not been made a party to the suit and because the mortgage itself was gone, because of the terms of section 89 of the Transfer of Property Act, 1882.

In *Matru Mal* v. *Durga Kunwar* (36) a property had also been the subject of two mortgages of 1872 and 1879 respectively. The mortgagee of 1872 obtained in 1884 a decree for sale under the same section 89 of the Transfer of Property Act, 1882, but omitted to implead the second mortgagee. A lady who was an assignee of the second mortgage raised suit in 1909. The owner resisted the decree unless he was paid the whole amount due under the first mortgage with interest calculated at the rate stipulated therein. The plaintiff offered to pay the amount under the decree of 1884, but refused to pay the amount of the mortgage so calculated. The Subordinate Judge gave effect to the contention of the owner. The High Court altered the decree and gave effect to the offer of the plaintiff. The owner then appealed. The Board adhered to the judgment of the High Court. The Judicial Committee, pressed with the decision in *Umes Chunder Sircar* v.

(34) 31 C. 863; 8 C. W. N. 684.

(35) 45 Ind. Cas. 798; 45 I. A. 130; 40 A. 407; 28 C. L. J. 188; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 24 M. L. T. 92; (1918) M. W. N. 518; 20 Bom. L. R. 798; 22 C. W. N. 1033; 9 L. W. 550; 12 Bur. L. T. 73 (P. C.).

(36) 55 Ind. Cas. 969; 47 I. A. 71; 42 A. 364; 32 C. L. J. 121; 18 A. L. J. 396; 38 M. L. J. 419; 11 L. W. 529; (1920) M. W. N. 338; 2 U. P. L. R. (P. C.) 75; 22 Bom. L. R. 553; 27 M. L. T. 319; 25 C. W. N. 397 (P. C.).

(37) 65 Ind. Cas. 151; 48 I. A. 465; 43 A. 469; (1921) M. W. N. 445; 14 L. W. 162; 26 C. W. N. 279; 42 M. L. J. 15; 30 M. L. T. 175; 24 Bom. L. R. 590; (1922) A. I. R. (P. C.) 11 (P. C.).

Zahur Fatima (38), pointed out that at the time when the High Court delivered judgment, the case of *Het Ram* v. *Shadi Ram* (35) had not been before the Board. That case decided that an order made under section 89 of the Transfer of Property Act, 1882 (Act IV of 1882), for the sale of mortgaged property, has the effect of substituting the right of sale thereby conferred upon the mortgagee for his rights under the mortgage and the latter rights are extinguished. When the decree or order for sale in the case of *Umes Chunder Sircar* v. *Zahur Fatima* (38) was made, the Transfer of Property Act, 1882, had not been passed and the procedure prescribed by that Act for suits for sales under that Act did not exist; that case was decided on the law as it then stood. The view thus adopted by the Judicial Committee fits in with the pronouncement in *Sundar Koer* v. *Rai Sham Krishen* (39), where Lord Davey observed that, after the expiration of the period of grace, if the property should not be redeemed, the matter would pass from the domain of contract to that of judgment and the rights of the mortgagee would thenceforth depend, not on the contents of his bond, but on the directions in the decree.

In *Sukhi* v. *Ghulam Safdar Khan* (37) Lord Dunedin pointed out that O. XXXIV, rr. 3 and 5 of the Code of Civil Procedure, 1908, which now govern final decrees for foreclosure and sale, do not provide that after a decree thereunder the mortgage security is extinguished, as was prescribed by section 89 of the Transfer of Property Act in the case of a sale decree made under that section. On this ground, the decisions in *Het Ram* v. *Shadi Ram* (35) and *Matru Mal* v. *Durga Kunwar* (36) were distinguished. The inference follows that the law now under the Code of Civil Procedure, 1908, remains as it certainly was before the Transfer of Property Act, 1882 as expounded and applied in *Sundar Koer* v. *Rai Sham Krishen* (39).

(38) 17 I. A. 201; 18 C. 164; 5 Sar. P. C. J. 507; 9 Ind. Dec. (N. S.) 110 (P. C.).

(39) 34 I. A. 9; 34 C. 150; 5 C. L. J. 106; 4 A. L. J. 109; 9 Bom. L. R. 304; 11 C. W. N. 249; 17 M. L. J. 43; 2 M. L. T. 75 (P. C.).

In the case before us, the mortgage decree was made on the 27th September 1902 and the execution sale thereunder took place on the 14th May, 1907. Section 89 of the Transfer of Property Act was in force till the Code of Civil Procedure, 1908 came into operation on the first day of January 1909. The rights of the parties must consequently be determined with reference to section 89 of the Transfer of Property Act and not O. XXXIV, r. 5 of the Civil Procedure Code. The decision in *Bepin Krishna Ray* v. *Jogeshwar Ray* (33) is consequently distinguishable. There the mortgage decree was made on the 16th December 1909, and the sale in execution was held on the 18th September, 1911. The rights of the parties thus fell to be determined only with reference to O. XXXIV, r. 5 Civil Procedure Code. In addition to this circumstance, the error in the mortgage instrument was discovered before the sale was completed; and, a suit was instituted for rectification of the mortgage, before the sale could be held again. We must accordingly consider, whether in view of section 89 of the Transfer of Property Act as explained by the Judicial Committee in *Het Ram* v. *Shadi Ram* (35) and *Matru Mal* v. *Durga Kunwar* (36), the plaintiff can establish, as against the defendant, that there was an error in the description of the property and is entitled to succeed on that footing.

The defendant has strenuously contended that under section 89 of the Transfer of Property Act, as soon as the order absolute for sale was made, the security was extinguished, and the relative rights of the mortgagor and mortgagee were thenceforth regulated by the decree. This may be conceded. But it does not follow that the mortgagee became thereby debarred from proving that the description of the property mentioned in the schedule to the decree itself was erroneous. The petitioner has contended in substance that the effect of section 89 is to place at the stage of the decree, an impassable barrier across the path of enquiry from the sale certificate backwards to the mortgage instrument. The question we have to solve is, what is the property, covered by the sale certificate, which has

passed into the hands of the plaintiff. Enquiry has elicited two facts, namely, first, that there is no property in existence which corresponds to the property described in the schedule to the sale certificate and the decree; and secondly, that if the northern and southern boundaries be interchanged, there is a property of the judgment-debtor which fits in with that description in every other respect to the minutest detail. No legal principle has been brought to our notice which, on these facts, prevents the Court from granting relief as among the decree-holder, the auction-purchaser and the judgment-debtor. What is essentially requisite is the rectification of the boundaries in the schedule to the sale certificate. For this purpose, it is not material that we should go back, behind the decree to the mortgage instrument itself. The clerical error becomes apparent on the result of the local enquiry held on the basis of the boundaries in the sale certificate. The investigation of the proceedings in the suit itself, antecedent to the decree, only furnishes a historical explanation, as it were, how the error arose. But there can be no question that there is an error in the sale certificate, and, in our opinion, the Court has ample authority as a Court of justice, equity and good conscience to mould the relief accordingly as between the original parties or their representatives in interest. In this view, it is needless to consider the scope of the questions which may be properly raised on an application for review of judgment as explained by the Judicial Committee in *Chhajju Ram* v. *Neki* (40).

The result is that the Rule is discharged with costs. We assess the hearing fee at two gold *mohurs*.

Z. K. *Rule discharged.*

(40) 72 Ind. Cas. 566; 49 I. A. 144; 36 C. L. J. 459; 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. 1922; 3 P. L. T. 435; (1922) A. I. R. (P. C.) 112; 16 L. W. 37; 17 P. W. R. 1922; 3 L. 127; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 201 OF 1923.

June 27, 1924.

Present :—Mr. Justice Dalal.

Sheikh KARIMULLAH—PLAINTIFF—APPEALLANT

versus

GUDAR KOERI AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss. 63, 67 to 73—Execution of document, whether can be proved by secondary evidence—Ss. 67 to 73, whether deal with secondary evidence.

A certified copy is sufficient secondary evidence under section 63 of the Evidence Act of the existence, condition and contents of a document but not of its execution. [p. 307, col. 1.]

Sections 67 to 73 of the Evidence Act deal with primary as well as secondary evidence. [*ibid.*]

Second appeal from a decree of the District Judge, Benares, dated the 10th November 1922.

Dr *M. L. Agarwala*, for the Appellant.

Dr. *K. N. Katju*, for the Respondents.

JUDGMENT.—The plaintiff Sheikh Karimullah is purchaser of the alleged rights and interest of defendant No. 4 Mital. His allegation was that Mital and others had mortgaged the property to defendant No. 1 Gudar and he desired to redeem that mortgage of 9th May 1917. Another important party defendant in the suit was defendant No. 6 *Musammat* Deokali.

In paragraph 10 of the plaint it is stated that defendant No. 6 *Musammat* Deokali was made a party though she had no concern in the property because of the allegation of the mortgagee, Gudar, that he had made over possession to her. Defendant No. 7 is a transferee from *Musammat* Deokali. It appears that contest lies between Mital and *Musammat* Deokali as to the ownership of the property. In the plaint however no relief is claimed specifically against *Musammat* Deokali as apart from the mortgage. In paragraph 12 possession is desired on redemption of the mortgage.

A copy of the registered mortgage-deed was produced and the mortgagee Gudar did not produce the original. Gudar denied the evidence of any mortgage. Both the Subordinates Courts have held that the mortgage was not proved because no attesting witness was called

for the purpose of proving its execution as laid down in section 68 of the Evidence Act. It is admitted that both the attesting witnesses are alive and no attempt was made to prove that they were not subject to the process of the Court or incapable of giving evidence. The argument of the learned Counsel for the plaintiff-appellant was twofold : (1) that the suit was not based on the mortgage and that, therefore, it was not necessary to prove the document strictly and (2) that when the mortgagee Gudar failed to produce the original document the evidence of the mortgagor Mital and of the scribe of the document was sufficient to prove the document by secondary evidence.

As I have already pointed out the suit is based entirely on the mortgage. The nature of the conflict between Mital and *Musammat* Deokali is not even indicated in the plaint. It cannot, therefore, be said that the suit is one for possession by the transferee of an owner against all possible persons who are keeping him out of possession. I am of opinion that the mortgage was required to be strictly proved having regard to the nature of the plaint.

The next argument was that the admission by the mortgagor of having executed the document was sufficient evidence of execution and that the existence, condition and contents of the document were proved by the production of a certified copy of the document. A certified copy is sufficient secondary evidence under section 63 of the existence, condition and contents of the deed but not of its execution. The ingenious argument was advanced that section 67 and those which follow up to 73 deal with primary evidence and not with secondary evidence. I do not think that such an argument can hold when in section 65 there is no mention of secondary evidence being given of the execution of a document. Section 67 follows the mention of primary and secondary evidence in sections 61-66 and would presumably govern both kinds of evidence. The submission was made that if the mortgagee suppressed the original document and won over the attesting witnesses it would be impossible to prove a deed of mortgage if the provisions of section 68 were insisted upon. This difficulty, however, can be overcome by the application of the provisions of section 71. If the plaintiff had summoned the two attesting witnesses and they denied execution either through collusion or absence of recollection it would have been open to the plaintiff to prove the execution by any other evidence.

In my opinion the two Subordinate Courts were correct in insisting upon the due observation of the provisions of section 68 and refusing to use the mortgage-deed as evidence on non-compliance by the plaintiffs of the terms thereof. I do not think that the present plaint can be turned into a conflict between the plaintiff and *Musammat* Deokali, so it will not be a proper course to remand the suit to the Trial Court to decide the question of possession by right of title.

I dismiss this appeal with costs which shall include here fees on the higher scale.

S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 200 OF 1923.
June 27, 1924.
Present:—Mr. Justice Dalal.
SIKANDAR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
BACHCHU PANDE AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family property—Alienation—After-born son's right to contest alienation—Son, whether acquires by birth interest in right to sue—Son, whether acquires by birth fresh cause of action—Limitation Act (IX of 1908), s. 6, applicability of.

A Hindu son when he is born in a family is born to all the rights which exist at the time in the family and not to rights which existed in the family a century before. No title derived from a Hindu would be safe under such a contingency. [p. 308, col. 2.]

A son born in a joint Hindu family acquires by birth interest in ancestral property but does not acquire any interest in any right to sue. The

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cause of action to contest an alienation of joint family property accrues after the alienation when the purchaser takes possession, and a new cause of action does not accrue upon the subsequent birth of a son in the family. [p. 309, col. 1.]

An after-born son does not acquire a fresh cause of action and a fresh period of limitation does not start from the date of his birth. In his case the time from which the period of limitation is to be reckoned is the date of the transfer and as he was not born on that date and was under no disability he cannot obtain the benefit of the provisions of section 6 of the Limitation Act. He can take advantage of any cause of action existing at his birth and sue within the period of limitation but cannot start a fresh period at his birth. [*ibid.*]

Second appeal against the decree of the District Judge, Benares, dated the 1st November, 1922.

Mr. *Mushtaq Ahmad*, for the Appellants.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—The plaintiffs (Hindu sons) sued for the setting aside of an alienation by their grand-father, one Ajudhia Singh. Both the Subordinate Courts held that the suit was time-barred. This second appeal is filed in consequence.

The youngest son of Ajudhia Singh was Ram Iqbal and the eldest son of Ram Iqbal is the plaintiff Sikandar Singh. The learned Subordinate Judge of the Trial Court held that when Sikandar Singh was born and also before he was conceived Ram Iqbal had lost his right to question the alienation, being at the time 24 years of age. It was argued on the basis of a slip in the judgment of the learned Subordinate Judge that Sikandar Singh was conceived before Ram Iqbal's right to sue had become time-barred. In one portion of the judgment he observed.

"Mahabir Singh the next witness said that Ajudhia had died at the age of 60 or 65. This seems correct. He further says that Ram Iqbal was 9 or 10 years old when Ajudhia died, so according to this calculation Ram Iqbal would be 21 years old when Sikandar was born, and this seems correct."

Here 21 is a slip for 24. The learned Judge goes on to observe:

"The fact is that Ram Iqbal is now 32 years old. He was 11 years old when his father died. He was 24 years old when his first son was born".

This 24 is correct because according to the lower Court Ajudhia died in 1901, Ram Iqbal was 11 years old at the time and Sikandar was born in 1914. So on the date of the birth of Sikandar Ram Iqbal would be 24 according to the finding of the Trial Court and not 21. This finding has been upheld by the lower Appellate Court.

The more interesting argument is that even granting that all the sons of Ajudhia Singh and every other member of the joint family at the time of the birth of Sikandar Singh had lost their right to sue for the setting aside of the transfer by reason of limitation, Sikandar Singh, as soon as he was born would acquire the right to bring a suit such as the present.

Various rulings were quoted stating general principles but not dealing exactly with the point of limitation. According to this argument even if the plaintiffs had not sued their great grandchildren could have come to Court to question the title of the then owner of the property on the ground that Ajudhia Singh had transferred the property without the consent of the other members of the joint family and the then owner was not able to prove legal necessity for the transfer. I am not prepared to countenance such a proposition of law, which would offend against every principle of the law of limitation. A Hindu son when he is born in a family is born to all the rights which exist at the time in the family and not to rights which existed in the family a century before. No title derived from a Hindu would be safe under such a contingency.

Adopting the view of law of the lower Courts, if when Sikandar Singh was born there had existed in the family a right to question the transfer on the ground of its being made without the consent of the other co-parceners and without legal necessity Sikandar Singh may have been entitled to bring a suit up to three years after attaining majority even though at the time when he brought the suit a similar suit by older members of the family had been

time barred. The right to sue must, however, be alive at the time of the birth or at the time of the conception of the Hindu son in order to entitle him to such a right. Once every member of a particular Hindu family has lost by efflux of time the right to question an alienation, a son conceived and born subsequent to the loss of the right to sue by family cannot revive a time barred right.

So far I have discussed the facts of the case with reference to the view of law adopted by the lower Courts. My own view of the law on the point is more restricted : it is that a son born in a joint Hindu family acquires by birth interest in ancestral property but does not acquire any interest in any right to sue. The cause of action accrues after an alienation when the purchaser takes possession (section 126, Limitation Act) and a new cause of action does not accrue upon the subsequent birth of a son in the family. This was held as early as 1867 in *Raja Ram Tewary* v. *Lachman Prasad* (1) and the same principle of law was laid down by the Privy Council in *Ujagar Singh* v. *Pitam Singh* (2) Applying this principle of law, the after-born son does not acquire a fresh cause of action and a fresh period of limitation does not start from the date of his birth. In his case the time from which the period of limitation is to be reckoned is the date of the transfer and as he was not born on that date and was under no disability he cannot obtain the benefit of the provisions of section 6 of the Limitation Act. He can take advantage of any cause of action existing at his birth and sue within the period of limitation but cannot start a fresh period at his birth.

Confusion of thought arises in the discussion of the present question from mixing it up with two other propositions of law more or less alike :

1. That after born sons have a vested interest co-extensive with that of previously born sons of the family. If A a minor is in existence at the time of the alienation, he can sue within three years of his majority and an after-born son can take advantage of this extension of time. *Ramkishore Kedarnath* v. *Jainarayan Ramrachpal* (3).

2. That the minority of one son will save limitation for all sons under section 7 of the Limitation Act. If A, B and C major sons and D minor son were in existence at the time of the alienation, limitation (if it has not expired earlier) will be saved for all until D attained the age of 21.

These propositions of law, however, have no bearing on the inquiry whether section 6 of the Limitation Act is applicable to an after-born son or not. A learned Judge of this Court Mr. Justice Daniels has elaborately discussed this question in the judgment of a Bench delivered by him in Oudh [*Chokhey Singh* v. *Hardeo Singh* (4)], and arrived at the same conclusion. He has quoted there in support of his view a recent authority of the Punjab High Court [*Lachman Das* v. *Sundar Das* (5)].

I dismiss this appeal with costs which shall include fees on the higher scale.

S. D. *Appeal dismissed.*

(1) 8 W. R. 15; B. L. R. Sup. 731 (F. B.).
(2) 4 A. 120; 8 I. A. 190; 4 Sar. P. C. J. 275; 2 Ind. Dec. (N. S.) 579 (P. C.).
(3) 20 Ind. Cas. 958; 40 C. 936; (8913) M. W. N. 661; 14 M. L. T. 163; 17 C. W. N. 1189; 18 C. L. J. 237; 15 Bom. L. R. 867; 11 A. L. J. 835; 25 M. L. J. 512; 10 N. L. R. 1; 40 I. A. 213 (P. C.).
(4) 64 Ind. Cas. 757; 24 O. C. 330; 8 O. L. J. 667; 4 U. P. L. R. (O.) 10.
(5) 59 Ind. Cas. 678; 1 L. 558.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2590 OF 1921.
March 28, 1924.

Present :—Mr. Justice Mukerji.

BANESWAR BANDOPADHYA—PLAINTIFF—APPELLANT

versus

AMULYA CHARAN (AMULYA CHANDRA IN *Vakalatnamah*) AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—Question of fact—Acquiescence—Estoppel—Delay—Co-owner—Neighbouring owner—"He who seeks equity must do equity", meaning and application of.

Acquiescence is not a question of fact but of legal inference from facts found and it is open, therefore, to the High Court to consider whether the question of acquiescence has been properly decided by the Court of Appeal below. [p. 311, col. 1.]

Beni Ram v. *Kundan Lal*, 21 A. 496 at p. 504 (P. C.); 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022 (P. C.) and *Ananda Chandra Sen* v. *Parbati Nath Sen*, 4 C. L. J. 198 at pp. 204, 205, relied upon.

Acquiescence is no more than an instance of the law of estoppel by words or by conduct. If a party having an interest to prevent an act being done has full notice of its being done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license. But mere quiescence or absence of interference is not sufficient to create an estoppel. [*ibid.*]

Cairncross v. *Lorimer*, (1860) 7 Jur. (N. S.) 149; 3 Macq. H. L. 827; 3 L. T. 130; 123 R. R. 906 and *De Bussche* v. *Alt*, (1878) 8 Ch. D. 286 at p. 314; 47 L. J. Ch. 381; 38 L. T. 370, relied upon.

Duke of Leeds v. *Earl of Amherst*, (1846) 2 Ph. 117; 10 Jur. 956; 41 E. R. 886; 78 R. R. 47; 16 L. J. Ch. 5, referred to.

The vigilance required of and the duty cast upon a co-owner with regard to an infringement of his right is greater than and of a different description from what is expected of a neighbouring owner when he finds an act being done by the other on his own property. [p. 311, col. 2.]

Mere delay in taking legal proceedings, if the remedy is not barred, is nothing. [*ibid.*]

The *onus* of proving acquiescence is on the person who alleges it.

He who seeks equity must do equity, that is to say, the plaintiff in equity must come with perfect propriety of conduct or with clean hands. Fraud or misrepresentation or matters of that description stand in the way of a plaintiff's obtaining an equitable relief by virtue of this principle. It has hardly any application in a case when he has simply tried, without the Court's intervention, to abate a nuisance of which he complains. [p. 312, col. 1.]

Appeal against the decree of the Second Additional District Judge, 24-Parganas, dated the 20th of September, 1921, reversing that of the Munsif Second Court at Barasat, dated the 15th March, 1920.

Babus *Surendra Chandra Sen* and *Hemendra Chandra Sen*, for the Appellant.

Babu *Jatindra Mohun Sen Gupta*, for the Respondents.

JUDGMENT.—The two grounds upon which the learned Additional District Judge has reversed the decision of the learned Munsif and dismissed the plaintiff's suit are: first, that the delay in instituting the suit leads to the conclusion that he acquiesced in the defendant's acts, and 2nd, that the plaintiff himself has not done equity and so has offended the principle that he who seeks equity must do equity. These grounds according to the learned Additional District Judge have disentitled the plaintiff to the relief he sought for.

As to the first of these grounds the position is this: The defendant's case was that the rooms were constructed about 1312 B. S. The suit was not instituted till 1325 B. S. "If this be so", says the learned Additional District Judge, "then plaintiff has waited a matter of 13 years before seeking relief and I think he is plainly out of Court." As authorities in support of this view he has relied upon the cases of *Duke of Leeds* v. *Earl of Amherst* (1) and *Cairncross* v. *Lorimer* (2). The learned Munsif had found that the plaintiff's statement that when the rooms were constructed he objected to the direction of the slope of the roof was true. This finding has not been reversed or dissented from by the learned Additional District Judge but he observes that "If these principles, (referring to the principles quoted by him from the two cases cited above) are applied to the present case, I think there can be no doubt that plaintiff's conduct was such as to lead the defendants to believe that he had no objection at the time to the way in which the new rooms were being constructed." It is not clear what conduct was being referred to—whether any conduct relating to the time when the rooms were constructed or the conduct in refraining from instituting the suit earlier or from taking prompt action. Presumably it is the latter, judging from the context. However that may be, no facts have been found which would suggest that the plaintiff stood by and saw the defendant dealing with the property in a manner inconsistent with the plaintiff's right and made no objection *while the act was in progress*,

(1) (1846) 2 Ph. 117; 10 Jur. 956; 41 E. R. 886; 78 R. R. 47; 16 L. J. Ch. 5.

(2) (1860) 7 Jur. (N. S.) 149; 3 Macq. H. L. 827; 3 L. T. 130; 123 R. R. 906.

Nor is it at all established that the plaintiff acquiesced in the act so as to induce a reasonable belief in the defendant that he has consented to it, and there is nothing to show that the position of the defendants was altered by their giving credit to his sincerity. Acquiescence is not a question of fact but of legal inference from facts found and it is open, therefore, to invite this Court to consider whether the question of acquiescence has been properly decided by the Court of Appeal below [*Beni Ram* v. *Kundan Lal* (3), Per Mookerjee, J., in *Ananda Chandra Sen* v. *Parbati Nath Sen* (4)]. In *De Bussche* v. *Alt* (5) Thesiger L. J., observed that if a person having a right and seeing another person *about to commit or in the course of committing* an act infringing upon that right stands by in such a manner as *really to induce* the person committing the act and *who might otherwise have abstained from it, to believe* that he assents to its being committed, he cannot afterwards be heard to complain of the act. This, as Lord Cottenham said in *Duke of Leeds* v. *Earl of Amherst* (1), the case cited by the Court of Appeal below in its judgment, is the proper sense of the term 'acquiescence,' and in that sense may be defined as quiescence under such circumstances as that assent may be reasonably inferred from it, and is no more than *an instance of the law of estoppel by words or by conduct.* In the case of *Cairncross* v. *Lorimer* (2). Lord Campbell enunciated the same principle in these words "Generally speaking, if a party having an interest to prevent an act being done, has full notice of its being done, and acquiesces in it, so as *to induce a reasonable belief* that he consents to it, and the *position of others is altered by their giving credit to his sincerity*, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license". Mere quiescence or absence of interference is not sufficient to create an estoppel [*Baswantapa* v. *Ranu* (6), *Joy Chandra Banerjee* v. *Sree Nath Chatterjee* (7), *Uda Begam* v. *Imam-ud-Din* (8), *Fatehyab Khan* v. *Muhammad Yusuf* (9), *Chintaman Ramchandra* v. *Dareppa* (10), *Jaharuddi Mandal* v. *Debnath Chowdhury* (11)]. In the present case, no act or conduct on the part of the plaintiff has been found which could induce the defendant reasonably to believe that he consented to their act, nor any which could reasonably induce them to give credit to his sincerity, nor again any but for which they would have abstained from doing what they did. It should not also be forgotten that the plaintiffs and the defendants are not co-owners but only owners of adjoining properties, and the vigilance required of and the duty cast upon a co-owner with regard to an infringement of his right is certainly greater than and of a different description from what is expected of a neighbouring owner when he finds an act being done by the other on his own property. The only thing that has been proved is delay in coming to Court but mere delay in taking legal proceedings, if the remedy is not barred, is nothing. The onus was entirely on the defendants to prove acquiescence. The Judicial Committee in the case of *Beni Ram* v. *Kundun Lal* (3) observed as follows:—In order to raise the equitable estoppel which was enforced against the appellants by both the Courts below, it was incumbent upon the respondents to show that the conduct of the owner whether consisting in abstinence from interference or in active intervention, was sufficient to justify the legal inference that they had by plain implication, contracted that the right of tenancy under which the lessees originally obtained possession of the land, should be changed into a perpetual right of occupation". In my opinion the defendant has entirely

(3) 21 A. 496 at p. 504 (P. C.); 1 Bom. L. R. 400; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022 (P. C.).
(4) 4 C. L. J. 198 at pp. 204, 205.
(5) (1878) 8 Ch. D. 286 at p. 314; 47 L. J. Ch. ; 38 L. T. 370.
(6) 9 B. 86; 5 Ind. Dec. (N. S.) 58.
(7) 32 C. 357; 1 C. L. J. 23.
(8) 1 A. 82; 1 Ind. Dec. (N. S.) 55.
(9) 9 A. 434; A. W. N. (1887) 82; 5 Ind. Dec. N. S.) 725.
(10) 14 B. 506; 7 Ind. Dec. (N. S.) 801.
(11) 33 Ind. Cas. 762; 20 C. W. N. 657.

failed to discharge his onus in the present case. The next ground is based upon the principle, as the Court below puts it "He who seeks equity must do equity". The circumstance, upon which the application of this doctrine is invoked, is that the plaintiff stated in his evidence that he had closed the openings, though that was not put forward as a defence in the written statement. The principle was formerly expressed by the maxim. "He who has committed inequity shall not have equity", and relief was refused where a transaction was based on the plaintiff's fraud or misrepresentation, or where the plaintiff sought to enforce a security improperly obtained or where he claimed a remedy for a breach of trust which he had himself procured and whereby he had obtained money. Later, it was said that the plaintiff in equity must come with perfect propriety of conduct or with clean hands. Fraud or misrepresentation or matters of that description stand in the way of a plaintiff obtaining an equitable relief by virtue of this principle. It has hardly any application in a case when he has simply tried without the Court's intervention to abate a nuisance of which he complains.

Both the grounds upon which the suit has been dismissed, seem to me to be unsustainable. As no facts were challenged by the respondents in the appeal preferred by them to the Court of Appeal below I do not consider it necessary to send the case down for any further consideration of the facts.

I, therefore, reverse the decree of the learned Additional District Judge and restore that of the learned Munsif with costs in this Court and in the lower Appellate Court.

S. D. *Appeal allowed.*

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL NO. 184 OF 1923.

May 26, 1924.

Present:—Mr. Justice Mukerji and Mr. Justice Dalal.

Sri GANESHJI MAHARAJ—JUDGMENT-DEBTOR—APPELLANT

versus

LALTA PRASAD—DECREE-HOLDER—RESPONDENT.

Hindu Law—Decree for mesne profits against temple—Endowed property, whether liable.

A decree passed against a temple for the recovery of mesne profits with respect to property owned by the idol is recoverable from the endowed property. [p. 313, col. 2.]

Pramada Nath Ray v. *Poorna Chandra Ray*, 35 C. 691; 12 C. W. N. 550; 7 C. L. J. 514, followed.

Prosunno Kumari Debya v. *Golab Chand Bahoo*, 2 I. A. 145; 14 B. L. R. 450; 3 Sar. P. C. J. 449; 23 W. R. 253; 3 Suth. 102, distinguished.

Execution first appeal from a decree of the Second Subordinate Judge, Cawnpore, dated the 9th February 1923.

Mr. *Gulzari Lal*, for the Appellant.

Dr. *M. L. Agarwala*, Dr. *K. N. Katju* and Mr. *Indu Bhusan Banerji*, for the Respondent.

JUDGMENT.—This is an appeal from an order passed by the Additional Subordinate Judge of Cawnpore in the execution department. A suit was brought by one Lalta Prasad against Sri Ganeshji Maharaj, under the management of Shiam Lal and two other defendants for partition of a one-third share and mesne profits for six years, prior to the date of the institution of the suit and subsequent mesne profits up to the date of possession. A preliminary decree was passed on 27th June 1918, for possession and for mesne profits of the past six years and future. The decree-holder obtained possession of his one-third share and took out execution for recovery of mesne profits by sale of the one-third share of the house, belonging to Sri Ganeshji Maharaj. The objections, made on behalf of the endowment, through its manager, so far as we are concerned in this appeal, are two:—(1) that interest should not be allowed on the mesne profits from year to year, and (2) that the amount

should be recovered from Shiam Lal personally and not from the endowment.

The objector, judgment-debtor, succeeded on the first ground, but in appeal it is further prayed that interest should run from the date of the final decree, *i. e.*, from 22nd January 1919, and not from the date of the preliminary decree, *i. e.*, from 27th June 1918. We have read both the decrees. In the preliminary decree the mesne profits for six years were decreed and only the amount was not ascertained. That amount was subsequently ascertained and mentioned in the final decree to be Rs. 1,995. Both the parties are agreed that interest is payable on this sum, so it is clear that interest must run from the date on which the amount was decreed and not from the date on which it was ascertained. We hold that interest was rightly calculated from the date of the preliminary decree.

The decree was actually passed for recovery of mesne profits from Sri Ganeshji Maharaj. As pointed out by the learned Judge of the lower Court, when such a decree is passed, it is recoverable from endowed property, as held by the Calcutta High Court in *Pramada Nath Ray* v. *Poorna Chandra Ray* (1). The ruling of the Privy Council in *Prosunno Kumari Debya* v. *Golab Chand Bahoo* (2) was passed on different facts. There the decree was passed against the *shebait* (manager) of the temple personally and against the profits of the temple. Even there, their Lordships held that the term *shebait* meant the successive managers of the temple, and not only the person who happened to be the manager at the time of the suit. In the present case, there is a definite decree against the temple. The learned Counsel for the appellant drew our attention to the plaint in which it was pleaded that Shiam Lal was really the owner of the one-third share in the house and Sri Ganeshji was merely a fiction. This plea, however, was not admitted by Shiam Lal and he asserted that the property was really owned by the idol. It was so held in the suit.

(1) 35 C. 691; 12 C. W. N. 550; 7 C. L. J. 514.
(2) 2 I. A. 145; 14 B. L. R. 450; 3 Sar. P. C. J. 449; 23 W. R. 253; 3 Suth. 102.

When such was the finding, it cannot be said that the plaintiff desired to recover the mesne profits from Shiam Lal and not from the idol. In the relief, claimed by him, he specifically desired relief both against the idol and against Shiam Lal. Execution was rightly ordered by the lower Court against the idol.

The appeal fails ahd we dismiss it with costs here on the higher scale.

S. D. *Appeal dismissed*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1225 OF 1922.
May 21, 1924.
Present:—Mr. Justice Daniels and Mr. Justice Neave.

FIRM GOPAL RAI PHUL CHAND—PLAINTIFF—APPELLANT
versus
GREAT INDIAN PENINSULA RAILWAY—DEFENDANT—RESPONDENT.

Railways Act (IX of 1890), s. 72—Risk Note, Form B. signed by person delivering goods to Company, whether valid—"Robbery", and "theft," whether synonymous—Theft from running train—Liability of Railway administration.

A Risk Note in Form B signed by the person delivering the goods to the Railway Company is validly executed within the meaning of section 72 of the Railways Act.

The word "robbery" as used in Risk Note B is synonymous with "theft".

Under the Risk Note B, where a plaintiff depends for his cause of action on wilful neglect on the part of either the Railway administration or any of its servants, he cannot succeed if it is shown that the loss of the goods was due to theft from a running train. [p. 314, col. 2.]

G. I. P. Railway Co. v. *Bhola Nath Debi Das*, 70 Ind. Cas. 851; 45 A. 56; (1923) A. I. R. (A.) 79 referred to.

B. B. and C. I. Railway Company v. *Ranchhodlal Chhotalal*, 52 Ind. Cas. 516; 43 B. 769 at p. 773; 21 Bom. L. R. 779, followed.

Second appeal against the decree of the District Judge of Ghazipur, dated the 20th May, 1922.

Messrs. *U. S. Bajpai* and *S. N. Varma*, for the Appellant.

Mr. *Ladli Prasad Zutshi*, for the Respondent.

JUDGMENT.—These three connected appeals have been heard together. They relate to claims by different

plaintiffs against the G. I. P. Railway Company. In this judgment we refer in particular to the facts of the Second Appeal (No. 1225 of 1922), but the facts of the others are admittedly on all fours with them and the points for decision are the same.

On 26th November 1920 a bale of cloth was delivered to the G. I. P. Railway Company at Victoria Terminus, Bombay, for despatch to Railway Station Yasufpur on the B. and N. W. Railway. The goods were never delivered. It is also admitted that they never reached the B. and N. W. Railway. A Risk Note in form B. was executed in respect of this consignment by one Hari Gobind whom the learned District Judge finds to be the person who delivered the goods to the Railway Company. The learned Judge finds that the loss of the goods was due to theft from a running train, that the guard of the train knew that the theft was being committed but that he is not shown to have been negligent in not stopping the train in order to prevent the theft or recover the goods.

The two questions which have been argued before us are :—

1. Whether the Risk Note was validly executed within the meaning of section 72 of the Indian Railways Act.

2. Whether the Railway Company is protected by it.

As to the former point section 72 provides that the note must be signed by or on behalf of the person sending or the person delivering the goods to the Railway Company. In this case Hari Gobind purported to sign on behalf of the sender R. Ramdeo. The learned Judge finds that he is not proved to have been R. Ramdeo's agent, but he finds that he was the deliverer of the goods to the Railway Company. This is a finding of fact which we must accept and it is sufficient to bring the Note within the terms of section 72.

If the decision of the second issue depended on our being able to accept the learned Judge's view that there was no negligence on the part of the Railway Company's servants we might have difficulty in upholding it. We find, however, that under the terms of the Risk Note the Railway is absolutely protected in case of robbery from a running train, which in this case is proved. It has been held in two cases of this Court, *E. I. R. Co.* v. *Nathumal Behari Lal* (1) and *G. I. P. Railway Co.* v. *Bhola Nath Debi Das* (2) that as used in Risk Note B the word "robbery" is synonymous with "theft". It has been argued on behalf of the appellants that the Railway is not protected if the robbery was due to negligence on the part of the Railway Company's servants. We think that the form of Risk Note is not capable of this construction. A Risk Note in the first instance holds the Railway Company free from responsibility for any loss or destruction of or damage to the goods from any cause whatever. To this there is an exception, namely, that when loss of a complete consignment is due to one of three causes the Railway Company can be held liable. These three causes are :—

1. Wilful neglect on the part of the Railway Administration.

2. Theft by the servants of the Railway.

3. Wilful neglect of the servants of the Railway.

There is, however, an exception to the exception in the shape of a further proviso which lays down that wilful neglect is not to be held to include fire, robbery from a running train, or any other unforeseen event or accident. Where, therefore, the plaintiff depends for his cause of action on wilful neglect on the part of either the Railway Administration or any of its servants he cannot succeed if it is shown that the loss of the goods was due to theft from a running train. This view of the Risk Note was at least impliedly taken in the second of the cases referred to above, namely, *G. I. P. Railway Co.*, v. *Bhola Nath Debi Das* (2) It is directly laid down in *B. B.* and *C. I. Railway Compony* v. *Ranchhodlal Chhotalal* (3). The material passage

(1) 39 Ind. Cas. 130; 39 A. 418; 15 A. L. J. 321.

(2) 70 Ind. Cas 854; 45 A. 56; (1923) A I. R (A.) 79.

(3) 52 Ind. Cas. 516; 43 B 769 at p 773; 21 Bom. L. R. 779.

which is on page 773 is as follows :—

"In the absence of proof of wilful neglect or theft by the Railway servants the administration is to be held free from responsibility. If, however, neglect or theft by Railway servants is proved the administration will escape liability for loss if proof is given of robbery from a running train."

We think, therefore, that the decision of the lower Court is correct and dismiss all three appeals. In view of the fact that in our opinion there was gross negligence on the part of the G. I. P. Railway Company we allow to that Company no costs of the appeals. The other Railway Companies who have been impleaded in Second Appeals Nos. 1504 and 1507 of 1922 are entitled to their costs including in this Court fees on the higher scale.

S. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 710 OF 1922.

May 28, 1924.

Present:—Mr. Justice Pearson and Mr. Justice Graham.

GOSTA BEHARI PRAMANIK AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HEM CHANDRA DAS DE (HEM CHANDRA DAS IN *Vakalatnama*)—AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Landlord and tenant—Abatement of rent—Bengal Tenancy Act (VIII of 1885), ss. 38, 52—Suit for rent—Abatement, whether can be claimed.

Where a *kabuliyat* provided that "any loss arising from leaving the lands fallow or from floods or drought will be mine..... nor shall I be entitled to abatement of the stipulated rent on any account whatsoever; any such claim will not be entertained":

Held, that the words "on any account whatsoever" must be read as a whole along with what preceded them and should be taken as meaning that abatement would not be claimable in the case of loss by reason of causes *ejusdem generis* with those specified, and that they did not include a case of deficiency in area due to compulsory acquisition. [p. 316, col. 1.]

Watson & Co. v. *Nistarni Gupta*, 10 C. 544; 5 Ind. Dec. (N. S.) 364, followed.

Abatement of rent may be claimed in a rent suit under the Bengal Tenancy Act. [p. 316, col. 2.]

Sukhraj Rai v. *Ganga Dayal Singh*, 63 Ind. Cas. 219; 6 P. L. J. 665; 2 P. L. T. 569; (1922) Pat. 132; (1922) A. I. R. (Pat.) 169, relied on.

Appeal against the decree of the District Judge, Murshidabad, dated the 25th November 1921, affirming that of the Munsif, First Court, Kandi, dated 23rd March 1920.

Babu *Debendra Narayan Bhuttacharjee*, for the Appellants.

Babus *Hemendra Nath Sen*, *Sarat Kumar Mitra* and *Narendra Krishna Basu*, for the Respondents.

JUDGMENT.—This appeal is from the judgment of the District Judge of Murshidabad. The appellant is the plaintiff in a rent suit, the respondent No. 1 being the tenant and No. 2 a co-sharer landlord. The suit related to an occupancy holding governed by the terms of a *kabuliyat* executed in 1875. In 1911 four *bighas* odd was acquired for railway purposes under the Land Acquisition Act, and the compensation money, some Rs. 470, was paid over to the tenant. In 1919 this suit was brought for the rent, for the years 1322 to 1325. The defendant claimed abatement and also pleaded certain payments. The first Court gave effect to both pleas and made a decree in part. The learned District Judge dismissed the appeal. Before us various points have been taken in argument which were not touched in the Courts below. It is argued first of all that having regard to the terms of the *kabuliyat* no question of abatement can arise at all, because it is expressly provided against. The terms are as follows according to the translation before us.

"Any loss arising from leaving the lands fallow or from floods or drought will be mine; you will not have anything to do with it, nor shall I be entitled to claim abatement of the stipulated rent on any account whatsoever; any such claim will not be entertained,

We think that what is contemplated by those clauses of the *kabuliyat* is loss arising from the natural causes referred to, or due to the tenants' own default,

and that when the clause goes on to provide that abatement cannot be claimed "on any account whatsoever", it must be read as a whole along with what precedes it, and should be taken as meaning that abatement would not be claimable in the case of loss by reason of causes *ejusdem generis* with those specified. It cannot be taken to include a case where the deficiency is due to compulsory acquisition under the law of a portion of the land. The question has to be decided as a matter of construction of this particular document, but mention may perhaps be made of the case of *Waston & Co.* v. *Nistarini Gupta* (1), where a very similar question arose for decision.

It is next contended that under the provisions of the Bengal Tenancy Act it is not permissible for a tenant to set up a claim for abatement in answer to a rent suit, and that having regard to the provisions of section 38 and section 52 of that Act, the only procedure open to him is himself to institute a suit for the purpose of establishing his claim to abatement and a refund of anything already overpaid. The cases under Act X of 1859 show that under the law as then existing such matters could be raised and adjudicated upon in a rent suit: See *Deendyal Lal* v. *Thukroo Koonwar* (2), *Maharajah Dheraj Mahtab Chand* v. *Chittro Coomarree Bibee* (3), and *Gour Kishore Chunder* v. *Bonomalee Chowdhury* (4). In the case of *Siba Kumari Debi* v. *Biprodas Pal Chowdhury* (5) it was held that a tenant could set up such a plea in a rent suit in a case where he had never actually obtained possession of a portion of the land, though it was held that sections 38 and 52 of the Act were not applicable. The same principle is illustrated in *Beni Madhab Roy* v. *Krishna Kamini Gupta* (6).

The case of *Sukhraj Rai* v. *Ganga Dayal Singh* (7) is directly in point, and upholds the principle that abatement may be claimed in a rent suit. By section 52 of the Act a right is conferred upon the tenant to claim abatement for deficiency in area, and I do not think it is possible to say that any thing in the language of section 38 necessarily limits the assertion of that right to the case of a tenant coming forward as plaintiff in a suit instituted specifically for the purpose. It is further argued that the matter ought not to be entertained as there has been no compliance with the provisions of the Civil Procedere Code in regard to the pleading of set off, but there appears to be no substance in this. The defendant in his written statement definitely claimed a specified amount under the heading of abatement and though it may be that the term 'set off' was not used that is immaterial so long as the matter has been substantially and unmistakeably raised as in the present case.

Then it is contended that there has been no measurement as contemplated by section 52, and without that no claim to abatement can be allowed. The *kabuliyat* gives the area as 23 *bighas* 14 *kanals* 19 *gandas* of land "described in the schedule below" and the schedule contains the particular area and rent of a large number of smaller plots making up the whole. The acquisition by the Railway related to a portion of two of those plots only amounting to 4 *bighas* 1 *kanal* 5 *ch.* That was the measurement arrived at in the Land Acquisition Proceedings. The learned Munsif found that that amount had been so acquired, and apparently no question of fresh measurement was ever raised by the plaintiff at any stage of the suit in the original Court. The proof so far as it went was unchallenged, and afforded some evidence of measurement of the land.

It is further urged that if the abatement is allowed at all it should be confined to that claimable for the years covered by the suit, and no questions of payment should have been gone into. But as to a matter of set-off there has been no reason suggested why the claim should be so limited; and as to the question of payment, there is no reason

(1) 10 C. 544; 5 Ind. Dec. (N. S.) 364.
(2) 6 W. R. Actx. 24.
(3) 16 W. R. 201.
(4) 22 W. R. 117.
(5) 12 C. W. N. 167.
(6) 70 Ind. Cas. 177; 36 C. L. J. 121.
(7) 63 Ind. Cas. 219; 6 P. L. J. 665; 2 P. L. T. 569; (1922) Pat. 132; (1922) A. I. R. (Pat.) 169.

why the Munsif should not have gone into the character of the payments as he has done, and, after finding that a specified amount had been wrongly debited against the defendant under the guise of interest, direct that credit should be allowed him in this suit for the amount.

Upon the whole, therefore, the appeal fails and must be dismissed with costs.

M. B. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 81 OF 1923.

June 19, 1924.

Present :—Mr. Justice Mukerji,

Babu HIRDEY NARAIN RAI —PLAINTIFF—APPELLANT

versus

Babu JAGDISH NARAIN RAI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 202—Case referred to Revenue Court—Revenue Court, order of —Appeal, where lies.

Once a case has been properly referred to the Revenue Court, an appeal from the Revenue Court lies not to Civil Court but to the superior Revenue Court. [p. 318, col. 1.]

Second appeal from a decree of the District Judge, Ghazipur, dated the 21st December 1922.

Dr. *M. L. Agarwala*, for the Appellant.

Mr. *B. E. O'Conor*, for the Respondents.

JUDGMENT.—This appeal arises under the following circumstances :—

The respondents who are two in number, namely, Jagdish Narain Rai and *Musammat* Kesha Kunwar, brought a suit in the Civil Court against the appellant Hirdey Narain Rai for possession and mesne profits on the allegation that the parties were joint owners of the plots in suit and the share of the plaintiffs, namely, the present respondents, was two-thirds. The appellant pleaded that he was, apart from the question of the title being found in the parties, the sole tenant of the entire land in suit, and, therefore, he was not liable to be ejected, his possession being lawful. The respondents' case was that the lands were the *khud-kasht* of the parties and the entry of the appellant's name as a tenant in the village papers was a fictitious one. In accordance with the provisions of section 202 of the Agra Tenancy Act, the learned Subordinate Judge referred the appellant to the Revenue Court. The suit out of which the present appeal has arisen was accordingly instituted by the appellant in the Revenue Court. The respondents pleaded there that the entry in favour of the appellant as a tenant was fictitious, and that, if there was a tenancy, both the parties were entitled to it. They further took the plea that the Revenue Court had no jurisdiction to entertain the suit. The learned Assistant Collector held that he had jurisdiction, the case having been referred to him by the Subordinate Judge. He further held that the appellant was an occupancy tenant of the lands, holding under the entire body of proprietors.

The respondents being dissatisfied with the decree of the Assistant Collector lodged an appeal before the learned District Judge. There it was contended for the appellant that the appeal lay to the Commissioner and not to the District Judge. The learned District Judge held that he had jurisdiction to hear the appeal, and, accordingly, entertained the appeal, and in the result dismissed the suit of the appellant as instituted in the Revenue Court.

In this appeal only one point has been urged, namely the learned District Judge had no jurisdiction to entertain the appeal, and the entertainment of the appeal by the District Judge was entirely against the entire scheme on which section 202 of the Tenancy Act has been based.

I think this contention of the learned Counsel for the appellant is sound. Before proceeding further I may point out the anomaly that would arise by the learned District Judge entertaining the appeal. The original suit before the learned Subordinate Judge is still pending. It will have to be decided

(assuming that there was no appeal to this Court) according to the decision of the learned District Judge. Then there would be an appeal to the District Judge. Thus the learned District Judge would be hearing two appeals from different Courts on the same subject.

The learned Counsel for the respondents relied on section 177 (*f*) of the Tenancy Act and contended that an appeal did lie to the District Judge under the provision of law. But it was with the object of settling questions of jurisdiction that the provisions of Chapter XIV of the Tenancy Act were enacted, and there is no force in this contention.

If we assume, as we must assume for the present, that the learned Subordinate Judge was right in directing the appellant to obtain a declaration from the Revenue Court as to his status as a tenant, the only Court to which an appeal would lie from the decision of the Revenue Court would be a superior Revenue Court, namely, the Court of the Commissioner. This is expressly laid down in section 202 of the Tenancy Act itself. It says in clause (2) that the Civil Court would dispose of the suit in accordance with the final decision of the Revenue Court *of first instance or appeal as the case may be.* Clearly it was never contemplated that once a case has been properly referred to the Revenue Court an appeal from the Revenue Court would come to the Civil Court.

If, however, it be the case that the learned Subordinate Judge was wrong in referring the appellant to the Revenue Court, the question can be raised again by way of appeal against the decree that will be passed by the learned Subordinate Judge in accordance with the decision of the Revenue Court. That remedy, if necessary, against a wrong decision of the Civil Court as to the applicability or otherwise of section 202 of the Tenancy Act is still open.

In my opinion the learned District Judge was in error in assuming jurisdiction. I, accordingly, allow the appeal, set aside the decree of the Court below and direct the learned District Judge to return the memorandum of appeal (when the record is received in his Court) to the respondents for presentation to the proper Court. The respondents will at all events pay the costs of the appellant in the District Judge's Court and in this Court. Costs in this Court will include Counsel's fees on the higher scale.

K. S. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 521 OF 1922.

June 16, 1924.

Present:—Mr. Justice Chakravarti.

HARISADHAN PATARI—PLAINTIFF—APPELLANT

versus

DINANATH BANERJEE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 31—Appellate judgment, what should contain—Adverse possession—Occasional user by trespasser.

It is desirable in appealable cases that the Courts should pronounce their opinion on all important points in order to enable the Appellate Courts to dispose of the cases finally and thus avoid delay and expenses of a remand. [p. 320, col. 1.]

The occasional user by trespasser of land cannot extinguish the title of the rightful owner, unless the possession of the trespasser is open, is adequate in extent and continuity and so forth. [p. 320, col. 2.]

Basanta Kumar Roy v. *The Secretary of State for India*, 40 Ind. Cas. 337; 44 I. A. 104; 1 P. L. W. 593; 32 M. L. J. 505; 21 C. W. N. 642; 15 A. L. J. 398; 25 C. L. J. 487; 19 Bom. L. R. 480; (1917) M. W. N. 482; 6 L. W. 117; 22 M. L. T. 310; 44 C. 858 (P. C.), referred to.

Appeal against the decree of the Sub-Judge, 4th Court, 24-Parganas, dated the 14th September 1921, modifying that of the Munsif First Court at Alipur, dated the 28th of June 1920.

Babus *Tarak Chandra Chakravarti* and *Profulla Chandra Chakravarti*, for the Appellant.

Babu *Mrityunjoy Chattapadhaya*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff and arises out of a suit for *khas* possession after declaration of the plaintiff's title to the land in suit. The

plaintiff's case is that the land in suit consists of two plots with an intermediate plot which belonged to defendant No. 1, that the land in suit together with other lands originally belonged to one Dwarik Patari which he held under a registered *kabuliyat* executed by him in the year 1296 B. S. at a *jama* of Rs. 38 odd, that Dwarik Patari made a gift of the *jama* lands to the plaintiff in 1318 and that the plaintiff let out the land in suit to one Sadhan Patari who was dispossessed by defendant No. 1 in 1319. The present suit was brought against defendant No. 1 and one Chehiroo as defendant No. 2 to whom the defendant No. 1 let out the lands in 1319. Chehiroo filed a written statement alleging that he held the land originally under Dwarik and that in 1319 he was induced by defendant No. 1 to execute a *kabuliyat* in his favour, but the land, he said, really belonged to the plaintiff. Defendant No. 1 denied plaintiff's title and the dispossession alleged by him. Defendant No. 1 further alleged that the two plots in dispute together with the intermediate plot really formed one plot and formed part of the *jama* held by him under the *zemindar*.

The Munsif raised a number of issues; but the main issues were two, and they were:--

(3) Is the plaintiff's claim barred by limitation ? and

(2) Has the plaintiff any title to the land in suit as alleged in the plaint ?

The learned Munsif in an elaborate and careful judgment discussed the question of the plaintiff's title and the title of the defendants and found in favour of the plaintiff. He decided the question of limitation also in favour of the plaintiff. Although the learned Munsif found these issues in favour of the plaintiff, he gave him a decree only for declaration of title but refused to give *khas* possession on the ground that the tenancy of the tenant Sadhan with whom the plaintiff settled the land in 1318 was still subsisting and, therefore, the plaintiff was not entitled to *khas* possession of the land. Both parties appealed separately before the Subordinate Judge.

The Subordinate Judge without deciding the question of title which was also in appeal before him by defendant No. 1, decided the case on the question of limitation and dismissed the suit holding that the plaintiff's suit was barred by limitation. Plaintiff has brought this appeal against that decree and it was contended on his behalf by the learned Vakil who appeared for him that the judgment of the learned Subordinate Judge was erroneous, because first the questions of title and limitation were so intimately connected that the learned Subordinate Judge's judgment on the question of limitation alone was not based on the whole of the evidence and was, therefore, wrong; secondly, that the findings of the learned Subordinate Judge were based upon a misapprehension of law and facts and were not sufficient for the disposal of the question of limitation; thirdly, it was contended that the learned Munsif in discussing the question of title had referred to an exhibit which was a *kobala* in favour of the defendant by one Chitra Dasi in which there was a clear admission in the year 1910 that the plaintiff's predecessor Dwarik was the owner of the land in suit which was stated as one of the boundaries of the plots conveyed by the *kobala* in favour of the defendant. The land in suit was described as Dwarik's land and Patit. The learned Subordinate Judge, it was argued, was in error in not referring at all to that document and thereby excluded very material evidence from his consideration in the determination of the appeal. The learned Vakil who appeared for the respondent, although he frankly admitted that the judgment of the Subordinate Judge was not very satisfactory, still contended that there was a finding which shows that the suit was barred by limitation. After hearing the learned Vakils for the parties and after a very careful consideration of the judgment of the learned Subordinate Judge I am of opinion that there has not been a proper trial of the case by the Subordinate Judge. I think that the omission of the learned Subordinate Judge to consider the question of title and

the evidence adduced by both the parties on that point has very seriously prejudiced the trial in this case. The Judicial Committee of the Privy Council and this Court also have repeatedly pointed out the desirability in appealable cases, of the Courts' pronouncing their opinion on all important points in order to enable the Appellate Courts to dispose of the cases finally and thus avoid delay and expenses of a remand. In this connection it should also be borne in mind that O. XLI, r. 31 of the Code of Civil Procedure provides that the judgment of the Appellate Court should state the points raised in appeal and the decision upon those points and the reasons for the decision. There is no reason why this important rule should be ordinarily departed from. In the present case the question of limitation was intimately mixed up with the question of title. The evidence is directed against both the points. The judgment of the learned Subordinate Judge gives no indication that he had considered the very important and large body of evidence both oral and documentary which were on the record in support of the cases of the respective parties. If the Appellate Court had considered the evidence and accepted the evidence on behalf of the plaintiff so far as title is concerned, it might well be that he would have taken the same view of the question of possession on behalf of the plaintiff as the learned Munsif did. In discussing the question of title the learned Munsif points out that defendant No. 1 admitted the title of Dwarik in the *kobala* which I have already mentioned and also that defendant No. 1 became a witness to the Will of Dwarik by which he disposed of the land in suit, as his own property. Defendant No. 1 tried to explain away his conduct with reference to this document, but the learned Munsif refused to accept his explanation and held that defendant No. 1 admitted the title of Dwarik. The learned Subordinate Judge has not referred to this important evidence. It is clear to my mind that the judgment of the Subordinate Judge is not based upon the whole of the evidence in the case.

Then the judgment of the learned Subordinate Judge on the question of limitation is also clearly defective. All that the judgment amounts to is that the plaintiff has failed to prove that he was in possession by receipt of rent within 12 years of the suit. The learned Subordinate Judge does not even say that the defendant was in possession or when his possession really began. The First Court found that the title was with the plaintiff. The learned Subordinate Judge, therefore, when considering the question of limitation should have assumed that the title was with the plaintiff. In considering the question of possession of land like the land in suit, various matters should be considered. According to the plaint, Dwarik, except for the short period that the land was *khas*, possessed those lands through tenants of whom Chehiroo was one. The defendant also claimed Chehiroo as his tenant. If Chehiroo was Dwarik's tenant, the mere non-payment of rent by a tenant or non-receipt of rent by the landlord would show that the plaintiff the rightful owner was not in possession. It was essential to consider who was tenant in possession of the land, and also when, if at all, such tenancy was terminated. Then again the land in suit appears to be what is called Bastu land and such lands unfenced as they are in the villages, usually remain vacant and the only act of possession as is usual and as was suggested in the present case, was occasional cultivation by broadcasting of pulses. It was necessary to enquire who was in occupation and on whose behalf. The occasional user by a trespasser of land cannot extinguish the title of the rightful owner, unless the possession of the trespasser is open, is adequate in extent and continuity and so forth. In this connection see the case of *Basanta Kumar Roy* v. *The Secretary of State for India* (1) Here the land was described as *patit* in the Schedule of the

(1) 40 Ind. Cas. 337; 44 I. A. 104; 1 P. L. W. 593; 32 M. L. J. 505; 21 C. W. N. 642; 15 A. L. J. 398; 25 C. L. J. 487; 19 Bom. L. R. 480; (1917) M. W. N. 482; 6 L. W. 117; 22 M. L. T. 310; 44 C. 858 (P. C.).

plaint and was also described as *patit* in the conveyance of defendant No. 1 and the plaintiff expressly drew the attention of the Court to this fact by a petition. No notice of this fact was taken by the Subordinate Judge in discussing the question of the plaintiff's possession. It is unnecessary for me to discuss what *patit* really means in the present case. Possibly it means that when the lands were not in the actual occupation of a tenant no particular use was made of the land by anybody. On these grounds I think that the judgment of the Subordinate Judge on the question of limitation in the circumstances of the present case is not sufficient or satisfactory. The result is that the judgment and decree of the Subordinate Judge are set aside and the case is sent back to the lower Appellate Court for a re-trial of the appeal according to law. If the plaintiff is found entitled to succeed, in these circumstances of the case, he should get *khas* possession. The plaintiff is entitled to the costs of this appeal and the other costs will abide the result.

M. B. *Appeal allowed; case remanded.*

ALLAHABAD HIGH COURT.

STAMP REFERENCE IN F. A. No. 513 OF 1923.

July 10, 1924.

Present:—Mr. Justice Daniels.

BAIJNATH DAS—DEFENDANT—APPELLANT

versus

BALMUKAND—PLAINTIFF—RESPONDENT.

Court Fees Act (VII of 1870), Sch. I, Art 1—Civil Procedure Code (Act V of 1908), ss. 47, 144—Restitution order—Appeal—Ad valorem Court-fee.

An appeal from an order passed on an application for restitution under section 144, Civil Procedure Code, must be stamped *ad valorem* under Article 1, Schedule I of the Court Fees Act as an appeal from a decree and cannot be filed as an appeal from an order in execution of a decree with a fixed Court-fee stamp.

An order under section 144, Civil Procedure Code, is not an order in execution falling under section 47, Civil Procedure Code.

Reference under section 5 of the Court Fees Act.

Mr. *P. L. Banerji*, for the Appellant.

The Government Advocate, for the Crown.

JUDGMENT.—The question for decision in this reference is whether an appeal from an order passed on an application for restitution under section 144 of the Civil Procedure Code requires to be stamped *ad valorem* under Article 1 Schedule 1 of the Court Fees Act as an appeal from a decree, or can be filed as an appeal from an order in execution on a Court-fee of Rs 2. The suit out of which the reference arises was one claiming a declaration that the plaintiff was an owner in possession of a house which had been sold in execution and bought by the defendant-appellant. The first Court dismissed the suit. In appeal the suit was decreed for a one-third share in the house. The defendant had obtained possession of the entire house under the Trial Court's decree. The order under appeal has granted the plaintiff possession of a one-third in the house by way of restitution. The appellant's case is that the plaintiff could only obtain possession of his one-third share by means of a suit for partition.

The question of law does not admit of any doubt. Orders under sections 47 and 144 are expressly declared to be decrees by section 2 of the Code. In the absence of any provision to the contrary appeals from decrees require to be stamped *ad valorem*. The fee payable on appeals under section 47 would be *ad valorem*, but that it has been specially reduced by the Governor in Council by Notification No. 1231/VII of the 11th October 1923 under the powers conferred by section 35 of the Court Fees Act as amended by the Devolution Act of 1920. No similar reduction has been made in the case of appeals under section 144.

In order to claim exemption from an *ad valorem* fee the objector is compelled to argue that all orders under section 144 are orders in execution falling also under

section 47. There was at one time some difference of opinion even in this Court as to whether orders under section 144 were to be treated as orders in execution, and the objector is able to cite one decision, *Gokal Prasad* v. *Ram Deri* (1), in his favour, but the opposite view is now generally accepted and has been adopted by this Court in two cases, *Jiwa Ram* v. *Nand Ram* (2), and *Brij Lal* v. *Damodar Das* (3), and by the Patna High Court in an elaborate Full Bench decision in *Balmukanda Marwari* v. *Basanta Kumari Dasi* (4). The question has usually arisen with reference to limitation whether an application would be barred if it falls under Art. 181 of the Limitation Act but in time if it can be traced as an application for the execution of a decree under Art. 182. The principle of these decisions is equally applicable to the question of Court fees.

An application under section 144 is no doubt one which carries out the intention of the Appellate Court's decree, but it does not directly execute that decree. What it does is to undo an execution wrongly granted by the Court below. In this case the High Court's decree was a declaratory and could only have been executed in respect of costs. The appellant must, therefore, stamp his appeal *ad valorem*. As only one-third of the house is really in dispute and not the entire house, he asks leave to amend his valuation so as to correspond with the matter in dispute. He is permittad to do this. The Court fee on the amended valuation (the value of one-third of the house) must be made good within two months of this date, failing which the appeal will be put up for orders of rejection.

It is unlikely that the omission of orders under section 144 from the notification referred to above was due to deliberate intention. The exemption of appeals under section 47 from an *ad valorem* fee dates back to a time when the Code of 1882 was in force. Under that Code, section 583, an application by way of restitution was treated as a proceeding in execution and there was no need for a separate notification under the section corresponding to the present section 144. It is probable that if the matter is brought to the notice of Government, Government will not consider it desirable to impose an *ad valorem* fee on a party who is merely asking the Court to right a wrong unintentionally done by the Court itself. I direct that a copy of this judgment be forwarded to Government with the suggestion that the provisions of paragraph (4) of the notification should be extended to appeals from orders under section 144.

S. D. *Reference answered.*

(1) 63 Ind. Cas. 513; 19 A. L. J. 771; 3 U. P. L. R. (A.) 126.
(2) 66 Ind. Cas. 144; 20 A. L. J. 226; 44 A. 407; (1922) A. I. R. (A.) 223.
(3) 66 Ind. Cas. 545; 20 A. L. J. 453; 4 U. P. L. R. (A.) 74; (1922) A. I. R. (A.) 238; 44 A. 555.
(4) 78 Ind. Cas. 200; 3 Pat. 371; (1924) Pat. 33; 5 P. L. T. 145.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 343 OF 1922.
May 8, 1924.

Present :—Mr. Justice Pearson and Mr. Justice Graham.

HARIPADA HALDAR AND OTHERS —JUDGMENT-DEBTORS—APPELLANTS

versus

BARADAPROSAD ROY CHOWDHURY—DECREE-HOLDER AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 166, scope of—Rent-decree—Sale in execution—Application to set aside sale—Bengal Tenancy Act (VIII of 1885), s. 173—Limitation—Legislation, policy of.

Article 166 of Sch. I to the Limitation Act is quite general in its terms and governs all applications to have an execution sale set aside. [p. 323, col. 2.]

An application under section 173, Bengal Tenancy Act, is cognizable under section 47, Civil Procedure Code, and is, therefore, governed by Art. 166 of Sch. I to the Limitation Act. [p. 324, col. 1.]

Chand Monee Dasya v. *Santo Monee Dasya*, 1 C. W. N. 534; 24 C. 707; 12 Ind. Dec. (N. S.) 1140, followed.

Chandrama Rai v. *Maharaja of Dumraon*, 38 Ind. Cas. 209, distinguished.

The policy of the Legislature is that questions arising in execution should be brought before the Courts and decided without the least possible delay. [*ibid.*]

HARIPADA HALDAR *v.* BARADAPROSAD.

Satish Chandra Kanungo v. *Nishi Chandra Dutta*, 54 Ind. Cas. 431; 46 C. 975 at p. 977, followed.

Appeal against the order of the Second Additional District Judge, 24-Parganas, dated the 8th of June 1922, affirming that of the Munsif, Fourth Court at Diamond Harbour in the District of 24-Parganas, dated the 26th of May, 1921.

Babu *Hiralal Chakravarty*, for the Appellants.

Babus *Surendra Chandra Sen* and *Hemendra Chandra Sen*, for the Decree-holder Respondent.

Babu *Manmatha Nath Roy*, for Respondents Nos. 5 and 6.

JUDGMENT.—This appeal is directed againt an order of the Second Additional District Judge of the 24 Parganas confirming the order of the Munsif, Fourth Court, Diamond Harbour, dismissing an application for setting aside a sale in execution of a rent decree. The judgment-debtor applicants, now appellants, with a large number of co-sharers held under the decree-holder Barada Prosad Roy Chowdhury a *chak* comprising an area of 147 *bighas* bearing a yearly rental of Rs. 183-12. The said Barada Prosad sued the tenants, the applicants and their co-sharers for arrears of rent and obtained a decree on the 28th August 1917. The decree was in due course put into execution on the 18th January, 1918, and the *chak* in default being put up to sale was purchased by one Jadu Nath Sarma on the 2nd July 1918. The judgment-debtor Haripada and others then applied to have the sale set aside and assailed both the decree and the sale on various grounds. One of the points for determination was whether the application was barred by limitation, and the finding of the Munsif was that the case was governed by Art. 166 of the Limitation Act, and that the application was time-barred, and he accordingly dismisssd it with costs. On appeal the learned Additional District Judge confirmed the decision of the Munsif holding that Art. 166 and not Art. 181 was applicable to the case, and dismissed the appeal with costs. The judgment-debtors Hari Pada Haldar and others then filed the second appeal.

A preliminary objection has been taken on behalf of the respondents to the hearing of the appeal, *firstly* on the ground that in so far as the application was one under section 173 of the Bengal Tenancy Act, no appeal lies either in this Court or in the Court of first appeal; and *secondly* that the appeal is not competent by reason of non-joinder of parties, the heirs and legal representatives of one of the respondents No. 10 Annoda Charan Haldar not having been brought on to the record. We do not think it is necessary to go into these matters because we are satisfied that the appeal fails upon the merits. On the merits the sole point for determination is whether the Courts below have rightly held that the application was barred by limitation. The execution sale took place on the 2nd July 1918, and the application for setting aside the sale was made in August 1920 *i. e.*, some two years later. Under Art. 166 the period of limitation is 30 days, whereas under Art. 181 it is three years. If the former is applicable the application was clearly time-barred, while if Art. 181 applies it was within time. In our judgment the Courts below have rightly held that the case is governed by Art. 166. The rulings which have been referred to in support of the contrary view, *Chand Monee Dasya* v. *Santo Monee Dasya* (1) and *Chandrama Rai* v. *Maharaja of Dumraon* (2) were decided under the Act as it formerly stood before the passing of the present Limitation Act when Art. 166 was restricted to a particular class of applications. That article as now worded is very much wider and is quite general in its terms governing all applications to have an execution sale set aside. Indeed it is arguable having regard to the extremely wide wording of the article that it covers the case of applications made under section 173 of the Bengal Tenancy Act. But, be that as it may, it is clear that an appli-

(1) 1 C W. N. 534; 24 C. 707; 12 Ind. Dec. (N. S.) 1140.

(2) 38 Ind. Cas. 209.

cation under section 173, Bengal Tenency Act, is cognisable under section 47, Code of Civil Procedure [see *Chand Monee Dasya* v. *Santo Monee Dasya* (1) relating to section 244 of the Old Civil Procedure Code], and that being so the operation of Art. 166 will be attracted. This view accords moreover with the fitness of things as it is manifestly anomalous that the period of limitation for setting aside a sale under the Bengal Tenancy Act should be so long as three years, whereas under the Code of Civil Procedure it should be only 30 days. As pointed out in *Satish Chandra Kanungo* v. *Nishi Chandra Dutta* (3) the policy of the Legislature appears to be that questions arising in execution should be brought before the Courts and decided with the least possible delay. In the present instance nearly two years elapsed before the application was made.

For the reasons stated the appeal in our judgment fails and must be dismissed with costs. Hearing-fee two gold *mohurs*.

An application is also made under section 115, Civil Procedure Code, in the alternative. Inasmuch as we have disposed of the appeal on the merits it is not necessary to pass any order under section 115, Civil Procedure Code.

K. S. D. *Appeal dismissed.*

(3) 54 Ind. Cas. 431; 46 C. 975 at p. 977.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1521 OF 1922.

June 18, 1924.

Present:—Mr. Justice Sulaiman and Mr. Justice Kanhaiya Lal.

GANESH RAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

BHUSHI RAI—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), s. 9—Benefit of section, how to be taken—Possessian on basis of title, suit for—Failure to establish title—Decree for possession, whether can be given—Occupancy holding—Mortgage, whether legal — Dispossessed mortgagee, suit by—Section, whether applies.

When a plaintiff is dispossessed otherwise than in due course of law and wishes to take the benefit of section 9 of the Specific Relief Act, he ought to institute his suit on that ground alone and not on title. [p. 326, col. 1.]

Therefore, when a plaintiff sues for possession on the basis of a title and fails to establish his title, his suit for possession based on title cannot be converted into a suit for possession under section 9 of the Specific Relief Act, and a decree for possession cannot be granted to him under that section. [p. 326, col. 1.]

Lachhman v. *Shambhu Nath*, 7 Ind. Cas. 495; 33 A. 174; 7 A. L. J. 1078, followed.

Pal Ahir v. *Asghar Husain*, 10 Ind. Cas. 145; 8 A. L. J. 404, referred to.

Section 9 of the Specific Relief Act does not apply to a suit by a dispossessed mortgagee for recovery of possession and in the alternative for recovery of the mortgage-money. [*ibid.*]

Second appeal from a decree of the District Judge, Ghazipur, dated the 8th September 1922.

Mr. *Mangal Prasad Bhargava*, for the Appellants.

Mr. *U S. Bajpai*, for the Respondent.

JUDGMENT.—The question for consideration in this case is not one free from difficulty. On the 13th June 1908 Tilak Rai, Ganesh Rai and Mahabir Rai borrowed Rs. 160 from Bhusi Rai, the plaintiff-respondent, and mortgaged with possession certain occupancy plots. There was an agreement that in case the mortgagee was ejected from the occupancy holding or from any portion thereof by any act on the part of the mortgagors or his heirs or legal representatives, he would be entitled to claim possession of the occupancy holding or to recover damages at the rate of 10 maunds per *bigha* from the date of his ejectment, or to recover the entire money due to him with interest at the rate of 2 per cent per mensum from the date of his ejectment till the date of realisation from the person and the other property of the mortgagors, including two houses specifically described in the deed. There was a further covenant that the occupancy holding. and the two houses aforesaid shall be deemed to be mortgaged and hypothecated for the repayment of the money secured by the mortgage. The occupancy holding in question was situated in Chak Abdulla Khatib *alias Mauza* Raziapur. The houses in question were situated in Balapur.

GANESH RAI *v.* BHUSHI RAI.

On the 16th February 1910 a deed of further charge was executed for Rs. 99-15 which provided for the repayment of the money due thereon, including interest, at the time of the repayment of the above mortgage and also mentioned that the occupancy holding and one of the houses shall stand mortgaged and hypothecated for the above amount.

On the 5th October 1910 there was a second deed of further charge executed for Rs. 49-15 couched in almost identical terms, with this difference that the house hypothecated for the repayment of the money due on that deed was the other of the two houses.

The allegation of the plaintiff was that he was placed in possession of the mortgaged holding and that in 1328 *Fasli* the defendants wrongfully interfered with his possession and removed the *bajra* crop, which he had sown over the mortgaged land. The plaintiff accordingly sued for a decree maintaining his possession as a mortgagee over the occupancy plots in question with the *Arhar* crop standing on a portion of it. He further prayed that in case he was found to be out of possession, such possession may be awarded to him. In the alternative he asked for the recovery of the money due on the mortgage and deeds of further charge by the sale of the houses mortgaged. He also claimed the price of the crop, which was alleged to have been sown by him and wrongfully cut away by the defendants.

The defendants contested the claim on various grounds. Their plea was that the mortgage and deeds of further charge were fictitious and without consideration, that they did not give possession to the plaintiff over the disputed plots, that the crops standing thereon had been sown and cut by them, and that the plaintiff was not entitled to get possession of the holding or to bring the mortgaged houses to sale.

The Court of first instance dismissed the claim, holding that as the mortgage of an occupancy holding was illegal, the mortgage of the houses could not be enforced because its enforcement was inter-dependent on the failure of the mortgage of the occupancy holding. The lower Appellate Court, however, was of opinion that although the mortgage of an occupancy holding was illegal, the mortgagors could not oust the mortgagee by force after he had already obtained possession without repaying the mortgage-money. It then asked the Trial Court to determine whether the plaintiff had obtained possession under the mortgage in question and when he had been dispossessed. The finding of the Court of first instance was that the plaintiff had remained in continuous possession of the mortgaged holding till 1326 *Fasli* and that he was subsequently ousted by the defendants who took possession of the *bajra* crop sown by the plaintiff on a portion of the mortgaged holding, worth Rs. 15. The finding of the lower Appellate Court was that the plaintiff had been dispossessed less than six months before the institution of the suit and that on the ground of equity he was entitled to a decree for possession of the occupancy holding unless the mortgagors were willing to repay the mortgage-money. It proceeded accordingly to give the plaintiff a decree for possession but omitted to consider whether the plaintiff was entitled to a decree for damages on account of the crop said to have been cut away by the defendants or whether the other crop which is said to have existed on the date of the suit was still existing on the spot or had been removed.

There can be no question that the mortgage of an occupancy holding was illegal. The only matter which requires consideration is whether in that event the plaintiff is entitled to get back possession except by a suit brought under section 9 of the Specific Relief Act or to sue for the recovery of his money by the sale of the houses. The suit was not brought under section 9 of the Specific Relief Act. In fact if it had been brought no appeal from a decree passed in such a suit could have been maintainable. As has been pointed out in *Lachhman* v. *Shambhu Nath* (1) where a plaintiff sues for possession on the

(1) 7 Ind. Cas. 495; 33 A. 174; 7 A. L. J. 1078.

basis of a title and fails to establish his title, his suit for possession based on title cannot be converted into a suit for possession under section 9 of the Specific Relief Act; and a decree for possession cannot be granted to him under the latter provision. In *Pal Ahir* v. *Asghar Husain* (2) where certain property mortgaged by the defendants, as if it were a fixed rate tenancy, was sold as such and purchased by the plaintiff who remained in possession for a time and afterwards the plaintiff was dispossessed by the defendants, who were found to have been occupancy tenants, it was held that a suit for the recovery of possession by the plaintiff was not maintainable in as much as the holding was an occupancy tenancy, a mortgage or sale of which could not be recognised. It was further held in that case that when a plaintiff is dispossessed otherwise than in due course of law and wishes to take the benefit of section 9 of the Specific Relief Act, he ought to institute his suit on that ground alone and not on title so that the nature of the enquiry therein may be limited to the question of the immediate right of each party to possession. The learned District Judge observes that it would amount to encouraging the use of violence, if the Court refuses to give the mortgagee possession in these circumstances. But the mortgagee has his remedy open to him to seek possession irrespective of his title. He did not adopt that remedy and sought to obtain possession on the strength of his title and in the alternative for the recovery of the mortgage-money due on the mortgage and the deeds of further charge. To such a suit section 9 of the Specific Relief Act has no application.

The other points raised in the appeal have not been tried. The appeal is therefore allowed and the case remanded to the lower Appellate Court with a direction to reinstate the appeal under its original number and dispose of it after determining the other points raised in the suit and the appeal in the manner directed by law. Costs shall abide the result and will include fees on the higher scale.

K. S. D. *Appeal allowed ; Case remanded.*

(2) 10 Ind. Cas. 145; 8 A. L. J. 404.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 265 OF 1923.

July 3, 1924.

Present:—Mr. Justice Kanhaiya Lal.

SUKHDEO AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM NEWAS AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Vendor and purchaser—Some interest reserved by vendor in property sold—Transfer of Property Act (IV of 1882), s. 10—Rule against perpetuity—Succession.

There is nothing to prevent a vendor from reserving a certain interest in the property comprised in the sale for the benefit of himself and his lineal male descendants without any power of alienation, subject to the reversion of that interest in case there were no male descendants left to enjoy the benefit of that reservation. [p. 327, col. 1.]

The reservation of such an interest does not offend against the rule of perpetuity or involve the laying down of a rule of succession varying the ordinary law. On the other hand it merely amounts to the cutting of a certain interest out of the property sold for a limited purpose; and the vendee becomes fully entitled to the whole, when the interest so created dies out. [*ibid.*]

Second appeal against a decree of the Judge, Small Cause Court, exercising the powers of a Subordinate Judge, Allahabad, dated the 17th November 1922.

Mr. *Gulzari Lal*, for the Appellants.

Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—The dispute in this appeal relates to two *bighas* of *nankar* land situated in the village Balakmau, which appertained to a 9 pies share belonging to Ram Charan. On the 12th February 1884, Ram Charan sold his *zemindari* share aforesaid to Sheo Narain, his son-in-law, reserving at the same time the said two *bighas* of *nankar* land for his use and for the use of his male descendants (*aulad khas*) without any power of alienation and free

from any liability for the payment of rent subject to the condition that if at any time he had no descendant left the land shall revert to the purchaser.

Ram Charan accordingly remained in possession of the said land during his lifetime. He was succeeded by his son Muazzam Ram, who died in the year 1918 without leaving any issue. The plaintiffs claim to be the nephews of Ram Charan and their contention is that the said two *bighas* of land had been permanently exempted from the sale and that the covenant restraining alienation and providing for the reversion of the property to the vendee in case Ram Charan had no male descendant left, was invalid. The defendants are the purchasers of the interest of Bindeshri and Rameshar, the nephews and legal representatives of Sheo Narain. The Courts below were of opinion that the reservation made in the sale-deed was absolute and a provision made for the reversion of the land to the vendee in case Ram Charan left no male descendant was void.

There is nothing, however, to prevent the vendor from reserving a certain interest in the property comprised in the sale for the benefit of himself and his lineal male descendants without any power of alienation subject to the reversion of that interest in case there were no male descendants left to enjoy the benefit of that reservation. The intention of the parties to the deed evidently was to have a provision for the maintenance of the vendor and his lineal descendants who were not to be charged any rent for the occupation of the land so long as any such lineal descendants were in existence and to have the rights of the vendee otherwise unaffected. The reservation of such an interest does not offend against the rule of perpetuity or involve the laying down of a rule of succession varying the ordinary law. On the other hand it merely amounts to the cutting of a certain interest out of the property sold for a limited purpose; and the vendee becomes fully entitled to the whole, when the interest so created dies out, as has happened in the present case. The plaintiffs are not the lineal descendants of Ram Charan and are not entitled to the benefit of the reservation made in the instrument of sale. This appeal is, therefore, allowed and the claim of the plaintiffs dismissed with costs here and hitherto including fees in this Court on the higher scale.

S. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 106 OF 1923.

May 22, 1924.

Present:—Mr. Justice Pearson and Mr. Justice Graham.

SARAT CHANDRA GHOSE, COMMON MANAGER TO THE ESTATE OF BENI LAL CHUKERBUTTY AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

RAJ KUMAR CHAKRAVARTY AND OTHERS—DECREE-HOLDERS—AUCTION-PURCHASERS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 95, 98, 100—Common Manager—Suit for rent—Execution of decree—Previous sanction of District Judge, whether necessary.

There is no provision in the Bengal Tenancy Act which requires the previous sanction of the District Judge to be obtained to bring a suit for rent against a Common Manager or to execute a decree obtained in such suit. [p. 328, col. 1.]

Appeal against the order of the Additional Subordinate Judge, Backergunj, dated the 18th of November 1922, affirming that of the Officiating Munsif, Second Court, Patuakhali, dated the 19th September 1921.

Babu *Prokash Chandra Majumdar*, for the Appellants.

Babus *Sures Chandra Talukdar* and *Mohendra Kumar Ghose*, for the Respondents.

JUDGMENT.—This appeal is directed against the judgment of the Additional Subordinate Judge of Backergunj confirming an order of the Munsif, Second Court, Patuakhali, dismissing an application for setting aside a sale.

The only point which has been urged before us on behalf of the appellant is that, inasmuch as the decree-holders did not obtain the previous sanction of the District Judge to execute the decree

against the Common Manager, the sale held in execution thereof was a nullity, it being contended that the powers of a Common Manager are analogous to those of a Receiver and that the same procedure applies. This argument was advanced in the Courts below and was, we think, rightly rejected. Sections 93 to 100 of the Bengal Tenancy Act relate to the appointment of Common Manager, and there is no provision which requires the previous sanction of the District Judge to be obtained to bring a suit for rent against a Common Manager or to execute a decree obtained in such suit. If it had been the intention of the Legislature to require such sanction it may be presumed that it would have been plainly expressed. We cannot read into the Act something which is not to be found there.

The learned Vakil for the appellants was constrained to admit that he could not find any authority exactly in point in support of his proposition, but he relied upon the case of *Nabo Kishore Mandal* v. *Atul Chandra Chatterjee* (1) where it was laid down that a suit for accounts against a Common Manager requires the previous sanction of the District Judge. In the course of the judgment in that case it is said : "The manager is, in our opinion, so far as he holds his office and performs his duties under the provisions of the Act, in a position analogous to that of a Receiver appointed by the Court under the provisions of O. XL, r., 1 of the Civil Procedure Code, and is in our opinion entitled to the same protection, for the period during which he exercises his duties within the powers given to him by the Act, as a Receiver appointed by a Civil Court". In the suit for accounts the object was to re-open the accounts filed by the Common Manager from time to time before the District Judge, objections to which had been actually made before and disposed of by the District Judge, and it was, therefore, held that as regards items which in the ordinary course of the management ought to have appeared in the account and which the party was aware at the time were not included in the account or with due enquiry might have discovered were not included in the account no suit would lie without sanction. The other case in which a similar opinion was expressed is *Beni Madhab* v *Upendra Chandra* (2) which was also an account suit, and the question related to the institution of such a suit.

We are here, however, dealing not with an account suit but with an execution proceeding arising out of a rent-suit. In an account suit there are special reasons why such sanction is necessary. Those reasons do not exist, the decree being merely against the estate of the Common Manager in his capacity as such, and not involving him in any personal capacity. Furthermore, it is to be observed that the decree out of which the execution proceedings arose, was passed against the Common Manager and the Execution Court could not go behind the decree but was bound to execute it.

In our judgment, therefore, the Courts below rightly refused to set aside the sale. The appeal fails and must be dismissed wtth costs. We assess the hearing-fee at two gold *mohurs*.

K. S. D. *Appeal dismissed.*

(1) 16 Ind Cas. 193; 40 C. 150; 17 C. W. N. 846.

(2) 53 Ind. Cas. 747; 30 C. L. J. 279; 24 C. W. N. 138.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1565 OF 1922.

July 2, 1924.

Present:—Mr Justice Daniels and Mr. Justice Neave.

BUDDHOO *alias* GULAB DASS —DEFENDANT—APPELLANT

versus

SHEO CHARAN—PLAINTIFF AND BHAGWAN DASS—DEFENDANT —RESPONDENTS.

Guardians and Wards Act (VIII of 1890), ss. 29, 31 (2)—Sanction for sale—Necessity—Inquiry by purchaser.

Where a mortgage is made by a certificated guardian of a minor with the sanction of the District Judge recorded under section 31 of the Guardians and Wards Act, that sanction is *prima facie* evidence that the transaction is justified and is sufficient to relieve the creditor of the necessity of making any inquiry as to its being for legal necessity. [p. 329, col. 1.]

G. N. Das
Advocate High Court
Jammu & Kashmir
Srinagar.

BUDDHOO *v.* SHEO CHARAN.

It is the duty of the Court to which an application is made under section 29 of the Guardians and Wards Act for sanction of the sale of minor's property, to satisfy itself by inquiry that the transaction is necessary and is for the minor's benefit; and a creditor is entitled to rely on an order of sanction as evidence that the Court has satisfied itself on this point and that the transaction is a proper one. [*ibid.*]

Nallaka Venkatasami v. *Rajam Virranna*, 65 Ind. Cas. 964; 45 M. 429; 15 L. W. 373; 42 M. L. J. 333; (1922) M. W. N. 357; (1922) A. I. R. (M.) 135; 31 M. L. T. 484 and *Gangapershad Sahu* v. *Maharani Bibi*, 11 C. 379 at p. 383; 12 I. A. 47; 4 Sar. P. C. J. 621; 9 Ind. Jur. 158; 5 Ind. Dec. (N. S.) 1012 (P. C.), relied on.

The mere omission to recite the necessity in an order granting sanction, as required by section 31 (2) of the Guardians and Wards Act, is no more than an irregularity and it does not render the sanction altogether illegal. [p. 329, col. 2.]

Second appeal from a decree of the District Judge, Benares, dated the 9th May 1922.

Dr. *Harnandan Prasad*, for the Appellant.

Mr. *K. N. Katju*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff to enforce a mortgage of a house belonging to the appellant Buddhoo. The appellant impeaches the transfer on the ground that it was made by his father as his guardian without legal necessity. It was also suggeated that his father was spendthrift and an immoral person, but this plea has now disappeared. The appellant's father Bhagwan Das was the certificated guardian of his son, and the mortgage was made with the sanction of the District Judge recorded under section 31 of the Guardians and Wards Act. Both the Courts below have held that this sanction is *prima facie* evidence that the transaction was justified and that it was sufficient to relieve the creditor of the necessity of making any further enquiry. We think that this view is correct. It is the duty of the Court to which an application is made under section 29 of the Act for sanction of the sale of a minor's property, to satisfy itself by enquiry that the transaction is necessary and is for the minor's benefit, and a creditor is entitled to rely on an order of sanction as evidence that the Court has satisfied itself on this point and that the transaction is a proper one This view has quite recently been taken by the Madras High Court in *Nallaka Venkatasami* v. *Rajam Virranna* (1). It is also in accordance with the observations of their Lordships of the Privy Council in *Gangapershad Sahu* v. *Maharani Bibi* (2) where they say :—

"Their Lordships think that when an order of the Court has been made authorising the guardian of an infant to raise a loan on the security of the infant's estate, the lender of the money is entitled to trust to that order, and that he is not bound to inquire as to the expediency or necessity of the loan for the benefit of the infant's estate. If any fraud or underhand dealing is brought home to him that would be a different matter; but, apart from any charge of that kind, their Lordships think he is entitled to rest upon the order".

Two other points have been raised by the appellent in argument. The first is that the sanction is not a legal sanction because the necessity for the mortgage was not recited in the order as required by section 31 (2) of the Act, and the other that the reasons given by the plaintiff's father in his original application are not sufficient to justify the transaction.

As to the second point, it is sufficient to say that the question is one which might have involved the taking of evidence, and that it was never raised in either of the Courts below. We, therefore, decline to enter into it. The first question also was not raised in either of the Courts below, and we need not therefore go into it, but in any case we consider that the mere omission to recite the necessity in the order is no more than an irregularity and that it does not render the sanction altogether illegal. In this respect we prefer the view of the Calcutta High Court in *Maharaja Sir Rameshwar Singh Bahadur* v. *Dhanpat Singh* (3)

(1) 65 Ind. Cas. 964; 45 M. 429; 15 L. W. 373; 42 M. L. J. 333; (1922) M. W. N. 357; (1922) A. I. R. (M.) 135; 31 M. L. T. 484.

(2) 11 C. 379 at p. 383; 12 I. A. 47; 4 Sar. P. C. J. 621; 9 Ind. Jur. 158; 5 Ind. Dec. (N. S.) 1012 (P. C.).

(3) 5 Ind. Cas. 334; 11 C. L. J. 197.

to that taken by the Judicial Commissioner of Oudh in *Bankey Lal* v. *Swami Dayal* (4). Except for the omission to recite the necessity, the order appears on the face of it to have been passed with due care, for the learned Judge has been careful to lay down the condition that the interest on the mortgage to be effected should not exceed 12 per cent. For these reasons we dismiss the appeal with costs including in this Court, fees on the higher scale.

S. D. *Appeal dismissed.*

(4) 56 Ind. Cas. 328; 23 O. C. 72; 7 O. L. J. 207; 2 U. P. L. R. (O.) 82.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 56 OF 1923.
May 19, 1924.
Present:—Mr. Justice Pearson and Mr. Justice Graham.

KRISHNA CHARAN MONDAL—DEFENDANT—PETITIONER—APPELLANT
versus
CHINIBASI MONDAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 19—Appeal—Dismissal for default—Application for re-admission of appeal—Proper procedure—Court, duty of.

An application for re-admitting an appeal dismissed for default should be treated as a miscellaneous matter and the Court should give the applicant an opportunity to show that he was prevented by sufficient cause from being present when the appeal was called on for hearing.

Appeal against an order of the Second Additional District Judge, Dacca, dated the 9th of June 1922.

Babu *Upendra Kumar Roy*, for Babu *Prokash Chandra Pakrashi*, for the Appellant.

Babu *Bepin Chandra Bose*, for the Respondents.

JUDGMENT.—This appeal relates to an order of the Second Additional District Judge of Dacca passed on the 9th June 1922. On that date it appears that the present appellant had an appeal and a cross-appeal pending in that Court and when the appeals were called on he

was absent. The result was that the appeal was dismissed for default and the cross-appeal was decreed *ex parte*. On the same day an application was made to re-admit the appeal upon which the application was rejected summarily, the learned Judge noting at the time that he had gone to the length of sending a peon to the Bar library to find the Pleader, but neither the Pleader nor the client could be found. We think that in these cases the best course to adopt, and the shortest in the end, is to treat the application as a miscellaneous matter and to give the applicant an opportunity to show that he was prevented by any sufficient cause from being present when the appeal was called on so as to comply with the provisions of O. XLI, r. 19, Civil Procedure Code. In the present case no such opportunity has been given to the appellant. Under the circumstances the appeal must be allowed and the case sent back to the lower Appellate Court to entertain the application for re-admission of the appeal upon the merits and to dispose it of according to law.

We make no order as to costs.

K. S. D. *Appeal allowed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 464 OF 1921.
June 4, 1924.
Present:—Mr. Justice Mukerji and Mr. Justice Dalal.

ROSHAN LAL AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
Chaudhri BASHIR AHMAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 25—Computation of time—'Month', meaning of—Principle applicable.

If the starting point is to be calculated, as so many months or so many years from a particular date, that point must be calculated according to the Gregorian calendar. On the other hand, if the starting point is otherwise fixed by the stipulation itself, the Court cannot apply section 25 of the Limitation Act. Really it is a matter of interpretation in every case. [p. 331, cols. 1 & 2.]

ROSHAN LAL *v.* BASHIR AHMED.

First appeal from a decree of the Subordinate Judge, Allahabad, dated the 19th May 1921.

Mr. *Gulzari Lal* and Dr. *S. N. Sen*, for the Appellants.

Messrs. *Iqbal Ahmad* and *Mukhtar Ahmad*, for the Respondents.

JUDGMENT.—The question for determination in this appeal is whether the suit was rightly dismissed by the Court below on the ground of limitation.

The suit was brought on foot of a bond executed on the 10th of July 1908. The principal amount was payable in the course of three years. But it was also stipulated that interest would be paid every six months according to the Hindi calendar and if any much interest (payable every six months) should remain unpaid the mortgagee would be entitled to enforce his bond without waiting for the three years' time. It is common ground that no interest was paid by the mortgagor. It is also common ground that if six months, according to the Hindi calendar, be added to the date of the bond, the starting point of limitation would be some time before the 10th of January 1909, the date on which the suit was actually filed. On the other hand if six months, according to the Gregorian calendar, be taken from the date of the bond as the starting point of limitation, the suit would be just within time. The question is what course should be adopted to find out the starting point of limitation.

The learned Counsel for the appellants has taken his stand on section 25 of the Limitation Act and has referred us to two cases *viz: Rango Bujaji* v. *Babaji* (1) and *Latifunnisa* v. *Dhan Kunwar* (2). The Court below has referred to the case of *Dwarka Prasad* v. *Raja Ram* (3). We have carefully gone through these cases and are of opinion that it is really a matter of interpretation in every case. The true principle seems to be this. If the starting point is to be calculated, as so many months or so many years from a particular date, that point must be calculated according to the Gregorian calendar. On the other hand, if the starting point is otherwise fixed by the stipulation itself, the Court cannot apply section 25 of the Limitation Act. In the case of *South British Fire and Marine Insurance Co.* v. *Brojo Nath Shaha* (4) their Lordships of the Calcutta High Court had to interpret a policy of insurance and they held that lunar months were meant and not calendar months. It is, therefore, really a matter of interpretation in every case.

Coming to the facts of this case we find in the bond itself the following expressions:—

"I, therefore, covenant and give in writing that I shall pay the principal to the said creditor within three years and shall continue to pay interest on the entire amount at 0-14- per cent per mensem according to Hindi months including the intercalary month till the payment of the entire amount due thereunder. If God forbid.....or if six monthly interest be not paid, the said creditor shall, under all the circumstances, have power to realise the whole of the principal, etc." We have read and re-read the document and we have also consulted the original document in Urdu character. It seems clear to us that the parties meant that interest would be paid every six Hindi months without dividing the year in which there is an intercalary month, into the two periods of six and seven months. This view of the stipulation has been taken by the plaintiff himself in the account appended to the plaint. Their interest has been calculated every six Hindi months. In the first two six months the calculation is from Asarh to Pus and Pus to Asarh. But in the third period which contained apparently an intercalary month, the six months are composed not of seven months Asarh to Pus but exactly six months Asarh to Aghan. The intention, therefore, was that the interest should be payable at the expiry of six months according to the Hindi calendar, that is to say, on a particular date and not at the expiry of "six months" which under section 25

(1) 6 B. 83; 3 Ind. Dec. (N. S.) 513.
(2) 24 C. 382; 12 Ind. Dec. (N. S.) 922.
(3) 29 Ind. Cas. 980; 13 A. L. J. 486.
(4) 2 Ind. Cas. 573; 36 C. 516; 13 C. W. N. 425.

of the Limitation Act would mean six months under the Gregorian calendar.

The decree of the Court below seems to be right and we hereby dismiss the appeal with costs which will include Counsel's fees in this Court on the higher scale.

K. S. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 224 OF 1923.
June 27, 1924.
Present:—Mr. Justice Neave.
RAM PRASAD—PLAINTIFF—APPELLANT
versus
RAJJAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 41, 97—Occupancy holding—Rent, enhancement of—Entry in khatauni, *whether constitutes agreement.*

The mere entry of a figure in the *khatauni*, with the signatures of the landlord, the tenant and the *Qanungo* cannot be regarded as an agreement to enhance rent duly attested under sections 41 and 97 of the Agra Tenancy Act.

Second appeal against a decree of the District Judge, Jhansi, dated the 15th of November 1922.

Mr. *P. L. Banerji*, for the Appellant.

Dr. *N. C. Vaish*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for arrears of rent at the rate of Rs. 45 a year for the three years, 1327, 1328 and 1329 *Fasli*. The defence was that the rate of rent was Rs. 18 only and this had been duly paid. The First Court has found that this defence was false, that the rent recorded until 1325 was Rs. 21-8, that from 1325 onwards Rs. 45 has been entered as the rent, and that in the *khatauni* of 1329 Fasli there appear against the entry of Rs. 45 the signatures of the landlord, of one of the tenants and of the *Qanungo*. This entry it has accepted as an agreement to pay rent at the enhanced rate of Rs. 45 under section 41 of the Tenancy Act and the signature of the *Qanungo* it has accepted as a sufficient attestation to dispense with the necessity for registration under section 97 of that Act. The lower Appellate Court has dissented from this view and has decreed the suit at the rate of Rs. 21-8, holding that no valid enhancement of rent had taken place.

In appeal two points have been taken, the first that the entry in the *khatauni* amounts to a valid agreement for the enhancement of the rent under section 41 read with section 97 of the Tenancy Act, the second that even if this is not the case, there is evidence to prove that for the years 1325 and 1326 *Fasli* rent at the enhanced rate had been paid, and that under section 35 of the Tenancy Act this must be presumed to be the rate payable for the holding.

Section 41 of the Tenancy Act provides that the rent of an occupancy tenant shall be liable to enhancement only by registered agreement or by decree or order of a Revenue Court. Section 97 allows the substitution of the attestation of a Revenue Officer not inferior in rank to a *Qanungo* for registration subject to such conditions as the Local Government may direct. The Local Government has laid down a certain form of endorsement to be entered on in such an agreement. It is quite clear that the mere entry of a figure in the *khatauni* with the signatures of the landlord, the tenant and the *Qanungo* cannot be regarded as an agreement to enhance rent duly attested under these provisions of the Act. There remains the question whether it is proved that the tenants had been paying rent at the enhanced rate for two years previously to the years in suit. In support of this there is the entry in the *khatauni*, but no other direct evidence. The plaintiff, when examined on oath, deposed that the defendant's brother and predecessor-in-interest had executed a registered *kabuliyat* under which he had to pay the higher rate. He did not, however, produce this *kabuliyat*. I am unable to regard the evidence of payment of Rs. 45 for the years 1325 and 1326 as adequate. In these circumstances the appeal must fail

and is dismissed with costs including in this Court fees on the higher scale.

K. S. D. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 26 OF 1923.

April 17, 1924.

Present:—Mr. Wazir Hasan, J. C. and Mr. Pullan, A. J. C.

BANSIDHAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

Lala AJUDHIA PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Benami *transaction*—Benamidar, *position of*—*Agreement to sue for benefit of another*—*Contract, whether executory and opposed to public policy*—*Specific performance*—*Formal deed of conveyance, whether necessary*—*Non-existing property, agreement to assign, validity of*—*Operative assignment, essentials of*—*Part-performance, doctrine of*—*Civil Procedure Code (Act V of 1908), O. II, r. 3, O. VI, r. 2*—*Inconsistent pleadings*—*Alternative relief*—*Intention to defraud Court*—"In pari delicto," *maxim of.*

So long as a *benami* transaction does not contravene the provisions of the law, the Courts are bound to give it effect. The *benamidar* has no beneficial interest in the property that stands in his name, he represents, in fact, the real owner and is a mere trustee for him.[p. 337, col. 2; p. 338, col. 1.]

Bilas Kunwar v. *Desraj Ranjit Singh*, 30 Ind. Cas. 299; 42 I. A. 202; 19 C. W. N. 1207; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; 37 A. 557; 22 C. L. J. 516; (1915) M. W. N. 757 (P. C.) and *Gur Narayan* v. *Sheo Lal Singh*, 49 Ind. Cas. 1; 46 I. A. 1; 17 A. L. J. 66; 36 M. L. J. 68; 9 L. W. 335; 23 C. W. N. 521; 1 U. P. L. R. (P. C.) 1; 46 C. 566 (P. C.), referred to.

An agreement to sue for the benefit of another requiring the latter to defray all the expenditure of the suit and giving him the right to become the owner of the property recovered under the decree in that suit, is not of an executory nature requiring the execution in future of a formal deed of conveyance. Such an agreement is not opposed to public policy, the paramount public policy being not to interfere with contracts entered into freely and voluntarily by men of full age and competent understanding. [p. 338, col. 1.]

Printing and Numerical Registering Co. v. *Sampson*, (1875), 19 Eq. 412; 44 L. J. Ch. 705; 32 L. T. 354; 23 W. R. 463, referred to.

In equity as well as in law non-existing property may be made the subject of an agreement. When the property comes into existence, the contract to assign works out as a complete assignment by itself, provided the nature of the property is such that its transfer is not forbidden by law. The assignment, however, to be operative, must be valid in form and where it is not so, the doctrine of part performance cures the defect. [p. 338, cols. 1 & 2.]

Tailby v. *Official Receiver*, (1889) 13 App. Cas. 523; 58 L. J. Q. B. 75; 60 L. T. 162; 37 W. R. 513; *Holroyd* v. *Marshall*, (1862) 10 H. L. C. 191; 33 L. J. Ch. 193; 9 Jur. (N. S.) 213; 7 L. T. (N. S.) 172; 11 W. R. 171; 11 E. R. 999; 138 R. R. 108; *Legard* v. *Hodges*, (1792) 1 Ves. Jun. 477; 4 Bro. C. C. 421; 2 R. R. 146; 30 E. R. 447; *Performing Right Society, Limited* v. *London Theatre of Varieties, Limited*, (1924) A. C. 1; 93 L. J. K. B. 33; *Wolverhampton and Walsall Ry.* v. *London & North Western Ry. Co.*, (1873) 16 Eq. 433; 43 L. J. Ch. 131; *Western Waggon Co.* v. *West*, (1892) 1 Ch. 271; 61 L. J. Ch. 24 4; 66 L. T. 402; 40 W. R. 182; *Lester* v. *Foxcroft*, (1700) 2 Wh. & Tud. L. C. (8th Ed.) 460 at p. 464; Colles 108; 1 E. R. 205; *Maddison* v. *Alderson*, (1883) 8 App. Cas. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821, *Mahomed Musa* v. *Aghore Kumar Ganguli*, 28 Ind. Cas. 930; 42 I. A. 1; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M L. T. 143; 2 L. W. 258; 42 C. 801; (1915) M. W. N. 621 (P. C.), referred to.

Order VI, r. 2, Civil Procedure Code, does not exclude the pleading of inconsistent facts. This rule is the same as r. 4 of O. XIX of the Rules of the Supreme Court in England. Under it an alternative relief may, subject to certain regulations, be asked and several causes of action joined in the same statement of claim, as laid down in O. II, r. 3, Civil Procedure Code. [p. 335, col. 2.]

Bagot v. *Easton*, (1878) 7 Ch. D. 1; 47 L. J. Ch. 225; 37 L. T. 369; 26 W. R. 66 and *Morgan, In re*; *Owen* v. *Morgan*, (1887) 35 Ch. D. 492; 56 L. J. Ch. 603; 56 L. T. 503; 35 W. R. 705, referred to.

Mere intention to defraud will not deprive the true owner from recovering his property. When, however, the fraudulent purpose has been effected the maxim "*in pari delicto potior est conditio possidentis*" applies and the Court will help neither party. A guilty party cannot be permitted to defeat a judgment by showing that in obtaining it he had practised a fraud on the Court. [p. 336, col. 2.]

Jadu Nath Poddar v. *Rup Lall Poddar*, 33 C. 967; 4 C. L. J. 22, 10 C. W. N. 650; *Petherpermal Chetty* v. *Muniandy Chetty*, 35 I. A. 98; 10 Bom. L. R. 590; 12 C. W. N. 562; 5 A. L. J. 290; 7 C. L. J. 528; 14 Bur. L. R. 108; 35 C. 551; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 266 (P. C.) and *Doe d Roberts* v. *Roberts*, (1819) 2 B. & Ald. 367; 20 R. R. 477; 106 E. R. 401, referred to.

Essentials of doctrine of part performance stated.

Appeal against the decree of the Sub-Judge, Hardoi, dated the 14th February 1923.

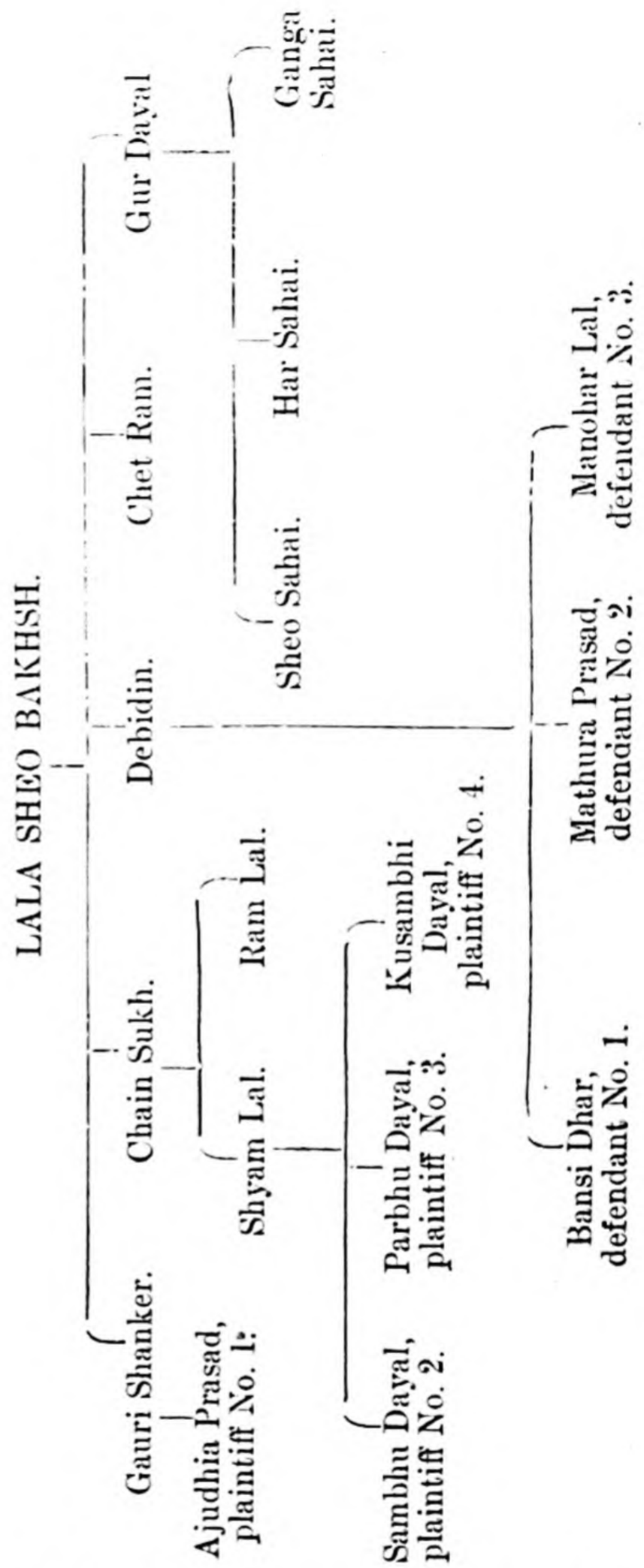
Messrs. *Niamat Ullah* and *E. R. Kidwai*, for the Appellants.

Messrs. *A. P. Sen, Bisheshar Nath, Salik Ram, H. K. Ghosh, Ali Zaheer* and *Raghbir Sahai*, for the Respondents.

BANSIDHAR *v.* AJUDHIA PRASAD.

JUDGMENT.—This is the defendants' appeal from the decree of the Subordinate Judge of Hardoi, dated the 14th February 1922, in a suit brought by the plaintiffs-respondents for possession of a one anna share in village Beshar, Pargana Bangar, District Hardoi. The admitted facts are as follows:—The property in suit originally belonged to Madho Singh, Subba Singh and *Musammat* Shiam Kuar. Under a possessory mortgage it has been in the possession of Ajudhia Prasad, plaintiff No. 1 in the present suit, and others. On the 29th September 1916, the original owners executed ostensibly a deed of mortgage in respect of the property in suit in favour of Murli, Ram Charan, Meharban Singh and Makrand Singh. Ajudhia Prasad then brought a suit for pre-emption in respect of the transfer of the 29th September 1916 on the ground that the transaction was in reality a sale and that the apparent form of it as a mortgage was merely a cloak assumed with the design of defeating the right of pre-emption. After that suit for pre-emption had proceeded up to a certain stage Debidin, uncle of Ajudhia Prasad, instituted another suit for pre-emption in respect of the same transfer and on the same grounds on which the first suit was founded. The two suits were consolidated and tried together with the result that they were settled by a compromise dated the 8th June 1918 (Exhibit B3) entered into between the two plaintiffs and the transferees. A decree of Court (Exhibit B 4) was framed in terms of the compromise. Under that decree Debidin was given the first right of pre-emption on payment within one month of the entire consideration entered in the deed of the 29th September 1916; in the event of default Ajudhia Prasad was to acquire the property in suit on payment of the same amount and within the like period. The condition of the decree in favour of Debidin was complied with by depositing in Court the money payable to the vendees on the 2nd July 1918.

We now enter into the region of controversy and with a view to elucidate the facts involved in it we set out the pedigree given at the beginning of the judgment of the Court below.



Ajudhia Prasad plaintiff No. 1 is the son of Gauri Shankar, a brother of Debidin. The plaintiffs Nos. 2, 3 and 4 are the sons of Shyam Lal, who was the son of another brother of Debidin. The defendants are the sons of Debidin. The substance of the plaintiffs' case is that by the force of certain circumstances arising out of the evidence produced by the defendants in Ajudhia Prasad's suit for pre-emption that suit was doomed to

failure, that with a view to avert this result "it was settled between Lala Debidin and the plaintiff No. 1 and the father of the plaintiffs Nos. 2 to 4, as the manager of his own family, that a *benami* suit in the name of the said Debidin be filed, that plaintiff No. 1 and the father of plaintiffs Nos. 2 to 4 may conduct and prosecute the suit, bear the expenses thereof and pay the purchase money, a decree for which has been passed; that they should become the owners of the decreed pre-empted property and that if God forbid the suit be lost the plaintiff No. 1 and the father of the plaintiffs Nos. 2 to 4 be held liable for the costs of the opposite party. As regards the costs of the suit assurance was held out by Babu Gauri Shankar." *Vide* paragraph 8 of the plaint. At the hearing of the appeal in this Court the statement as to the cause of action of the present suit as given above was subjected to two alternative constructions by the learned Counsel for the plaintiffs-respondents. The first construction as developed in the plaint is that the suit for pre-emption instituted in the name of Debidin was in reality a suit by Ajudhia Prasad. that the decree obtained in that suit was the decree in favour of Ajudhia Prasad and that by the force of that decree Ajudhia Prasad became the owner of the property in suit. This view of the plaintiffs' case has found favour with the Court below and the decree of that Court now under appeal is founded on that view. On behalf of the appellants the facts, which form the basis of the decision taken by the learned Subordinate Judge, are not seriously disputed before us. The arguments advanced in support of the appeal were mainly directed to the exposition of the law applicable to those facts.

The second construction which the learned Counsel for the plaintiffs-respondents placed before us for acceptance is that prior to the institution of Debidin's suit an agreement was arrived at between Debidin on one hand and Ajudhia Prasad and Shyam Lal on the other to the effect that Debidin would bring a suit for pre-emption in his own right but for the benefit of Ajudhia Prasad and Shyam Lal in consideration of their defraying the expenses of the litigation including the payment of any sum of money which might eventually be decreed in favour of the vendees, that on the success of the suit Ajudhya Prasad and Shyam Lal would be the owners of the pre-empted property and that under the said agreement Debidin's position was in law and in fact that of a trustee or a *benamidar* for the second party to the agreement.

At the hearing of the appeal the respondents' learned Counsel practically abandoned the position on which he obtained the decree now under appeal and supported it on the ground just now mentioned. The learned Advocate for the appellants strenuously contended that the second position was not open to the respondents. We are unable to accept this contention. When the pleadings are adjudged as a whole they are susceptible of being considered as involving either an inconsistency of facts or two inconsistent aspects of one set of facts. Neither view makes the pleadings open to the charge of being against the rules of procedure. The Court of Civil Procedure of 1908 lays down for the first time definite rules as to the pleadings. Rule 2 of O. VI of that Code is as follows:—"Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved....." This rule is the same as r. 4 of O. XIX of the Rules of the Supreme Court in England. On the face of it, it does not exclude the pleading of inconsistent facts. All that it requires is a statement of material facts on which a party relies. In the case of *Bagot* v. *Easton* (1) Lord Cairns, L. C., observed: "But the Judicature Act has enlarged the liberty of the plaintiff in claiming relief, for it is expressly provided that, subject to certain regulations, alternative relief may be asked and several causes of action may be joined in the same statement of claim." The effect of r. 3 of O. II of the Indian Code of Civil Procedure is

(1) (1878) 7 Ch. D. 1; 47 L. J. Ch. 225; 37 L. T. 369; 26 W. R. 66.

the same. In construing r. 4 of O. XIX of the Rules of the Supreme Court in England, Lindley, L. J., *In re Morgan Owen* v. *Morgan* (2) said: "Now I cannot myself construe that order as prohibiting inconsistent pleadings. One sees perfectly well what is meant by it, *viz.*, that each party is to state succinctly and concisely and in a summary form the material facts on which he relies. Now a person may rely upon one set of facts if he can succeed in proving them, and he may rely upon another set of facts if he can succeed in proving them."

Indeed the learned Advocate frankly admitted that the proper view of the circumstances and so much of the evidence as was reliable distinctly led to the inference that Debidin brought the suit in consequence of an agreement between him and Ajudhia Prasad and Shyam Lal to the effect that he could sue and obtain a decree in his own right and subsequently transfer the property acquired under that decree by means of a valid and formal conveyance in consideration of the expenditure incurred by the second party in relation to that suit. Though the matter was in controversy in the Court below and was the subject-matter of an issue it is now admitted that all the expenses of Debidin's suit including the money paid under the decree to the vendees were defrayed by Ajudhia Prasad and Shyam Lal. In conclusion the learned Advocate for the appellants contended on this part of the case that the proper course for the respondents to adopt was to bring a suit for specific performance of the agreement mentioned above with proper pleadings leading to that relief and the present suit not being of that nature should fail. To this argument we will address ourselves later.

At the opening of the appeal the first attack was naturally directed against the foundation of the decision of the Court below. It was argued that the institution of the pre-emption suit fictitiously in the name of Debidin and obtaining a decree from the Court in the same character was a fraud primarily on the Court and also on the vendees and the vendors who were made parties to that suit, that the fraud was perpetrated successfully, that consequently the plaintiffs are not entitled to recover the property and that the decree of the Court in Debidin's suit operates as a bar to the present suit.

On the first part of this argument, we find no difficulty in forming our own judgment. In this aspect of the case there can be no doubt that Ajudhia Prasad was the real plaintiff who came into Court concealed in the mask of the name of Debidin. If this second suit in the name of Debidin had not been brought by Ajudhia Prasad it is agreed on the pleadings that the first suit would have failed and Ajudhia Prasad would not have acquired the property in suit. It may be that if Ajudhia Prasad had instituted the second suit in his own name it might not have been thrown out at once by the Court and at the worst its trial would have been stayed under section 10 of the Code of Civil Procedure. But on the admitted facts the first suit would have failed if it had been left to run its own course without being interrupted by the second suit and the failure of the first suit would clearly have resulted in the dismissal of the second also by the effect of the rule of *res judicata*. The fraud on the Court therefore consisted in interrupting the course of law. It is also clear that the fraud came to fruition inasmuch as the two suits were consolidated, tried and disposed of together with the result that each suit was decreed under certain conditions. If this were the only case of the plaintiffs there can be no doubt that the plaintiffs' suit must fail.

It is settled law that where the fraudulent purpose has been effected the maxim *in pari delicto potior est conditio possidentis* applies and the Court will help neither party. On the other hand, where the purpose of fraud is not carried into execution the mere intention to defraud will not deprive the true owner from recovering his property. The authorities on this point are so exhaustively and completely reviewed, if I may say so, by Mookerjee, J., in his

(2) (1887) 35 Ch. D. 492; 56 L. J. Ch. 603; 56 L. T. 503; 35 W. R. 705.

judgment in the case of *Jadu Nath Poddar* v. *Rupe Lall Poddar* (3) that it is neither possible nor desirable to add to it. Finally the view propounded in the case just now mentioned was affirmed by their Lordships of the Privy Council in the case of *Petherpermal Chetty* v. *Muniandy Chetty* (4). In this view of the case it is equally true that the previous decree in the suit for pre-emption brought by Debidin against Ajudhia Prasad and others would operate as a bar to the present suit on the principle that a guilty party would not be permitted to defeat a judgment by showing that in obtaining it he had practised an imposition on the Court—*Doe d Roberts* v. *Roberts* (5), *Bessey* v. *Windham* (6).

Now we come to the second aspect of the plaintiffs' case as set out in a previous part of this judgment. The first question which arises is 'Has the alleged agreement been proved.' Our answer is in the affirmative. We find on the evidence, which has been accepted by the learned Subordinate Judge as reliable and the veracity of which has not been challenged in appeal before us, that the arrangement was that Debidin should sue for pre-emption for the benefit of Ajudhia Prasad and Shyam Lal, that they would defray all the expenditure of the suit together with the money that Debidin might be made liable to pay to the transferees under the decree of the Court and that Ajudhia Prasad and Shyam Lal would be the owners of the property recovered under that decree. In this connection specific reference may be made to the statements of plaintiffs' witnesses Bijai Kuar Dat, Har Dayal, Bhairon Prasad, Gauri Shankar, Ram Lal Gupta and finally of Ajudhia Prasad plaintiff No. 1. The recitals in the document of the 3rd July 1918 executed by Debidin also tend in the same direction (Exhibit 31). We do not agree with the learned Advocate for the appellants that the agreement was of an executory nature depending for its consummation upon any subsequent act on the part of Debidin of conveying the decreed property to Ajudhia Prasad and Shyam Lal by means of executing in future a formal deed of conveyance.

We think that the contract as originally settled between these two parties was complete by itself. It is true that in the document executed by Debidin on the 3rd July 1918 he made a promise that he would transfer the decreed property "by means of a gift deed in favour of the said Lala Ajudhia Prasad and Shyam Lal in equal shares." But this was a later and a unilateral promise on the part of Debidin which he did not and could not fulfil before he died on the 19th March 1919. Exhibit 31, therefore, cannot be given the effect of superseding the original and the earlier contract. That contract was clearly binding on the conscience of Debidin and he was a trustee saddled with the obligation of giving effect to it. It is of no consequence that Debidin is called a *benamidar* in the pleadings and the evidence in the case. In *Bilas Kunwar* v. *Desraj Ranjit Singh* (7), Sir George Farwell, in speaking of a *benami* transaction, said:—"It is quite unobjectionable and has a curious resemblance to the doctrine of our English Law that the trust of the legal estate results to the man who pays the purchase money, and this again follows the analogy of our common law that where a feoffment is made without consideration the use results to the feoffor." Again in delivering the judgment of their Lordships of the Privy Council in the case of *Gur Narayan* v. *Sheo Lal Singh* (8) Mr. Ameer Ali, after quoting the *dictum* of Sir George Farwell, made the following observations:—"So long, therefore, as a *benami* transaction does not contravene the provisions of

(3) 33 C. 967; 4 C. L. J. 22; 10 C. W. N. 650.
(4) 35 I. A. 98; 10 Bom. L. R. 590; 12 C. W. N. 562; 5 A. L. J. 290; 7 C. L. J. 528; 14 Bur. L. R. 108; 35 C. 551; 18 M. L. J. 277; 4 M. L. T. 12; 1 L. B. R. 266 (P. C.).
(5) (1819) 2 B. & Ald. 367; 20 R. R. 477; 106 E. R. 401.
(6) (1844) 6 Q. B. 166; 14 L. J. Q. B. 7; 8 Jur. 824; 66 R. R. 336; 115 E. R. 61.
(7) 30 Ind. Cas. 299; 42 I. A. 202; 19 C. W. N. 1207; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; 37 A. 557; 22 C. L. J. 516; (1915) M. W. N. 757 (P. C.).
(8) 49 Ind. Cas. 1; 46 I. A. 1; 17 A. L. J. 66; 36 M. L. J. 68; 9 L. W. 335; 23 C. W. N. 521; 1 U. P. L. R. (P. C.) 1; 46 C. 566 (P. C.).

the law the Courts are bound to give it effect. As already observed, the *benamidar* has no beneficial interest in the property or business that stands in his name; he represents, in fact, the real owner, and so far as their relative legal position is concerned he is a mere trustee for him." The agreement which we have held as proved in the present case does not contravene any provision of law nor do we think it is opposed to public policy as the learned Advocate for the appellants contended. That Debidin was competent in his own right to institute a suit for pre-emption and thereby obtain the property in suit is admitted. His suit, therefore, in pursuance of that agreement was clearly in accordance with law. As regards public policy we prefer to follow the observation of Sir G. Jessel, M. R. in the case of *Printing and Numerical Registering Co.* v. *Sampson* (9). "It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of Justice. Therefore, you have this paramount public policy to consider that you are not lightly to interfere with this freedom of contract."

Now the property in relation to which this contract was made was neither owned nor possessed by Debidin at the time of the contract but in equity as well as in law non-existing property may be made the subject of an agreement though in neither can it be assigned. There is nothing in the laws of this country to prevent the same result from following. Further it is a well-established principle of equity that when the property comes into existence the contract to assign works out as a complete assignment by itself provided the nature of the property is such that its transfer is not forbidden by law. It is so in the present case. In the case of *Tailby* v. *Official Receiver* (10) Lord Macnaghten said:—"Long before *Holroyd* v. *Marshall* (11) was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done and in accordance with the maxim which Lord Thurlow said he took to be universal, 'that whenever persons agree concerning any particular subject, that, in a Court of Equity, as against the party himself, and any one claiming under him, voluntarily or with notice, raises a trust'" *Legard* v. *Hodges* (12). The same principle was stated by Viscount Cave, L. C., in the recent case of *Performing Right Society, Limited* v. *London Theatre of Varieties, Limited* (13). With reference to the cases of *Holroyd* v. *Marshall* (11) and *Tailby* v. *Official Receiver* (10) he said:—"No doubt when a person executes a document purporting to assign property to be afterwards acquired by him, that property on its acquisition passes in equity to the assignee." On these authorities it is clear that the relief for recovery of property on the basis of such an assignment is not a relief for specific performance of a contract. This was explained at some length by Lord Selborne in the case of *Wolverhampton and Walsall Ry.* v. *London and North Western Ry. Co.* (14) and was adverted to by Lord Macnaghten in his judgment in the case of *Tailby* v. *Official Receiver* (10) already mentioned. His Lordship said:—"Cases of equitable assignment or specific lien, where the consideration has passed, depend on the real meaning of the agreement between the parties. The difficulty, generally speaking, is to ascertain the true scope

(9) (1875) 19 Eq. 462; 44 L. J Ch. 705; 32 L. T. 354; 23 W. R. 463.

(10) (1889) 13 App. Cas. 523; 58 L. J. Q. B. 75; 60 L. T. 162; 37 W. R. 513.

(11) (1862) 10 H. L. C. 191; 33 L. J. Ch. 193; 9 Jur. (N. S.) 213; 7 L. T. (N. S.) 172; 11 W. R. 171; 11 E. R. 999; 138 R. R. 108.

(12) (1792) 1 Ves. Jun. 477; 4 Bro. C. C. 421; 2 R. R. 146; 30 E. R. 447.

(13) (1924) A. C. 1; 93 L. J. K. B. 33.

(14) (1873) 16 Eq. 433; 43 L. J. Ch. 131.

and effect of the agreement. When that is ascertained you have only to apply the principle that equity considers that done which ought to be done if that principle is applicable under the circumstances of the case." In effectuating an assignment the Court acts independently of the doctrine of specific performance—*Western Waggon Co.* v. *West* (15). The argument of the learned Advocate for the appellants, therefore, that the plaintiffs should have claimed the relief of specific performance has no force.

The assignment, however, to be operative must be valid in form. *Ex facie*, it being oral in the present case is not valid. To cure this defect recourse is taken to the doctrine of part performance. *Lester* v. *Foxcroft* (16) is treated as the leading case on the subject. Lord Selborne examined the doctrine in detail in the case of *Maddison* v. *Elderson* (17) and it was applied by their Lordships of the Privy Council in a case which arose in Bengal—*Mahomed Musa* v. *Aghore Kumar Ganguli* (18). The essentials of that doctrine are stated in White and Tudor's to be as follows :—

"1. That the acts of part performance must be unequivocally referable to the alleged agreement; in other words, 'part performance, to take a case out of the Statute of Frauds always supposes a completed agreement. There can be no part performance where there is no completed agreement in existence. It must be obligatory, and what is done must be under the terms of the agreement, and by force of the agreement.' Per Lord Brougham in *Lady Edward Thynne* v. *Earl of Glengall* (19). And, therefore, part performance of an agreement which is purely a matter of honour, and not a legal obligation, will not give the Court jurisdiction.

"2. The acts must be done by the plaintiff and be such that it would amount to fraud in the defendant to take advantage of the contract not being in writing, hence the acts must be acquiesced in or done with the knowledge of other party.

"3 The parol agreement must be of such a character that the Court would be able to decree specific performance thereof if it were in writing.

"4 The parol evidence must prove the agreement."

We are of opinion that the above essentials exist in the present case. We have already held the agreement to be proved. Had it been in writing relief for specific performance of it would be available to the plaintiffs if it were necessary for them to seek such a relief. We have held previously that such a relief is not essential for the success of the plaintiffs' claim. It is equally clear in the circumstances of this case that the defendants would be guilty of fraud in taking advantage of the agreement not being in writing. It has already been found that the agreement was a completed one. What are then the acts done under that agreement which amount to part performance? On the one hand Debidin instituted the suit for pre-emption in his own name and finally obtained a decree from Court. On the other hand Ajudhia Prasad and Shyam Lal paid all the expenditure of the litigation and also the money due under the decree to the vendees. This is all that could be done by the parties under the agreement and they did all that. The plaintiffs' claim, therefore, succeeds on this ground.

The plaintiffs also base their claim on the document of the 3rd July 1918 (Exhibit 31). The defence to this claim was that the said document was executed by Debidin under undue influence. This defence was embodied in issue No. 3 framed by the Court below. The plea of undue influence was abandoned in this Court and the Counsel for the plaintiffs-respondents supported the decree of the Court below on the basis of that document also. The document is a testamentary disposition of Debidin in respect of

(15) (1892) 1 Ch. 271; 61 L. J. Ch. 244; 66 L. T 402; 40 W. R. 182.

(16) (1700) 2 Wh. & Tud. L. C. 18th Ed. 460 at p. 464; Colles 108; 1 E. R. 205.

(17) (1883) 8 App. Cas. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.

(18) 28 Ind. Cas. 930; 42 I. A. 1; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 19 C. W. N. 250; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 258; 42 C. 801; (1915) M. W. N. 621 (P. C.).

(19) (1847) 2 H. L. C. 131 at p. 158; 12 Jur. 805; 81 R. R. 77; 9 E. R. 1042.

the property in suit in favour of Ajudhia Prasad and Shyam Lal in equal shares. It was argued on behalf of the defendants-appellants that the disposition was ineffective in respect of the share of Shyam Lal who died before the suit. In view of our finding recorded above it is unnecessary to decide these questions.

The result is that the appeal fails and is dismissed with costs.

G. H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1542 OF 1922.
July 1, 1924.
Present:—Mr. Justice Daniels and Mr. Justice Neave.

HAR PRASAD AND ANOTHER—DEFENDANTS—APPELLANTS
versus
FIRM RAM SARUP RADHA KISHEN—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VIII, r. 6—Set-off—'Ascertained sum', meaning of.

The words 'ascertained sum' used in O. VIII, r. 6 of the Civil Procedure Code are used to exclude such items as liquidated damages and mesne profits the amount of which is not ascertainable until the Court determines them.

Where a defendant says that there were definite sums of debit and credit between the parties and that on the date of suit a definite known balance, the amount of which is given in the written statement, was due to the defendant from the plaintiff, the sum so claimed is an 'ascertained sum' for which a set-off is allowed.

Second appeal from a decree of the District Judge, Mainpuri, dated the 20th May 1922.

Dr. *K. N. Katju*, for the Appellants.

Messrs. *Nehal Chand* and *S. N. Sen*, for the Respondent.

JUDGMENT.—The sole question in this appeal is whether the defendants are entitled to claim a set-off under O. VIII, r. 6 of the Code of Civil Procedure. The Courts below have declined to go into the merits of the set-off claimed on the ground that the sum claimed is not an ascertained sum and, therefore, does not fall within the provisions of the rule. In the Courts below the question of equitable set-off was also discussed, but in this Court the argument has been confined to the legal set-off provided by rule 6. The suit was one for the balance of the price of castor seed sold by the plaintiff to the defendants. The defence, so far as we are now concerned with it, substantially was that this transaction formed one of the number of transactions between the parties in which there were payments to be credited on both sides and that on these other transactions on the date of suit a definite sum of Rs. 1126 was due to the defendants from the plaintiff. There were also certain minor ascertained sums as to one of which the claim of set-off has been allowed. If this were a claim for accounts in the sense that the defendants were asking the plaintiff to render an account and the sum due to the defendants could only be known to the latter when the accounts were rendered, there might be great force in the view taken by the Courts below. This, however, is not the nature of the claim. What the defendants say is that there were definite sums of debit and credit between the parties and that on the date of suit a definite known balance, the amount of which is given in the written statement, was due to the defendants from the plaintiff and that this balance is shown in their account books as due on the date of suit. In any ordinary meaning of the term, the sum so claimed is an ascertained sum. The learned Counsel for the respondent has argued that a sum can only be treated as ascertained when it has been either admitted by the plaintiff or decreed by the Court. None of the authorities to which he has referred, supports this proposition, and the case of *Edward Dalgleish* v. *Ramdin Singh Chowdhury* (1) definitely contradicts it. The commentators on the Code are also all agreed that the words 'ascertained sum' are used to exclude such items as unliquidated damages and mesne profits the amount of which is not ascertainable until the Court determines them. Here the sum claimed is a definite ascertained amount,

(1) 5 Ind. Cas. 67; 14 C. W. N. 170.

and we think that the Courts below were wrong in refusing to go into the defendants' claim. We accordingly set aside the decrees of both the Courts below and remand the case, through the lower Appellate Court to the Court of first instance with directions to enquire into the set-off claimed and to modify its decree accordingly if anything is found to be due to the defendants on account of set-off. The appellants will get their costs of this appeal including in this Court fees on the higher scale. Other costs will abide the result. It will not be open to the parties to re-agitate any question already decided except the questions which arise on the claim of set-off.

S. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION No. 195 OF 1923.

April 29, 1924.

Present :—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice Walmsley.

S. & C. NORDLINGER—DEFENDANTS—APPELLANTS

versus

CHANDMULL MULCHAND—PLAINTIFFS—RESPONDENTS.

Arbitration—Contract for sale of goods—Provision for arbitration in case of dispute—Dispute as to quality—Reference to Arbitrators—Burden of proving defectiveness in quality—Arbitrators, jurisdiction of—Stipulation for survey of goods—Award made without survey, whether valid.

Plaintiffs entered into a contract with the defendants for the purchase of certain goods. The contract provided that in the event of a dispute arising between the parties as to quality, etc., it would be referred to the Bengal Chamber of Commerce who would "arrange for survey in accordance with its rules." Plaintiffs took exception to the quality of the goods supplied and the dispute was referred to arbitration, the buyers "leaving the matter in the hands of the Arbitrators either to award cancelment or any other relief as they would deem fit." The Arbitrators made their award as follows: "We have considered the papers and as buyers are unwilling to produce the bales required for inspection their claim cannot be upheld and we award that they pay for and take delivery of the goods in terms of contract." Thereupon the buyers sued for a declaration that the award was invalid and inoperative;

Held, (1) that it was for the plaintiffs buyers to prove the case which they were alleging before the Arbitrators, namely that the goods supplied were not in accordance with the contract by reason of their inferior quality; [p. 342, col. 2.]

(2) that as the buyers failed to produce the goods for inspection when called on by the Arbitrators to do so they could not complain of the decision of the Arbitrators that they (the buyers) had not proved their case ; [p. 343, col. 1.]

(3) that having come to that conclusion, the Arbitrators were within their jurisdiction in awarding that the buyers should pay for and take delivery of the goods ; [p. 343, col. 2.]

(4) that the provision in the deed of reference to the effect that the Chamber should arrange for survey in accordance with its rules did not contemplate that a survey should be the only method of obtaining evidence as regards quality of the goods, or that if a survey was not held there should be no award ; [*ibid.*]

(5) that under the circumstances the plaintiffs were not entitled to any relief. [p. 344, col. 1.]

U. M. Chaudhury & Co v. Jiban Krishna Ghose & Son, 69 Ind. Cas. 995; 49 C. 646; (1922) A. I. R. (C.) 447 and *Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co.*, 73 Ind. Cas. 436; 47 B. 578; 28 C. W. N. 397; 44 M. L. J. 706; 25 Bom. L. R. 588; (1923) A. R. (P. C.) 66; (1923) M. W. N. 596; 50 C. 130; 33 M. L. T. 419; (1923) A. C. 480; 92 L. J P. C. 163; 50 I. A. 324; 129 L. T. 166; 39 T. L. R. 253 (P. C.), referred to.

Appeal from the judgment of Mr. Justice Buckland, dated the 19th November 1923.

Messrs. *S. R. Das, A. N. Chaudhri, R. C. Bonnerjee* and *J. N. Sinha*, for the Appellants.

Messrs. *N. N. Sirkar* and *A. K. Roy*, for the Respondents.

JUDGMENT.

Sanderson, C. J.—This is an appeal by the defendants S. & C. Nordlinger against the judgment of my learned brother Mr. Justice Buckland.

The suit was brought by the plaintiffs Chandmull Mulchand against the defendants for a declaration that a certain award, dated the 3rd of September 1921, made by the Bengal Chamber of Commerce, was invalid and inoperative ; and the two grounds upon which the claim was based at the trial in this Court are *first*, that the award was bad on the face of it and *secondly*, that the Arbitrators had no jurisdiction to make the award.

The learned Judge held in favour of the plaintiffs on both the points and declared that the award wes invalid and in-

operative. Against that decision the defendants have appealed.

The award was in the following terms:—

"Contract No. Nil, dated 7th December 1920.

Goods covered by contract. Finished *Dhoties*.

Basis of Sale No. 2226.

Packages available for inspection B/S 116/20, 141/5.

Packages examined.

Complaint—inferior quality and other defects as per buyers' statement, dated 1st March 1921. Award:—We have considered the papers and as buyers Messrs. Chandmull Mulchand are unwilling to produce the bales required for inspection their claim cannot be upheld and we award that they pay for and take delivery of the goods in terms of contract.

Buyers to pay cost of this reference, amounting to Rs. 101."

The learned Judge on the first point, namely, whether there was an error of law on the face of the award, said this: "The contract related to 60 bales. There was a dispute as to quality. The mere fact that the buyers are unwilling to produce the bales required for inspection is not by itself a sufficient reason for making an award against them. I do not desire to go further than I should having regard to the strict limitation laid down by the authorities as to what may be considered in a case such as this; but ordinarily, where there is a dispute between a buyer and a seller, with reference to quality, it would be the duty of the seller to prove that the goods were of the quality contracted for."

It is not necessary for me to refer to the authorities because they were fully considered by this Court in the case of *U. M. Chaudhury & Co.* v. *Jiban Krishna Ghose & Sons* (1) and because the learned Judge has himself drawn attention to the decision of the Judicial Committee in the Privy Council in *Champsey Bhara & Co.* v. *Jivraj Ballo Spinning and Weaving Co.* (2) and the narrow limits within which a matter like this has to be considered. The first question which I have to ask myself is whether I am satisfied that the award does show upon the face of it an error in law, and, for the purpose of coming to that conclusion, one is entitled to consider the award itself and any documents incorporated in the award.

It is, therefore, legitimate to consider, in the first place, the buyers' statement dated the 1st of March 1921. That is referred to in the award as the "complaint." That statement sets out the reasons why the buyers alleged that the goods were inferior in quality to the contract quality. I need not refer to them in detail and the statement concludes in this manner:

"The combined defectiveness in the out-turn has thus made the goods too much unqualified and ought to be cancelled but we leave the matter to the hands of the learned arbitrators either to award cancelment or any other relief as they would deem fit."

Therefore, it is clear, in my judgment, that the buyers were contending that the goods were not in accordance with the contract by reason of their inferior quality and that they left the decision of the question as to quality to the Arbitrators and they further left it to them to say whether the contract should be cancelled or whether any allowance should be made to the buyers in respect of the inferiority in the quality.

It appears to me that it was for the buyers to prove the case which they were alleging before the Arbitrators.

The Arbitrators said in their award: "We have considered the papers and as buyers Messrs. Chandmull Mulchand are unwilling to produce the bales required for inspection, their claim cannot be upheld." The learned Counsel for the respondents, as I understood his argument, did not find fault with that

(1) 69 Ind. Cas. 995; 49 C. 646; (1922) A. I. R. (C.) 447.

(2) 73 Ind. Cas. 436; 47 B. 578; 28 C. W. N. 397; 44 M. L. J. 706; 25 Bom. L. R. 588; (1923) A. I. R. (P. C.) 66; (1923) M. W. N. 596; 50 C. 130; 33 M. L. T. 419; (1923) A. C. 480; 92 L. J. P. C. 163; 50 I. A. 324; 129 L. T. 166; 39 T. L. R. 253 (P. C.).

part of the award because it must be obvious that when the buyers were the complainants and were alleging the inferior quality of the goods and they were asked by the Arbitrators to produce the goods so that they might be inspected by the Arbitrators, and when they failed to produce any of the goods in question, the buyers cannot now complain of the Arbitrators coming to the conclusion that the buyers did not prove their case.

The learned Judge seems to have thought that the Arbitrators had decided against the buyers relying upon the mere fact that the buyers were unwilling to produce the bales. In my judgment, with great respect to the learned Judge, that is not a legitimate inference to be drawn from the terms of the award. The Arbitrators said that they had certain papers. I am not in a position to say what those papers were or to speculate what their contents were. They certainly had some materials before them which were contained in the papers referred to in the award.

But the learned Counsel for the respondents presented a further argument and contended that the second part of the award should not be upheld even though the first part, to which I have already referred, was held to be correct. The second part of the award, to which the learned Counsel referred, was that the buyers should pay for and take delivery of the goods in terms of the contract.

The argument was that the only question that the Arbitrators had to decide was whether the goods were of the contract quality or not; and if they did not decide that, then they ought not to have made the award. I cannot accept that contention. In the first place, the buyers' statement, to which I have referred, makes it clear that the question as to what was to be done with regard to the *dhoties* was left to the arbitration of the Bengal Chamber of Commerce. The Arbitrators were to say whether the goods were in accordance with the contract. If they found that they were not then they were to say whether the contract was to be cancelled or whether any allowance should be made. It seems to me that when the Arbitrators, as they obviously did, came to the conclusion that the complainants did not satisfy them that the goods were not in accordance with the contract quality it follows, as a matter of course, that they should award that the buyers should pay for and take delivery of the goods. In my judgment it was within their jurisdiction so to do. In short, on this part of the case, on the materials which we are entitled to consider upon the question as to whether there was an error of law on the face of the contract, I am by no means satisfied that the Arbitrators have been guilty of an error of law.

The second point depends upon the question of survey. The learned Counsel for the respondents argued that it was a part of the submission that there should be a survey by the Arbitrators and that if no survey took place, there should be no award.

The learned Advocate-General, who appeared for the appellants, on the other hand, argued that no doubt it was contemplated by both parties that there should be a survey and that if there was a survey it should be carried out in a particular manner which was specified by the sellers but that it was not agreed upon by the parties and was not contemplated by the parties that a survey should be the only method of obtaining evidence as regards the quality of the goods. I think that the learned Advocate-General's argument in this respect is correct. The Arbitrators were not merely surveyors. We do not know the names of the gentlemen who acted in this case. I believe that it is the practice of the Bengal Chamber of Commerce not to disclose the names of gentlemen who acted as Arbitrators. But it is clear on a reference to the arbitration and the statement of buyers that it was intended that the gentlemen, who would act in accordance with the Rules of the Bengal Chamber of Commerce, should act as Arbitrators and should finally decide the question in dispute between the parties.

One method of deciding as to the quality of the goods was contemplated to be a survey, but in my judgment, it was not contemplated that that should be the only means of arriving at a decision.

I am by no means satisfied that the parties agreed that there should be a survey, and that if a survey were not held, there should be no award. It seems to me that the argument of the learned Advocate-General on behalf of the appellants must be adopted. The result is that in this respect also, with great respect to the learned Judge, I am constrained to come to the conclusion that the Arbitrators acted within their jurisdiction.

For these reasons, in my judgment, the appeal must be allowed, the learned Judge's judgment and decree will be set aside and the suit dismissed with costs in both the Courts, except such costs as have been directed to be paid by the defendants with regard to the amendment of the written statement.

Walmsley, J.—I agree.

K. S. D. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 288 OF 1923.
June 30, 1924.
Present:—Mr. Justice Neave.
Lala JAMBU DASS—PLAINTIFF—APPELLANT
versus
JAI PRAKASH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 66, applicability of.

Section 66 of the Civil Procedure Code applies only when the plaintiff attempts to assert his secret title as against a certified purchaser. [p. 345, col. 1.]

Second appeal against the decree of the Additional District Judge, Saharanpur, dated the 11th November 1922.

Mr. *P. L. Banerji*, for the Appellant.

Mr. *Nehal Chand*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit for recovery of possession of a share in a house. The plaintiff Jambu Dass and the first two defendants Jai Prakash and Jai Chandan are brothers. A dispute over the ancestral property was referred to arbitration and in 1906 the share now in suit was awarded to the plaintiff by the arbitrator. This award was confirmed by a decree of a Civil Court on the 18th of June 1908. In 1910 the share in suit was sold in execution of a decree to one Kanwal Nain who has been impleaded in the present suit as defendant No. 3 He has not appeared throughout the proceedings and has not contested the plaintiff's claim.

The present suit was instituted on the 14th of June, 1920. The plaintiff's case was that five or six years previously he had permitted his two brothers to live in his part of the house. The purchase at auction by Kanwal Nain was merely *benami* on his own account. His brothers now refused to surrender possession to him and he accordingly brought the suit to compel them to do so.

The Trial Court held that the suit was barred by limitation. It doubted the plaintiff's story of permission to his brothers to take possession and considered that limitation should be held to run from the date of the private award and not from the date of the decree confirming that award. If the latter is the correct date then in any case the suit was in time by four days.

The lower Appellate Court expressed considerable doubt as to the correctness of the First Court's finding on the subject of limitation pointing out that the only evidence on the point consisted of the two conflicting statements of the plaintiff and one of the defendants. It, however, did not come to a positive decision on the question as it held that section 66 of the Civil Procedure Code barred this suit. This section provides that no suit shall be maintained against any person claiming title under a purchase certified by the Court on the ground that the purchase was made on behalf of the plaintiff. No doubt it would be a complete answer to the suit so far as

Kanwal Nain is concerned, but the latter has not chosen to contest the claim. In *Saradindu Chakarvarti* v. *Gosta Behari Pramanick* (1) on almost identical facts, where the heirs of the auction-purchaser did not appear and deny the plaintiff's *benami* purchase, it was held that section 66 of the Code of Civil Procedure only applies when the plaintiff attempts to assert his secret title as against a certified purchaser. This view of the law appears to be a correct one and in the circumstances of the present case section 66 is no bar.

The only point which has been strongly urged on behalf of the respondent is that the plaintiff no longer has any subsisting title. On his own showing he had given up possession of the property a year or more before the auction-sale and was not in possession when that took place, and had, therefore, no right to sue at the time when the suit was brought. But the title was in him from the date of the award and unless the defendants' statement is accepted it was under permission from him that the defendants had taken possession. The burden of proving adverse possession was unquestionably on the defendants. The somewhat hesitating finding of the lower Appellate Court is to the effect that they have failed to discharge this burden. They produced no evidence in support of their contention beyond the statement of one of themselves. I agree with the lower Appellate Court. The appeal, therefore, must succeed and the plaintiff will get a decree for recovery of possession of the property in suit with costs in all Courts including in this Court fees on the higher scale.

S. D. *Appeal allowed.*

(1) 75 Ind. Cas. 196; 27 C. W. N. 208; 37 C. L. J. 403; (1923) A. I. R. (C.) 302.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1994 OF 1921.

November 15, 1923.

Present:—Mr. Justice Newbould and Mr. Justice B. B. Ghose.

THE CHAIRMAN OF THE COMMISSIONERS OF THE HOWRAH MUNICIPALITY AND OTHERS—DEFENDANTS—APPELLANTS

versus

HARIPADA ROY CHOWDHURY—PLAINTIFF—RESPONDENT.

Bengal Municipal Act (B. C. III of 1884), s. 15—Rules under section, r. 14—Municipal election—Voting enclosure—Candidate, right of, to be present—Natural right.

A candidate for election as a Municipal Commissioner has, in view of rule 14 of the Rules framed under section 15 of the Bengal Municipal Act, no right to be present in that part of the polling station where the votes are actually recorded. No such right can be recognised under natural law. [p. 346, cols. 1 & 2.]

Where rights of candidates or electors are given expressly by Statute, they do not carry with them any rights under natural law not given by statutory law. [p. 346, col. 2.]

Clementson v. *Mason*, (1875) 10 C. P. 209; 44 L. J. C. P. 171; 32 L. T. 325; 23 W. R. 620, distinguished.

Appeal against a decree of the First Subordinate Judge, Howrah, dated the 30th of June 1921, affirming that of the Munsif, Second Court, Howrah, dated the 15th of March 1920.

Babus *Ram Chandra Mazumdar* and *Panchanan Ghose* for Babu *Manmatha Nath Roy*, for the Appellants.

Dr. *Dwarka Nath Mitter* and Babu *Kanaidhan Dutt*, for the Respondent.

JUDGMENT.—This is an appeal from the decision of the First Subordinate Judge of Howrah affirming the decision of the Munsif, Second Court, Howrah. The plaintiff in this case was a candidate for election as Commissioner of the Howrah Municipality. The defendants are the Chairman of the Municipal Commissioners of Howrah, the Vice-Chairman and the Presiding Officer appointed to hold the Municipal General Election which was to take place shortly after the suit was instituted. The plaintiff asked for a declaration of his right to be present at the place and time when and where the votes of the voters would be recorded and also that the defendants

or any of them had no right to prevent the plaintiff from being present at that place. He further asked that the defendants be restrained from prohibiting the plaintiff to be present at that place.

The Municipal Act applicable in Howrah is Act III of 1884, B. C. Section 15 of that Act gives the Local Government power to lay down rules not inconsistent with the provisions of the Act, amongst other matters in respect of the mode of election. Such rules are published in Notification No. 4345 M, dated the 21st November 1896. Also instructions to the Presiding Officer have been drawn up, and this case really turns on the legality of rule 14 of those instructions which is to the following effect: "After getting his ticket the voter will enter the second enclosure where candidates or their agents shall not be permitted to enter this enclosure except to get their own votes recorded." In order to understand the point it is necessary to state the provisions made for the recording of votes. The polling station is divided into three separate enclosures. There is the first general enclosure in which the voters are to be assembled. There is then the further enclosure which is entered through gates and there are Municipal employees sitting at separate tables where tickets with serial numbers of the voters are given to the voters as they apply for them. Under the rules it is the duty of any one objecting on the ground of false personation to do so when the voter applies for his ticket in the enclosure. After the voter has obtained his ticket he enters into the third enclosure and there his vote is recorded by one of the members of the Committee who sit at separate tables.

The whole question is whether the candidate is entitled to be present in that part of the polling station where votes are actually recorded. Both the lower Courts have decided this point in the plaintiff's favour. The First Court based its decision on the ruling in the English case of *Clementson* v. *Mason* (1). As the learned Subordinate Judge has rightly pointed out the decision of this English case has no application to the facts of the present case. That decision was based on the construction of certain sections of the Ballot Act which is not in force in this country. The learned Subordinate Judge, however, supported the decree on the ground that every person interested like the candidate has a natural right to be present where votes are recorded under the ordinary law. With this we are unable to agree. We cannot agree that the rights of candidates or electors which are rights expressly given by Statute carry with them any rights under natural law not given by statutory law. In order to succeed in this case it is necessary for the plaintiff to show that he has the statutory right to be present at the place where votes are recorded or that the rule forbidding his presence in that particular place is inconsistent with the provisions of the Bengal Municipal Act, III of 1884, B. C. The learned Vakil for the respondent has been unable to satisfy us on either of these points. The candidate as such has a right to be present to take objection where there has been wrongful personation. Also as an elector he has the right to enter the enclosure where votes are recorded in order that his vote may be recorded. But we can find nothing in the Act which suggests that the candidate has the right of himself supervising the recording of the votes. The recording of the votes is supervised by the Presiding Officer and the Committee and there is no reason why the candidates themselves or their agents should necessarily be present to see that the votes are properly recorded. As regards the right of the candidate to object in case of wrongful personation that is fully provided by the rules which have been drawn up as regards the issue of tickets in the second of the enclosures to which the candidate and his agent are not only allowed but specially invited to be present.

We, therefore, hold that the plaintiff has failed in establishing his case and the suit must fail on that ground.

It was also contended that section 42 of the Specific Relief Act is a bar to this suit. But we hold that as the plain-

(1) (1875) 10 C. P. 209; 44 L. J. C. P. 171; 32 L. T. 325; 23 W. R. 620.

tiff asked for further relief in the form of an injunction that section is no bar.

The result is that the appeal is decreed with costs in all Courts.

N. H. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1381 OF 1922.
July 2, 1924.
Present :—Mr. Justice Mukerji and Mr. Justice Dalal.

BALDEO PRASAD—PLAINTIFF—APPELLANT
versus
RAM AUTAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 92, proviso (1)—*Bond—Want of consideration, whether can be proved.*

Under proviso (1) to section 92, Evidence Act, want of consideration for a contract in writing may be proved, even if it is registered.

Second appeal from a decree of the Subordinate Judge, Jaunpur, dated the 9th August 1922.

Mr. *Ram Nama Prasad*, for the Appellant.

Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—Two points have been urged in this appeal. It appears that the appellant purchased a bond from one Ghulam Mohi-ud-din and brought the suit, out of which this appeal has arisen, on foot of it. The bond was given on the 6th of October 1914 by the father of the respondents. The defence was that there was no consideration for the bond, that it had been agreed between the parties that Ghulam Mohi-ud-din who was the landlord of the executant, would lease out certain lands to the executant and the executant would pay the consideration money of the bond as a premium or *nazrana*. No such lease having been executed, the bond was without consideration.

The learned Judge of the lower Appellate Court found that the allegation of the defendants was correct and dismissed the suit.

In appeal it is contended that it was not open to the respondents, being the representatives of the late executant of the bond, to set up a plea that the bond was executed under circumstances other than those mentioned in the deed itself. This argument is not sound. The plea taken by the respondents was to the effect that there was no consideration for the bond. By *proviso* (1) of section 92, it is open to a party or his representative to show that there is no consideration for the agreement which may have been reduced into writing and which may have even been registered. The learned Counsel for the appellant takes his stand on the case of *Sri Ram* v. *Firm Sobha Ram Gopal Rai* (1). In that case a party sued on an unconditional promissory note given by the opposite party and it was held that the executant of the promissory note could not show that the money was not to be paid on demand, but was meant to be paid under other circumstances. It is not necessary to express any opinion as to the correctness or otherwise of the ruling, simply because the facts of the two cases are entirely different. In this case, as I have already stated, all that the respondents seek to establish is that there is no consideration for the bond. This they could do, not only under the express provision of law, but also under their Lordships of the Privy Council's ruling reported in the case of *Sah Lal Chand* v. *Indarjit* (2). The same view was adopted in this Court in the case of *Chuni Bibi* v. *Basanti Bibi* (3).

There is nothing in this appeal and it is hereby dismissed with costs which will include Counsel's fees on the higher scale.

S. D. *Appeal dismissed*

(1) 67 Ind. Cas. 513; 20 A. L. J. 315; (1922) A. I. R. (A.) 213; 4 U. P. L. R. (A.) 153; 44 A. 521.

(2) 20 A. 370; 4 C. W. N. 485; 2 Bom. L. R. 553; 27 I. A. 93; 7 Sar. P. C. J. 702; 9 Ind. Dec. (N. S.) 1281 (P. C.).

(3) 24 Ind. Cas. 661; 36 A. 537; 12 A. L. J. 969.

GALSTAUN v. SASSOON & CO.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION No. 56 OF 1923.

May 16, 1923.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Rankin.

J. C. GALSTAUN—DEFENDANT—APPELLANT

versus

E. D. SASSOON & CO., LTD.—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XII, r. 6—Suit for recovery of money—Judgment on admission—Admission, nature of—Discretion of Court.

In order to entitle a plaintiff, in a suit for recovery of money, to a judgment on admission there must be a clear admission that the money is due and recoverable in the action in which the admission is made. [p. 350, col. 1.]

Koramall Ramballabh v. *Mungilal Dalim Chand*, 54 Ind. Cas. 836; 23 C. W. N. 1017, referred to.

The power of Court to give judgment on admission is discretionary and its exercise cannot be claimed as a right. [*ibid.*]

Premsuk Das Assaram v. *Udairam Gungabux*, 44 Ind. Cas. 233; 45 C. 138; 22 C. W. N. 204; 28 C. L. J. 498, *Mellor* v. *Sidebottom*, (1877) 5 Ch. D. 342; 46 L. J. Ch. 398; 37 L. T. 7; 25 W. R. 401 and *In re Wright Kirke* v. *North*, (1895) 2 Ch. D. 747; 65 L. J. Ch. 37; 13 R. 849; 73 L. T. 396; 44 W. R. 125, referred to.

Appeal from an order of Mr. Justice Greaves passed on the 20th March 1923 in the exercise of Ordinary Original Civil Jurisdiction.

Messrs. *N. Sircar* and *S. M. Bose*, for the Appellant.

Messrs. *Langford James* and *Ameer Ali*, for the Respondents.

JUDGMENT.—This is an appeal from a judgment on admission pronounced by Mr. Justice Greaves under O. XII, r. 6, of the Code of Civil Procedure, 1908.

The suit was instituted on the 7th May 1921 by E. D. Sassoon & Co. against Ebrahim Soleman Saleji & Co. and J. C. Galstaun for recovery of money. The claim so far as Galstaun was concerned, was based on the following letter of guarantee written by him to the plaintiffs on the 6th January 1921:—

"In consideration of your advancing to Ebrahim Soleman Saleji & Co. of No. 1, Amratolla Lane in Calcutta at my request the sum of Rs. 5,00,000 as a loan bearing interest at nine per cent. per annum I, the undersigned John Carapiet Galstaun, hereby agree with you as follows:—

1. To make good any default on the part of the said Ebrahim Soleman Saleji & Co. or their successors-in-interest in the payment of the said loan and all interest due thereon.

2. You are to be at liberty without discharging me from liability hereunder to grant time or other indulgence to the said Ebrahim Soleman Saleji & Co. and to treat them in all respects as though I was jointly liable with them as a debtor to you instead of being a surety for them and in order to give full effect to the provisions of this guarantee I hereby waive all suretyship and other rights inconsistent with such provisions which I otherwise might be entitled to claim and enforce.

3. This guarantee shall not be revocable by notice or by reason of my death but it shall remain in full force until the said sum of Rs. 5,00,000 with interest is repaid to you or until such time as the proposed mortgage for Rs. 10,00,000 secured on certain properties of the said Ebraham Soleman Saleji & Co. shall be completed.

4. This guarantee shall be enforceable against me notwithstanding the fact that any other securities may be held by you against this loan at the time of any proceedings being taken against me on this guarantee."

There was an arrangement whereby the plaintiffs were to advance to the first defendant a loan of Rs. 10,00,000 secured on certain properties. The execution of the mortgage, after investigation of title, would of course occupy a certain amount of time, but apparently the first defendant was very anxious to obtain some money as soon as possible, and accordingly before the mortgage was executed or the title investigated, the plaintiff advanced to the first defendant the sum of Rs. 5,00,000 in consideration of this being guaranteed by the second defendant as in fact it was by the letter of the 6th January 1921. The mortgage was never executed and accordingly this suit was commenced.

The written statement of the first defendant was filed on the 23rd August 1921. This was followed by the written statement of the second defendant on the 21st December 1921. The present application

for judgment under O. XII, r. 6 was made on the 23rd February 1923. The plaintiffs rely upon admissions contained in three documents. The first is a letter written on the 26th February 1922 by Galstaun to the plaintiffs; the second is another letter addressed by Galstaun to the plaintiffs on the 15th August 1922; the third is a deposition intermediate in date, namely, a statement made by Galstaun in the course of an examination under section 36 of the Presidency Towns Insolvency Act on the 19th May 1922 in the matter of the insolvency of the first defendant. Mr. Justice Greaves has come to the conclusion that there is no such admission in either of the two letters as would justify a judgment under O. XII, r. 6. He has held, however, that the deposition of Galstaun contained an admission which afforded foundation for such a judgment.

As regards the letters, we agree with Mr. Justice Greaves that they do not contain such admission as would justify a judgment under O. XII, r. 6. In the first letter, Galstaun applied to the plaintiffs for a loan and stated that if the loan were sanctioned, he would allow the plaintiffs to deduct Rs. 5,00,000 on account of Saleji. In the second letter, Galstaun applied to the plaintiffs for another loan and stated that if the loan were arranged, the plaintiffs could deduct Rs. 5,00,000 advanced by them to Saleji. Mr. Justice Greaves has held that neither of these constitutes an unqualified admission of the type contemplated by the rule. We hold with him that they merely amount to this that if the plaintiff agreed to make the requisite advance he was prepared to allow Rs. 5,00,000 to be deducted from the loan on Saleji's account.

We have next to consider the third admission made on the 19th May 1922. In the course of his examination Galstaun was asked with regard to the title-deeds which had been handed over to him.

"*Q.*—How came these to be in your possession?

A.—All these documents were with Morgan & Co. Mr. Thornton Jones of Morgan & Co. had them.

Q.—How did they get them?

A.—Kassuni Ebrahim Saleji deposited the Letters of Administration with me and promised to make over the title-deeds of the property to Morgan & Co.

Q.—Who told you that?

A.—Kassim and Hashim. They wanted a loan of five lacs urgently and they deposited the title-deeds of these properties.

* * * * *

They took the five lacs from E. D. Sassoon & Co. on my guarantee, Kassim deposited the Letters of Administration and undertook to deposit with Messrs. Morgan & Co. the title-deeds of his properties as security.

* * * * *

The loan of ten lacs was never put through; out of five lacs, four and a half lacs were paid to him and the insolvent got Rs. 50,000.

Q.—Did you advance any money?

A.—No. Sassoons advanced the money.

Q.—You were not lending the money?

A.—No, but I was guaranteeing the money.

Q.—Up to now you have had nothing to pay as guarantor?

A.—But I shall have to pay."

This last statement, it was urged before Mr. Justice Greaves, constituted an unqualified admission that he was liable to pay five lacs to the plaintiffs. After a careful consideration of the deposition taken as a whole, we have come to the conclusion that it does not contain an admission of the requisite description.

The written statement of Galstaun makes it abundantly clear that he had in substance taken a two-fold defence; namely, first, that the conduct of the plaintiffs had been such as to absolve him from liability under the guarantee, and secondly that the suit was premature. We are not prepared to construe his statement in the deposition to imply that he had abandoned these defences in their entirety.

This case is in some respects similar to that of *Koramall Ramballabh* v. *Mungilal Dalim Chand* (1), where reference was made to the observation of Lopes, L. J.,

(1) 54 Ind. Cas. 836; 23 C. W. N. 1017.

BHOLA SINGH *v.* BANWARI.

in *Landergan* v. *Feast* (2): "There must be a clear admission that the money is due and recoverable in the action in which the admission is made. There is no such admission here. The defendant's statement that the action is premature may be untrue, but we cannot go into that." Lindley, L. J., said:—"The first thing necessary is an admission that the sum is due and recoverable in the action, and I can find no such admission here. The affidavit gives the defendant's view that the action was brought too soon." To the same effect are the observations of Fry, L. J., in *Hughes* v. *London, Edinburgh and Glasgow Assurance Co., Ltd.* (3), that he held a strong view that final judgment ought not to be signed upon admissions in a pleading or an affidavit, unless the admissions were clear and unequivocal. The observations of Sargant, J., in *Ellis* v. *Allen* (4) may also be usefully recalled:—"The object of the rule was to enable a party to obtain speedy judgment where the other party has made a plain admission entitling the former to succeed. This applies wherever there is a clear admission of facts in the face of which it is impossible for the party making it to succeed." We must further remember that the power of the Court is discretionary and that its exercise cannot be claimed as a matter of right; *Premsuk Das Assaram* v. *Udairam Gungabux* (5), *Mellor* v. *Sidebottom* (6), *In re Wright Kirke* v. *North* (7) and *Gilbert* v. *Smith* (8). We are of opinion that the present case is not one in which judgment on admission should have been pronounced.

The result is that this appeal is allowed and the order of Mr. Justice Greaves discharged. The appellant is entitled to his costs both here and in the Court below.

N. H. *Appeal allowed.*

(2) (1886) 34 W. R. (Eng.) 691; 55 L. T. 42
(3) (1891) 8 T. L. R. 81.
(4) (1914) 1 Ch. D. 904; 83 L. J. Ch. 590; 110 L. T. 479.
(5) 44 Ind. Cas. 233; 45 C. 138; 22 C. W. N. 204; 28 C. L. J. 498.
(6) (1877) 5 Ch. D. 342; 46 L. J. Ch. 398; 37 L. T. 7; 25 W. R. 401.
(7) (1895) 2 Ch. D. 747; 65 L. J. Ch. 37; 13 R. 849; 73 T. L. 396; 44 W. R. 125.
(8) (1876) 2 Ch. D. 686 at p. 689; 45 L. J. Ch 514; 35 L. T. 43; 34 W. R. 568.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 250 OF 1923.
June 30, 1924.
Present:—Mr. Justice Neave.

BHOLA SINGH—PLAINTIFF—APPELLANT
versus
BANWARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Suit for ejectment based on kirayanama *—Court-fee paid on one year's rent — Question of title.*

In a suit for ejectment based on a *kirayanama*, containing a condition for ejectment, and filed on Court-fee on only one year's rent, without any prayer for a declaration of title, the Court should not go into the question of title and should only determine whether the relation of landlord and tenant exists between the parties. [p. 351, col. 1.]

Second appeal from a decree of the Subordinate Judge, Meerut, dated the 6th of November 1922.

Dr. *N. C. Vaish*, for the Appellant.

Mr. *Durga Prasad*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal arising out of a suit to eject the respondents Mirchi and Banwari from a house which the plaintiff acquired under a sale-deed of the 27th June, 1921. The plaintiff came into Court on the allegation that the house had originally been purchased in execution of a decree by one Hira Lal who had leased it to Mirchi under a *kirayanama*. The plaintiff bought the house from Hira Lal's heir. He alleged that Mirchi had sublet the house to Banwari whom he also impleaded.

Banwari denied that any relationship of landlord and tenant existed between him and the plaintiff and set up his own title on the ground of adverse possesaion.

The First Court found that Mirchi had never obtained possession of the house and was, therefore, not a tenant and could not be called upon to pay rent, that Banwari was in occupation as a trespasser but had not acquired an adverse title. The suit was accordingly decreed for possession.

The lower Appellate Court has accepted the finding that Banwari was in possession as a trespasser and has held that as the plaintiff only came to the Court paying Court-fee on one year's rent and founding his suit on the *kirayanama* the

First Court ought not to have gone into the question of title at all, but only determined whether the parties were to one another in the relation of landlord and tenant. A reference has been made to *Balasidhantam* v. *Perumal Chetti* (1).

In appeal it is contended that the question of title was raised by the plaintiff in his plaint and that the Court was competent to decide it. The appellant's Counsel claims that he should have been allowed to make good any deficiency in Court fee in the present suit. This contention cannot be accepted. The plaint makes it perfectly clear that the suit was founded only on the *kirayanama* which contained a condition for ejectment. The cause of action is said to have arisen at the expiry of one year from the execution of this document. There was no prayer for a declaration of the plaintiff's title and the Court-fee was not the correct one in a suit for title. In addition to the ruling cited by the lower Appellate Court reference may be made to *Promotha Nath Ganguly* v. *Amir-ud-din Sheikh* (2). The appeal was properly rejected by the lower Appellate Court and must fail here. The appellant's Counsel desires to withdraw his appeal with permission to file a fresh suit. This is allowed. The appellant will pay the respondents costs including in this Court fees on the higher scale.

S. D. *Appeal withdrawn*

(1) 27 Ind. Cas. 162; 27 M. L. J. 475; 1 L. W. 641.

(2) 55 Ind. Cas. 178; 24 C. W. N. 151

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 33 OF 1924.

May 1, 1924.

Present :—Mr. Justice Dalal.

FIRM PEARE LAL-GOPI NATH—PLAINTIFF—APPLICANT

versus

THE EAST INDIAN RAILWAY COMPANY—DEFENDANT—OPPOSITE PARTY.

Railway receipt—Transfer by endorsement.

The title of the consignor of goods to a Railway Company can be conveyed to another person by an endorsement on the Rail way receipt.

Dolatram Dwarkadas v. *Bombay Baroda & Central India Railway Co.*, 25 Ind. Cas. 380; 38 B. 659; 16 Bom. L. R. 525, followed.

G. I. P. Railway Co. v. *Saheb Ram*, 5 Bom. L. R. 953, distinguished.

Civil revision from an order of the Additional Subordinate Judge, Mainpuri, dated the 5th November 1923.

Mr. *G. Agarwala*, for the Applicant.

Mr. *Ladli Prasad Zutshi*, for the Opposite Party.

JUDGMENT.—Only one point is decided by the lower Appellate Court that the plaintiff, the Firm of Peare Lal-Gopi Nath, had no right to sue the East Indian Railway Company for damages caused on the consignment. The consignment was made from Kidderpore docks to Shikohabad by the Firm of Hemraj-Durga Das. The consignor endorsed the Railway receipt to the plaintiff's firm which took delivery. The plaintiff's firm then brought this suit for price of seven bags, the shortage in the consignment when it arrived at Shikohabad. The learned Judge of the Appellate Court was of opinion that there was no contract between the plaintiff and defendant companies and that, therefore, the plaintiff was not entitled to sue. The language of the judgment, however, is in favour of the plaintiff. The learned Judge was of opinion that a carrier's contract is with the person in whom the property in goods is vested at the time the contract of carriage was entered into. The learned Judge did not go further and enquire whether the consignor had transferred all his rights and interest in the contract to the plaintiff. The Bombay case of *Dolatram Dwarkadas* v. *Bombay Baroda & Central India Railway Co.* (1) is an authority for the proposition that the title of the consignor can be conveyed to another person by an endorsement on a Railway receipt. In that case one Sukhdin Ramlal consigned 115 bags of wheat from a station on the Oudh and Rohilkhand Railway to Ahmadabad. The goods were consigned by Sukhdin to self and he then endorsed on the Railway receipt delivery to one Naraindas. Naraindas on his side endorsed it in favour of the plaintiff of

(1) 25 Ind. Cas. 380; 38 B. 659; 16 Bom. L. R. 525.

that suit, Dolatram. Under these circumstances, a Bench of the Bombay High Court held that the Railway receipt was a mercantile document of title and that the endorsee of such a Railway receipt had sufficient interest in the goods covered by it to maintain an action for damages against the Railway Co. the carrier. If A makes a contract, there can be no doubt that A can pass over the benefit of that contract to a third person. The question here is whether the endorsement of the Railway receipt did pass the benefit of the contract to the endorsee. On the authority of the Bombay case I hold that it did. The learned Counsel for the respondent quoted another Bombay case of the *G. I. P. Railway Co.* v. *Saheb Ram* (2). That case, however, was of a consignee of goods and not of a person to whom the benefit of the contract of the consignor was conveyed by the consignor. In my opinion the plaintiff had a right to sue.

As other points have not been determined by the learned Judge of the lower Appellate Court I set saide his decree and direct that Court to decide the appeal after decision of the other issues. Costs here and hitherto shall abide by the result.

K. S. D. *Appeal allowed; Case remanded.*

(2) 5 Bom. L. R. 953.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL NO. 133 OF 1923.

February 11, 1924.

Present :—Mr. Justice Lentaigne and Mr. Justice Carr.

MA MA GUN—APPELLANT

versus

MAUNG BO THAN—RESPONDENT.

Landlord and tenant—Rent collected wrongfully by third person—Liability of Collector—Liability of tenant.

Where rent is wrongfully collected from a tenant by a person other than the landlord, the latter can recover the same from the former in an action on tort, but the tenant is not thereby discharged from his liability to the landlord under the contract.

First appeal from a decree of the District Court, Pegu, in Criminal Regular No. 10 of 1923.

Mr. *Keith*, for the Appellant.

Mr. *Dantra*, for the Respondent.

JUDGMENT.—The plaintiff-appellant is the widow of U Yaw and administratrix of his estate. She alleged that their joint estate included a large area of land in the Pegu District. The defendants had wrongfully collected the rents of the land from their tenants. She sued to recover the rents so collected.

The Additional Judge of the District Court held that on these allegations the plaintiffs had no cause of action against the defendants. Her remedy he considered was against the tenants only.

We are clearly of opinion that he was wrong. No doubt such payment as is alleged would not discharge the tenants from their liability to the plaintiff under their contracts. But the plaintiff's suit against the defendants is based not on contract but on tort, and if they have in fact wrongfully collected money due to the plaintiff she is entitled to recover that money from them. This is the only question that we have to decide.

The order of the District Court rejecting the plaint and the decree of that Court are set aside. The suit is remanded to the District Court with a direction that the plaint is admitted.

The appellant will be given a certificate for the refund of the Court-fee paid on this appeal.

The other costs in this appeal will be costs in the suit and follow its result.

N. H. *Suit remanded.*

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 100 OF 1924.
June 26, 1924.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Fawcett.

MUKUNDLAL BANSILAL—PETITIONER
versus
EMPEROR—RESPONDENT.

Cotton Duties Act (II of 1896), ss. 16, 25 (9)—Meaning of word "place" in definition of "mill"—Inspector of Cotton Excise—Right of free access to godown—Owner refusing to have locked-up godown opened—Wilful obstruction—Subsequent offer of access, whether condones obstruction.

Under section 16 of the Cotton Duties Act, the Inspector of Cotton Excise has a right of free access to the godown of a mill, inasmuch as, the definition of the word "mill" in the Act contains the wide word "place", which (supposing the godown is not in the particular building where the machinery is) is wide enough to cover the premises containing accessories to the manufacture of cotton goods in the mill. [p. 356, cols. 1 & 2.]

Therefore, if the owner of a mill does not, after due notice, get the locked door of a godown of the mill opened to give access to the Inspector of Cotton Excise, the owner is guilty of wilful obstruction under section 25 (9) of the Cotton Duties Act, the particular purposes for which the Inspector wanted access being immaterial so long as his object was to perform a duty under the Cotton Duties Act. [p. 354, col. 2.]

Once access is refused, and thus intentional obstruction is caused, a subsequent offer to give access is not sufficient to condone the obstruction. [p. 355, col. 1.]

Criminal application from conviction and sentence passed by the First Class Magistrate, Poona, confirmed on appeal by the Sessions Judge, Poona.

Sir *Chimanlal Setalvad* and Mr. *S. G. Velinkar*, instructed by Messrs. *Ardeshir, Hormusji, Dinshaw & Co.*, for the Petitioner.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

Shah, Ag. C. J.—This application arises out of proceedings taken by the Inspector of Cotton Excise, Bombay Presidency, against the accused. In the complaint that was lodged on August 3, 1923, before the District Magistrate, the complainant alleged that, on April 14, 1923, he went to the Raja Bahadur Motilal Mills of Poona, of which the accused was the owner, and asked him to give reasonable facilities for the inspection of certain records showing production of mixed cotton and silk goods. At about 9 A. M. when he went there the accused gave instructions to his servants that facilities should be given to the complainant. The complainant waited up to 2 P. M., but he had not been able to get until then the inspection of the records and of the godown which he wanted. When the accused returned at about 2 P. M. he was said to have refused to let him have access to the godown and to the records which he wanted, and accordingly charged him under section 25, clause 9, of the Cotton Duties Act II of 1896. On this the trial proceeded before the First Class Magistrate Mr. Atre to whom the District Magistrate had transferred this complaint. The case assumed somewhat undue proportions partly on account of the line of argument which was adopted on behalf of the accused in the Trial Court. But in the end the Magistrate found that under section 16 of the Cotton Duties Act, the complainant was entitled to have free access to the godown, and also to have inspection of the accounts from the year 1915 up to 1923 which he wanted; that the access to the godown and to the records was refused by the accused. He accordingly found him guilty of having intentionally caused obstruction in the discharge of his duties to the complainant under section 25, clause 9, of the Cotton Duties Act, and sentenced the accused to simple imprisonment till the rising of the Court and a fine of Rs. 1,000.

In appeal the learned Sessions Judge was not prepared to hold it proved as regards the account books from 1915 to 1920 that the Mill Authorities knew where they were and refused to produce them, and as regards the books from 1920 to 1923 he was not prepared to hold that the accounts were not produced. It may be mentioned that the connection of the accused with this Mill commenced in August 1920. The learned Judge, however, was satisfied on the evidence that the accused refused to give access to the godown, and that in doing so, he intentionally caused obstruction to the complainant. Accordingly he con-

firmed the conviction and upheld the sentence.

In the application before us the case on behalf of the applicant has been argued on the footing of the findings recorded by the Sessions Judge. We are no longer concerned with the obstruction alleged to have been caused to the complainant as regards the account books, because the learned Judge has so far found in favour of the accused.

We are concerned with the obstruction said to have been caused to the complainant in respect of the godown. As regards that, the facts, which are not in dispute, are these. The godown was locked at the time. Apparently, on April 14, from about 9 A. M. up to 2 P. M. the persons to whom the accused had given instructions to give facilities to the complainant had not done anything to open the godown. When the accused returned at about 2 P. M. to the Mill premises, he is found to have refused any access to this godown to the complainant. His case on that point was that he did not refuse, but that he said that he would write to him later on, suggesting that as he was absent during the morning hours and did not know what had transpired between the complainant and his own men, he wanted time to consider the situation. In support of that he relied upon the letter which he wrote that very afternoon which reached the complainant at about 5-30, in which he offered to open the godown to him. That offer, however, was not availed of later on, and we are not concerned with what happened subsequently. But that letter has been relied upon in the course of the argument as showing that from the beginning there was no intention on his part to cause obstruction. It is further urged before us that as the finding with regard to the refusal to produce the account books is in favour of the accused, really there could not have been any intention on the part of the accused to cause obstruction. It is also urged that this godown is not part of the Mill as defined by the Act, and that, therefore, really the accused would have a right to refuse free access to this part of the building.

As regards this last point, it is clear that it does not seem to have been suggested in either of the Courts below that this godown was not part of the building. Under section 3, sub-clause (6) of the Act "Mill" means any building or place where cotton goods are woven, knitted or otherwise manufactured by machinery moved otherwise than by manual labour, and includes every part of such building or place. It does not appear to have been suggested in this case that this godown was not part of such building or place. The learned Judge has found expressly that the complainant had a right of free access at all reasonable times during the working hours to this particular godown, and in the absence of any indication in the evidence to the contrary the suggestion made before us cannot be accepted. It is sufficient for our purposes in revision that both the lower Courts have found that he had a right of free access at all reasonable times to this godown.

As regards the question whether the act found to have been committed by the accused amounts to intentional obstruction, it seems that it is really a question of fact to be determined with reference to the circumstances of this case. Though several cases have been referred to in the course of the argument, I think that it must depend upon the facts of this case. We have to determine on the proved facts whether the conduct of the accused amounts to an obstruction within the meaning of clause 9 of section 25. As I have already stated, the godown was locked. The requisition of the complainant to have it opened was not complied with in the morning of the 14th, and about 2 o'clock when the accused returned, undoubtedly the complainant insisted upon the opening of the godown. It is not suggested in the case that the accused had not the necessary control over the key, and that he was not in a position to open the godown, if he was minded to do so. If under these circumstances he refused to open the godown,

it seems to me that he undoubtedly caused an obstruction to the free access to this godown to which the complainant was entitled. It does not matter as to what the object of the complainant was in asking the accused to open the godown. It has been urged with some insistence that the real thing that the complainant wanted was the account books, and as there is a finding in favour of the accused on that point, there could have been no intention on the part of the accused to cause obstruction. But the obstruction to the free access to the godown did arise in fact, and to me it appears that that obstruction existed no less because the purpose for which it was wanted was not established as alleged by the complainant. The fact appears to have been, as found by the learned Sessions Judge, that the complainant had a suspicion in his mind that the account books were in the godown, and possibly he wanted to get samples of the silk cloth which was manufactured in this Mill. It is possible, on the other hand, that on account of what had transpired between the complainant and the Mill people in the morning, when the accused and the complainant met at about 2 o'clock the interview between them was not exactly pleasant, and on account of mutual distrust and suspicion of each other both parties possibly behaved in a manner in which they might not have otherwise acted. But whatever the reason may be, the fact remains that the accused refused to open the godown at the time; and it seems to me that it is no answer to say that later on in the afternoon he offered to the complainant to have access to that godown. Undoubtedly he did make such an offer by his letter in the afternoon on the 14th, and to that extent, I think, he acted correctly. But that is not sufficient, in my opinion, to condone the obstruction which he in fact caused at about 2 o'clock when he refused access to the complainant to the godown.

It seems to me, therefore, that the conviction under clause 9 of section 25 of the Cotton Duties Act is correct. Having regard, however, to the findings of the learned Sessions Judge as regards the account books, and to the fact that the complainant really wanted access to the account books, and also to the subsequent conduct of the accused in writing the letter to which I have referred, it seems to me that the sentence is unduly severe. Having regard to these circumstances, I think that the sentence of fine of Rs. 100 would be sufficient to meet the requirements of the case. I would, therefore, reduce the sentence to a fine of Rs. 100 and direct the excess, if paid, to be refunded. We set aside the sentence of imprisonment.

Fawcett, J.—I agree that the conviction of the accused for having intentionally obstructed the complainant in the exercise of his power under the Cotton Duties Act should not be interfered with by this Court on revision.

On the main question the facts found by the lower Court seem to me clearly to show that there was wilful obstruction. The complainant had been trying to get access to this godown for some hours in the morning. He had written several memos. to that end addressed to the accused. He did not succeed in getting such access, and at the subsequent interview between the accused and the complainant the accused definitely refused to open the godown. To say that that does not amount to a wilful obstruction under clause 9 of section 25 of the Cotton Duties Act seems to me absurd. The complainant under section 16 had a right of free access, so that no conditions could be attached to it. It was not open to the accused, for instance, to say "you must wait some hours until I fully consider the question," and it is not alleged that the accused was not in a position, if he wanted to, to have had the godown at once opened and the complainant given access to it. The question of the particular purpose for which the complainant wanted such access, seems to me immaterial in the circumstances of this case, so long, at any rate, as the object was in connection with the Inspector's duties under the Cotton Duties Act. It may, however, be remarked that it was not an entirely new case set up for the first time by

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the learned Sessions Judge, that he wanted such access to see if there were any goods in this godown, for the letter of the Inspector, Exhibit 2 B, in fact mentioned his suspicion that there were such goods in the godown. Whether it was to see such goods, or whether it was to see whether any accounts were concealed there, in either case the complainant had a right of access to the godown and undoubtedly the accused, after due notice, declined to give him such access. It is absurd to say that because there was no other overt act, such as a threat or a blow, that therefore there was no intentional obstruction. I may in this connection refer to the case of *Gully* v. *Smith* (1) where the question arose whether an owner whose wall had tumbled down on to a road, and who, after due notice, omitted to remove it was guilty of "wilful obstruction" of the highway under a certain Statute. It was held by the Court that he was guilty of such obstruction, and Lord Coleridge in delivering judgment said, among other things:—

"To my mind it is clear that, though obstruction may have begun with an act for which the appellant was not responsible, yet if he ought to have removed that which caused the obstruction, and after notice did not do so, that act of leaving it becomes wilful on his part."

In that case there was also a contention that there ought to have been some overt act on his part, but that was overruled by the Court. So here there was obstruction to the complainant's right of free access, namely, the locked door. The accused had notice to remove that obstruction and to give the complainant free access, and he declined to do so, and, therefore, there was wilful obstruction on his part.

As to the point whether section 16 would cover free access to this godown, it seems to me quite clear from the definition of the word "Mill" in this Act that it must do so. That definition contains the wide word "place" which (supposing the godown is not in the particular building where the machinery is) is wide enough to cover the premises containing accessories to the manufacture of cotton goods in the Mill; and the Explanation to section 6 of the Act provides that cotton goods produced in the Mill cover any goods which are issued out of the premises of the Mill. Obviously the Legislature intends the Mill premises to be covered by the word "mill."

As regards the sentence, I agree with my learned brother that in the circumstances the fine should be reduced from Rs. 1,000 to Rs. 100.

S. D. *Conviction confirmed: Sentence reduced.*

(1) (1884) 12 Q. B. D. 121; 53 L. J. M. C. 35; 48 J. P. 309.

CALCUTTA HIGH COURT.

JURY REFERENCE No. 2 OF 1924.

March 20, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Duval.

EMPEROR—PROSECUTOR

versus

GOLAM KADER AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 307—Judge disagreeing with Jury—Reference to High Court—High Court, when will interfere.

The real test that has to be applied in a Reference under section 307 of the Criminal Procedure Code, when the Judge disagrees with the verdict of the Jury, is to see whether the verdict is so unreasonable that seven reasonable men could not have arrived at that verdict. [p. 359, col. 2.]

The High Court will not, therefore, interfere in a case unless it can be said that it was not possible for the Jury to have arrived at the verdict at which they did arrive. [*ibid.*]

Reference by the Sessions Judge, Chittagong, under section 307 of the Criminal Procedure Code, against an unanimous verdict of the Jury.

Mr. *Langford James*, Babus *Debendra Narain Bhattacharjee*, *Charu Chandra Sen*, *Debendra Chandra Pal* and *Krishta Kisore Basak*, for the Accused.

Babus *Panchanan Ghose* and *Jyotish Ch. Guha*, for the Complainant.

Mr. *Khundkar*, Officiating Deputy Legal Remembrancer, for the Crown.

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JUDGMENT.

Greaves, J.—This is a Reference by the Sessions Judge of Chittagong. Twenty persons were charged with offences under section 147 of the Indian Penal Code. Four of them 1, 2, 17 and 18 were further charged with offences under section 302 of the Indian Penal Code and there was a further charge under section 149 read with section 302 against all the 20 persons. The trial took place before a Jury between the 10th and the 19th of December last year, and the Jury by an unanimous verdict found the accused not guilty on the 19th December, giving them, so we understand, the benefit of the doubt. Under the circumstances the Sessions Judge who has disagreed with the unanimous verdict of the Jury has made this Reference to us under the provisions of section 307 of the Code of Criminal Procedure. It is necessary, therefore, for us to consider the evidence that was before the Jury and the view of the Sessions Judge and also the view of the Jury and after having done so to arrive at our own conclusion upon the case. The facts of the case are succinctly set forth both in the second paragraph of the letter of Reference and also in the charge to the Jury under the heading "prosecution case." I need only deal very shortly with the facts. The prosecution case is that on the 8th of July last year, one Bangshi Dey, a tenant of Prasanna and two other persons, labourers of Prasanna, were transplanting paddy in a large *char* lying to the west of the village Gahira which was in the possession of Prasanna, and his brother, Hara Kumar and Nishi, brothers of Prasanna, were watching the transplanting of the paddy. Then it is said that a large number of men armed with *lathis* came from the east and that the five men, Hara Kumar, Nishi, Bangshi and the two labourers ran away towards the west. It is said that near the *darga* of one Har Chandra Das, who was also a tenant of Prasanna, the five persons who were flying were intercepted by a party of men who were coming from the north-west. The two labourers effected their escape and it is said that the other three were surrounded and that Hara Kumar was struck on the head with a *lathi* by two of the accused, Azizur Rahman and Golam Kader. According to the prosecution case Hara Kumar fell down as the result of the blows and Bangshi tried to protect him by interposing his body and received a number of blows. The prosecution evidence states that despite this, various other blows were aimed by various members of the attacking party upon the prostrate body of Hara Kumar. Nishi is also said to have been beaten by the rioters and three other persons who arrived to see what was happening are said to have received injuries and another brother of Prasanna, Nabin, is said to have been struck by the rioters as they were dispersing. Hara Kumar was carried home. The occurrence took place in the evening and at about 9 o'clock in the night Hara Kumar and Nishi were taken in a *sampan* and information was sent to Prasanna who was in Chittagong where he was employed as a Pleader's clerk. Prasanna left Chittagong on the following morning, that is, on the 9th of July. On his way he met his brothers in the *sampan* and he took them to a *ghat* near the *thana* which is at a place called Anwara. At 2 P. M. next day, the 9th July, the first information was lodged by Prasanna. All the accused were named in that information. On Prasanna lodging the first information a Sub-Inspector went from the *thana* to the *ghat* and inspected the injuries of Hara Kumar and Nishi. After this was done Hara Kumar and Nishi were taken to Chittagong where Hara Kumar died of the injuries early in the morning of the 10th. The *post mortem* examination of Hara Kumar disclosed two wounds on the top of his head and a fracture of the frontal bone in five segments and the view of the Civil Surgeon was that the injuries on the head were sufficient by themselves to cause death. The dispute in respect of which the rioting is said to have taken place arose about the possession of this *char*.

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Prasanna and his brothers claimed it and Prasanna had recently obtained a decree with regard to certain plots in the *char* in section 145 proceedings to which Azizur Rahman, one of the accused, was a party. Azizur Rahman had started a title suit in respect of two of these plots and a *kabuliyat* had been executed by Azizur Rahman and his co-sharers in favour of one Umed Ali and ten others of the accused are said to have executed *kabuliyats* in favour of Umed Ali in respect of the disputed land. The prosecution's suggestion is that behind Umed Ali was one Khan Saheb Abdul Rahman Dovasha, a well-known merchant of Chittagong and this person is said to have instigated the attack. The defence story is not very clear and apparently the suggestion was that Nishi and Hara Kumar and others, when they were going to break down a hut which had been erected by Umed Ali or Abdul Rahman on the southern extremity of the *char*, were driven off and beaten by Umed Ali's men. No evidence was called on behalf of the defence and the defence story can only be gathered from the line of cross-examination that was followed with regard to some of the witnesses. A very large body of witnesses were called on behalf of the prosecution, many of whom purported to be eye-witnesses of the occurrence. Amongst them are prosecution witness No. 2, Bacha Mia, prosecution witnesses Nos. 3, 4, 5, 6 and 7. The other eye-witnesses are prosecution witnesses Nos. 9, 10, 11, 13 and 16 and in addition to these there are other witnesses who speak to having seen some occurrence from a distance. Most, if not all, of the eye-witnesses identified all the accused though it is true that prosecution witness No. 8 says in the Sessions Court that Azizur Rahman and Golam were not present on the occasion although before the Magistrate he stated that Azizur Rahman and Golam gave the blows. Prosecution witness No. 7 also says that Azizur Rahman was not present. As the learned Judge pointed out to the Jury the majority of the prosecution witnesses were either relatives or tenants or labourers of Prasanna and his brothers. There are one or two or possibly more persons who may be said to be entirely independent but it is not unnatural that a greater number of the prosecution witnesses are connected with Prasanna in one or other of the ways I have mentioned. There is no doubt that reading the evidence as it has been read to us there does seem an almost overwhelming case made out on the part of the prosecution against these accused. What, therefore, we have got to consider is whether the Jury were entirely unreasonable in giving the benefit of the doubt, as they did, to the accused and whether it was impossible for the Jury to arrive at any other conclusion reasonable than that the guilt of the accused had been brought home to them. Various points were urged by the learned Counsel who appeared on behalf of the accused in support of the view that the verdict of the Jury was not an unreasonable verdict and that accordingly we should not interfere with it.

First, he refers to the fact that according to the evidence the assault on Hara Kumar was made by at least 15 people and that yet according to the medical evidence only two blows were found on Hara Kumar's head and one slight abrasion on another portion of his body. Certainly we think that this is a fair comment because on reading the evidence we find that many blows are said to have been rained upon Hara Kumar by some of the accused after he had fallen down as a result of the first two blows. The evidence is that Azizur Rahman and Golam struck him first and that after that no less than 13 persons struck him and yet according to the medical evidence as we have already stated there were only three actual blows, according to the Doctor's view, that can be traced on the person of Hara Kumar. Then again so far as Nishi is concerned it is stated in the evidence that he was struck by no less than 11 people. But if you consider the evidence of the Doctor, so far as Nishi is concerned, you will find that he says that Nishi had a bruise on the eye-lid of the right eye and a contusion

on the left fore-arm and further injuries, all of which were slight except the one on the head.

Then it is further urged that there was evidence before the Jury that other persons, as I have already indicated, were injured in the affray and that yet the injuries of none of them were of sufficient gravity to demand examination by a Doctor.

Then it is urged that a certain number of witnesses, five I think it is said, went back to some extent in the Sessions Court upon the evidence that they had given before the Magistrate and emphasis was laid on the fact that prosecution witness No. 25, who had given a long and a coherent story as to the connection of Abdul Rahman Dovasha with the attack before the Magistrate, stated nothing whatsoever with regard to this in his evidence in the Sessions Court.

Then stress is laid on the fact that although there were other brothers of the two injured men who were at the place of the occurrence at the time it happened no information was given at the *thana* until nearly 24 hours after the occurrence although the *thana* was only 10 miles away and could be easily reached by a *sampan* by the river Sangu.

Then some point was made with regard to the exaggerations that are said to have appeared in the evidence with regard to the fact that the accused were armed with *daos* and *kirchis*. It is said that reference to this appears in the first information and that it is not borne out by the evidence of the witnesses and reference was also made to the picturesque figure who is said to have appeared with a *lathi* in one hand and a *dao* on the other.

Then some point was made with regard to the scene of the occurrence which was placed by the prosecution on Plot No. 2775 which is said to have been a plot which was not claimed by any of the accused.

Further stress is laid on the fact that I have already mentioned that the witnesses were tenants or labourers of Prasanna and that the Judge himself in his letter of reference says that the prosecution witnesses are not free from the charge that some of their evidence was tutored evidence.

Lastly, stress was laid on the point that a considerable number of witnesses were named in the first information including the names of the two *chowkidars*, none of whom were called at the trial of the case.

It is necessary to see in the light of these suggestions whether we can say that the verdict of the Jury was so unreasonable that seven reasonable men could not have arrived at that verdict, for it seems to us that that is the real test that we have got to apply. We are not able to say that it was not possible for the Jury to have arrived at the verdict at which they have arrived. We have read the evidence and considered it in the light of the criticisms that have been directed against it and we are of opinion that it is full of exaggerations and that it may well be that the Jury taking this view may have said to themselves that it was not safe to convict the accused upon the evidence which was clearly exaggerated, and, therefore, untrustworthy. This being so, it seems to us that we should not be justified in accepting the Reference and interfering with the verdict of not guilty at which the Jury have arrived. The accused are acquitted.

Duval, J.—I agree.

K. S. D. *Reference not accepted.*

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 219 OF 1924.
June 18, 1924.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Fawcett.

RAMDAS VISHNUDAS—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 195, 476, 476A—Application for sanction to prosecute made before amendment of Code—Application kept pending till after its amendment—Pendency of application, whether rejection of application—Jurisdiction of superior Court to order prosecution—Oaths

RAMDAS VISHNUDAS *v.* EMPEROR.

Act (X of 1873), s. 11—Special oath—Conclusive proof of statement made—Statement can be proved to be false.

An application for sanction to prosecute, filed under section 195, Criminal Procedure Code, before the amendment of the Code in 1923, remained pending in the lower Court till sometime after the Code was amended. Then the District Court, to which the lower Court was subordinate, acting under section 476A ordered prosecution under section 476 of the Code:

Held, that, as the pendency of the application for sanction did not mean rejection of the application within the meaning of section 476A, the District Court was competent to order prosecution.

The evidence given under section 11 of the Oaths Act is not conclusive proof of the matter stated, but is conclusive proof of the matter stated as against the person who offers to be bound by the special oath. Therefore, it can be proved that a statement made on a special oath was false, and false to the knowledge of the person making it.

Criminal appeal from an order passed by the District Judge, Sholapur.

FACTS.—The appellant, Ramdas Vishnudas, took a special oath in a civil case, under the Oaths Act (X of 1873). In a subsequent civil case he stated on oath that the previous statement, which he had made on the special oath, was false. Upon this his brother Manmohandas applied to the Subordinate Judge in July 1922 for sanction to prosecute him for perjury. This application remained pending before the Subordinate Judge till March 1924 when the District Judge, acting under section 476A, Criminal Procedure Code, ordered Ramdas Vishnudas' prosecution under section 476 of the Code.

An appeal against this order was preferred to the High Court under section 476-B of the Code.

Mr. *H. C. Coyajee*, with Mr. *V.B. Virkar*, for the Appellant.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.—Two points have been urged in support of this appeal which has been preferred to this Court under section 476-B, Criminal Procedure Code. The first point is that as an application for sanction was made by the brother of the present appellant on July 11, 1922, which has not been disposed of, the District Court, to which that Court would be subordinate within the meaning of section 195, Criminal Procedure Code, would not be competent to make an order under section 476-A. It is an admitted fact, however, that the application is not rejected by that Court. It is difficult to understand how that application has remained pending so long. But it being common ground before us that that application is pending, but not rejected, we do not think that there could be any objection to the superior Court taking such action as could be taken by the Court under section 476, Criminal Procedure Code. The pendency of the application cannot mean rejection of the application within the meaning of section 476-A.

The second point urged is that as the first statement which was made by the present appellant on January 26, 1921, on special oath it cannot be shown to be false because of the provision of section 11 of the Indian Oaths Act. That section provides that the evidence so given shall, as against the person who offered to be bound by the special oath, be conclusive proof of the matter stated. The section does not provide that it shall be conclusive proof of the matter stated; but it provides that as against the person, who offers to be bound by the special oath, it will be conclusive proof of the matter stated. Now the complaint is filed by the Court, and it is open to that Court to show, if it can, that that statement was false, and false to the knowledge of the person making it. Whether that Court will be able to establish those propositions must depend upon the evidence which will be available at the trial of the case against the appellant. We express no opinion whatever as to the merits of the complaint at this stage. But section 11 of the Indian Oaths Act does not prevent the Court from attempting to establish that a particular statement made by the appellant was false in fact and false to his knowledge. In other words it is open to the Court to establish that by making that statement the appellant gave false evidence within the meaning of section 193

Indian Penal Code. We, therefore, dismiss the appeal.

S. D. *Appeal dismissed.*

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 423 OF 1924.
July 12, 1924.
Present:—Mr. Justice Zafar Ali.
KHAN MIR—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 304 (2)—Sudden fight — Knife stab causing death — Dangerous weapon.

A dispute having arisen between the accused and another person about drawing water from a tap, they abused each other and the accused drew out his knife and stabbed the latter with it. The knife pierced the chest and cut the heart causing death. The knife had a blade of three or four inches, and the Counsel for the accused contended that it was not a dangerous weapon:

Held, (1) that a knife which actually caused the fatal injury was undoubtedly a dangerous weapon; [p. 361, col. 2.]

(2) that the accused did not intend to cause death or to cause such injury as was likely to cause death; [*ibid.*]

(3) that, however, he must have known that he was likely to cause death and was, therefore, guilty of an offence under section 304, Part II of the Penal Code. [p. 362, col. 1.]

Ghulam Muhay-ud-din v. *Emperor*, 63 Ind. Cas. 450; 22 Cr. L. J. 658; 3 L. L. J. 581; (1922) A. I. R. (L.) 26, distinguished.

Appeal from an order of the Sessions Judge, Rawalpindi, dated the 25th April 1924.

Mr. *Sagar Chand*, for Mr. *Philip Morton*, for the Appellant.

Lala *Amar Nath Chona*, for the Government Advocate, for the Respondent.

JUDGMENT.—Khan Mir, appellant, has been convicted of culpable homicide not amounting to murder and sentenced to rigorous imprisonment for ten years under section 304, Part I, Indian Penal Code. His Counsel does not contest the findings of fact arrived at by the learned Sessions Judge but contends that on those findings he should have been convicted under section 326, Indian Penal Code, and awarded a lesser sentence. The facts found may be stated as below.

A dispute arose between the accused and the deceased about drawing water from a tap with the result that they abused each other and then the accused drew his knife and stabbed the deceased with it. The knife pierced the chest wall and cut the heart. Death was due to the wound in the heart. The knife was not produced but two of the eye-witnesses stated that its blade was three or four inches long.

The accused admitted that he stabbed the deceased but pleaded that he did so in self-defence. But the plea of stabbing in self-defence is not pressed now in this Court.

The learned Sessions Judge found that the blow was struck in a sudden fight without premeditation and that there was no reason for thinking that the accused deliberately aimed the blow on the left side, *i. e.* in the region of the heart. The learned Counsel for the appellant contends that the present case is on all fours with that reported in *Ghulam Muhay-ud-din* v. *Emperor* (1) and by reference thereto he argues that the knife whose blade was not more than four inches in length could not be said to be a dangerous weapon and that as the Sessions Judge found that the blow was not deliberately aimed at the region of the heart the accused could not be convicted of culpable homicide but of the offence punishable under section 326, Indian Penal Code. I am of opinion that this contention is quite untenable. Each case is to be decided on its own facts. A knife which actually caused the fatal injury was undoubtedly a dangerous weapon, and as the accused struck in the chest it follows that he knew that the injury was likely to prove fatal even if the knife did not pierce the heart, because if it had penetrated any other part of the chest it would have naturally cut the lung and a wound in the lung also would have probably ended in death. But it cannot be said that he intended to cause death or to cause such injury

(1) 63 Ind. Cas. 450; 22 Cr. L. J. 658; 3 L. L. J. 581; (1922) A. I. R. (L.) 26.

as was likely to cause death. All that can be said against him is that he gave a stab in the chest knowing that he was likely by that act to cause death. His offence would therefore fall under the second part of section 304, Indian Penal Code and I alter the conviction accordingly and reduce the sentence to rigorous imprisonment for seven years, because the accused and the deceased were both quite youths aged 20 each, and the injury was caused in a sudden scuffle.

K. S. D. & N. H. *Sentence reduced.*

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 106 OF 1924.

June 12, 1924.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Fawcett.

EZEKIEL MOSES PENKAR—PETITIONER

versus

EMPEROR—RESPONDENT.

Municipal Committee of Pen—Bye-laws for privies—Bye-law No. 9—Privy erected without permission—Non-compliance with Bye-laws.

The Bye-law No. 9 of the bye-laws for Privies,* made by the Pen Municipal Committee, does not apply where a privy has been erected without the permission of the Committee. In such a case there is no obligation under the said bye-law on the owner to communicate the fact of the completion of the privy to the Chairman, Managing Committee; nor is he under any obligation not to commence to make use of the privy before obtaining the written order to that effect from the Chairman. The bye-law, as it stands, relates to the privy in respect of which an application has been made under bye-law No. 7, and for which permission has been granted under bye-law No. 8, and not a privy which has been constructed without permission of the Municipality. [p. 363, col. 2; p. 364, col. 1.]

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*The relevant bye-laws are as follows :—

Rule 5. Every owner of a house used for human habitation shall, if there be no public privy to which the residents can resort within 150 yards thereof, provide the same with a privy or privies in accordance with the following requirements.

Rule 6. Every person who shall construct a new privy or cess-pool, shall construct the same in such position only as shall be approved in writing by the Managing Committee and in such a way that every cess-pool and night-soil receptacle shall be at a distance of at least five feet from any place used for human habitation, twenty feet from any public road or place of public resort, twenty feet from any kitchen and thirty feet from any well, tank or stream the water of which is used for drinking purposes.

Provided that where the maintenance of any such distance is absolutely impossible the Municipality may, if they think no injury to health is likely to result from the proposed position of a privy, sanction the reduction of such distances down to half those prescribed above.

Rule 7. Every person desiring to erect a privy or desiring to repair or rebuild an old privy, shall apply in writing to the Chairman of the Managing Committee for the necessary permission. The application shall be accompanied by a plan showing the dimensions of the privy and the site on which it is to be erected.

Rule 8. On receipt of the application the Managing Committee shall give permission in writing for the erection of the privy subject to the conditions specified in bye-laws 5 and 6. These conditions shall be noted in the written permission and the person receiving the permission shall be bound to prepare the privy in terms of the written permission.

Rule 9. After completion of the privy the owner shall communicate this fact to the Chairman, Managing Committee, and no person shall commence to make use of the privy unless he obtains a written order to that effect from the Chairman, Managing Committee.

Rule 10. Before issuing an order the Chairman shall satisfy himself that the privy has been completed in terms of the written permission given under bye-law 8. In order to satisfy himself the Chairman may himself go or depute any member of the Managing or Sanitary Committee or Secretary to the place where the privy is constructed.

Rule 11. If the Chairman finds that the privy has not been prepared in terms of the written permission, he shall refuse to issue the necessary order to commence the privy unless the owner complies with the terms of the written permission. An appeal shall lie to the President from the order of the Chairman refusing permission to use the privy.

Rule 12. Every owner of a pre-existing privy shall, if so required by a special notice issued by the Municipality in this behalf within six months or within such further reasonable time as may be fixed in such notice, comply to the best of his ability with all reasonable directions given in detail in such notice as regards alterations required to be made in such privy towards bringing it into conformity with the requirements of these bye-laws.

Rule 13. Every person committing any breach of bye-laws 1 and 2, 7, 9 and 12 shall for such offence be liable on conviction to a fine not exceeding Rs. 25.

EZEKIEL MOSES PENKAR *v.* EMPEROR.

Criminal application from conviction and sentence recorded by the First Class Magistrate, Kolaba.

Mr. *P. B. Shingne*, for the Petitioner.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.—The few facts material for the purpose of the present application are these. The applicant applied for permission to build a house and a privy. It appears that there was an old privy on the spot. The Municipality, however, granted permission to build the house, but refused permission to erect a privy. Sometime thereafter, however, the applicant put up the privy in question on the site of the old privy. It has been found now that this was substantially a reconstruction of the privy. The applicant was prosecuted by the Municipality, among other things, for having committed a breach of Bye-law No. 9 of the Bye-laws for Privies framed by the Pen Municipality and sanctioned by the Commissioner, Southern Division.

As regards the other charges the learned Magistrate acquitted the accused. As to the charge relating to the contravening of rule 9 he has been found guilty and sentenced to a fine of Rs. 10.

The accused has now applied to this Court for a revision of the order relating to his conviction under bye-law No. 9. The bye-law is in these terms :—

"After the completion of the privy the owner shall communicate this fact to the Chairman, Managing Committee, and no person shall commence to make use of the privy unless he obtains a written order to that effect from the Chairman, Managing Committee."

It appears from rule 7 that every person desiring to erect a privy or desiring to repair or rebuild an old privy shall apply in writing to the Chairman of Managing Committee for the necessary permission.

Rule 8 provides that on receipt of the application the Managing Committee shall give permission in writing for the erection of the privy subject to the conditions specified in bye-laws Nos. 5 and 6.

It may be mentioned that though the applicant made an application to rebuild an old privy, that application was refused. The reason of the refusal was stated in general terms to be that according to the rules of the Municipality the permission could not be granted. Rule 8, however, provides that on receipt of the application the Managing Committee shall give permission in writing for the erection of the privy subject to the conditions specified in bye-laws Nos. 5 and 6. At the time the permission was refused it was not stated that according to the provisions of rule 6, now relied upon, the permission could not be granted as there was not a distance of at least five feet between the building and the proposed privy. It is also found by the learned Magistrate that the Municipality acted contrary to the provisions of rule 8 in refusing permission.

The privy must be taken to have been built without the permission of the Municipality, and the question is whether rule 9 applies to a privy so constructed. We are not concerned now with the question as to whether the Municipality could have pulled down the privy, which was built without the permission of the Municipality.

It is clear, however, that so far as rule 9 is concerned, when it is read with reference to the context, that is, in the light of rules 7 and 8 preceding rule 9 and of rule 10 which follows rule 9, it seems clear that the communication that is required by rule 9 to be made after the completion of the privy relates to a privy with reference to which permission has been granted under rule 8, and not to a privy which has been constructed without the permission of the Municipality. It may be that the rule as framed is defective, and the intention of the framers of the rule was not to exclude from the scope of rule 9 a privy such as we have in this case. But we have to construe the rule as it is framed, and if the original intention has not been sufficiently carried out, it is perfectly open to the Municipality to amend the bye-law. But the bye-law as it stands appears to relate to the privy in respect of which an application has been made under rule 7 and for which permission has been granted under rule

CHIDDA SINGH *v.* EMPEROR.

Rule 10 makes it clear that before issuing an order the Chairman is to satisfy himself that the privy has been completed in terms of the written permission given under bye-law 8. The Chairman would have no inquiry to make under rule 10, if there was no permission granted by the Municipality with reference to the privy.

On a consideration of the wording of the particular rule, as also of the other connected rules, we are of opinion that rule 9 does not apply to the facts of this case, and that there was no breach on the part of the applicant in not complying with the rule. There was no obligation on the applicant to communicate the fact of the completion of the privy to the Chairman, nor was he under any obligation not to commence to make use of the privy before obtaining the written order to that effect from the Chairman of the Managing Committee.

We make the Rule absolute, set aside the conviction and sentence and direct the fine, if paid, to be refunded.

S. D. *Rule made absolute.*

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 198 OF 1924.
June 6, 1924.
Present :—Mr. Justice Boys.
CHIDDA SINGH—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 236, 237, 238—Charge, alteration of—Penal Code (Act XLV of 1860), ss. 34, 325—Conviction under s. 325 set aside—Re-trial for offence under ss. 34, 325

Where an accused person has been tried for and convicted of an offence under section 325, Penal Code, on the charge that he himself struck blows to another person which resulted in the latter's death, but the witnesses against him are disbelieved by the Court of Appeal and, therefore, his conviction cannot be upheld on that charge, the Court cannot alter the charge and maintain his conviction by reading section 34, Penal Code, with section 325, on the ground that some member of the party of the accused, though not the accused himself, had struck blows to the deceased in pursuance of the common intention of the party, even if there is evidence to this effect on the record, nor can the case be sent back for re-trial, under section 325 read with section 34, as such a course would mean inviting the Court below to believe on the amended charge the very witnesses who are held by the Appellate Court to have committed deliberate perjury against the accused in stating that he had struck blows to the deceased. [p. 365, cols. 1 & 2.]

Criminal appeal from an order of the Additional Sessions Judge, Meerut, dated the 1st March 1924.

Mr. *N. C. Vaish*, for the Appellant.

The Government Pleader, for the Crown.

JUDGMENT.—In this case two men Randhira and Sital have been already in a prior case convicted and sentenced to three years' rigrous imprisonment each under section 325 of the Indian Penal Code. The present appellant Chidda Singh was absconding. Six witnesses now in the Sessions Court state that the present appellant was one of the three men, the other two being Randhira and Sital who struck Ram Sarup under a mango tree to which he had retreated at the instance of his son from the threshing floor where the fight began. Five of these six witnesses never named Chidda Singh as striking Ram Sarup under the mango tree in their statements which were recorded under section 164 of the Criminal Procedure Code nor in their statements at the first trial of the other two accused. Begraj mentioned him at the first trial but did not mention him in his statement under section 164, Exhibit P, Criminal Procedure Code. The learned Sessions Judge has not relied on these five witnesses but has considered himself justified in relying on Begraj supported by the fact that Chidda Singh absconded and as he says that Chidda Singh was named in the first report. The fact of his absconding can be of very little value. As to the first report it is a purely general statement that such and such people beat such and such people and it is made by one Sagar Mal who says nothing himself and was merely giving a general description of what he had heard from others and even that general description does not attribute to Chidda Singh the particular beating of Ram Sarup, still less the particular beating

which took place under the mango tree at which place it is certain the grievous hurt must have been caused which is the subject of the charge. Under these circumstances after hearing both sides at length I am quite certain that I find myself unable to uphold the conviction of Chidda Singh on the belief that he himself struck Ram Sarup the blow (there was only one blow on the head) which eventually proved fatal under the mango tree. It then becomes necessary to consider the charge. Chidda Singh the appellant was specifically charged that he "caused such bodily injury to Ram Sarup which resulted in the man's death and thereby committed an offence punishable under section 325, Indian Penal Code." Finding that I cannot uphold the conviction on the ground that Chidda Singh himself caused the injury the question is whether at this stage I can alter the charge.

It is urged on behalf of the Crown that there was common intention on the part of the several accused to beat the several members of the other party and that, therefore, a conviction could properly be arrived at with the aid of section 34 of the Indian Penal Code. This course appears to involve the following difficulties:—

Firstly, I cannot alter a charge except under the authority given by some section of the Criminal Procedure Code. The sections which would have to be considered are 236, 237 and 238. It is not urged, and cannot be urged, that sections 236 and 238 are applicable to a case of this description, and as regards section 237 the provision in that is prefaced by the words "in the case mentioned in section 236". It is clear to me, therefore, that there is no section which will justify me in altering the charge and proceeding now to a conviction on that charge. It would really mean convicting the accused by bringing in two new facts which he was never asked in any way at all to meet in the lower Court. Those two new facts being

(1) not that he himself but somebody else of his companions struck the accused;

(2) that blow was struck in pursuance of a common intention.

I might be inclined to hold that the evidence on the record certainly indicates that those two points might be held to be established; but that would not justify me in altering the charge and proceeding here to a conviction without giving the accused a definite opportunity of meeting them. The last question then is; ought I to set aside the conviction and send the case back for a re-trial on an amended charge of section 325, Indian Penal Code, in reference to the blow inflicted by Sital and Randhira read with section 34. It appears to me that I ought not to do this. In the first place the accused has stood his trial once. That is, however, not a conclusive reason for not sending the case back. The conclusive reason is that I am acquitting him here on the charge of section 325, Indian Penal Code, based on the allegation that he inflicted the blow himself and am acquitting him on that charge not on any technical ground but because I hold that the witnesses in now attributing to him a personal part have clearly interpolated his name. To send the case back would mean inviting the Court below to believe on the amended charge the very witnesses whom I have held here to have in effect committed deliberate perjury. This would be very undesirable.

For the above reasons I allow the appeal of Chidda Singh, set aside his conviction and sentence, and direct that he be forthwith released.

S. D. *Appeal allowed.*

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 80 OF 1924.

July 8, 1924.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Fawcett.

GURUNATH NARAYAN BETGERI—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 89,

KHALBAL *v.* MUHAMMAD YUSUF.

561A—Application for restoration of attached property two years after attachment—Inherent jurisdiction of High Court—Proper remedy—Application to Government.

If an application for the restoration of property attached under section 88, Criminal Procedure Code, is not made within two years, as prescribed by section 89 of the Code, the High Court has no jurisdiction, under section 561A of the Code, to order the restoration of property, as such an order, if made, would conflict with section 89. The proper remedy is an application to Government.

Criminal application against an order passed by the Sub-Divisional Magistrate, First Class at Dharwar, confirmed on appeal by the Sessions Judge, Dharwar.

Mr. *H. B. Gumaste*, for the Applicant.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.—The petitioner before us made an application to the Magistrate for the restoration of certain property which was attached under section 88, Criminal Procedure Code. The facts relating to this attachment have been stated in the petition, and the case of the petitioner was that as he was absent from the village, he did not know anything about the attachment until he came back to the village about the time he made the application in 1923. Under section 89, Criminal Procedure Code, it is clear that the application for the restoration of property has to be made within two years from the date of the attachment. In the present case the attachment was so far back as 1918 and the present application was made in 1923. The learned Magistrate rejected the application having regard to the provisions of section 89, Criminal Procedure Code. In appeal the learned Sessions Judge upheld that order.

In support of the application to this Court it is urged that we should exercise our inherent powers to secure the ends of justice under section 561 A, Criminal Procedure Code. We do not think that we could make any order which would conflict with the provisions of section 89, Criminal Procedure Code, in the exercise of our inherent powers to which a reference has been made. The order made by the Magistrate appears to be correct. As the application has not been made within two years from the date of the attachment, the Court has no jurisdiction to make the order which the applicant wants for the restoration of the property.

It is clear that his proper remedy is to apply to Government at whose disposal property is at present according to law. If the Government are satisfied that the allegations by the petitioner are correct and that the justice of the case requires that the property should be restored to him, the Government may allow a restoration of the property to the applicant; but we cannot help him, nor can we make any recommendation to the Government as to the merits of his application. We discharge the Rule.

S. D. *Rule discharged.*

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 255 OF 1924.

June 5, 1924.

Present:—Mr. Justice Boys.

KHALBAL—ACCUSED

versus

MUHAMMAD YUSUF—COMPLAINANT.

Workman's Breach of Contract Act (XIII of 1859), s. 2—Failure to perform contract—Complaint, when must be made—Second Class Magistrate, jurisdiction of—Period of grace, whether should be allowed—Court, discretion of.

A complaint with regard to a workman's default must be brought within three months of the neglect to perform the contract. [p. 367, col. 1.]

An Honorary Magistrate of the Second Class has jurisdiction to try a case under the Workman's Breach of Contract Act. [*ibid.*]

Some period of grace should be allowed to the accused for making the repayment before sending him to Jail. [*ibid.*]

It is within the discretion of the Magistrate to fix the length of the period. [p. 367, col. 2.]

Criminal Reference made by the District Magistrate, Hamirpur.

JUDGMENT.—This is a Reference by the District Magistrate of Hamirpur recommending this Court to set aside the conviction and sentence of three months' rigorous imprisonment passed against Khalbal under section 2 of

Act XIII of 1859. He recommends this on two grounds :—

(1) That the complaint was not brought within three months of the neglect to perform the contract as required by the Amending Act XII of 1920, and

(2) That the Trying Magistrate being a Magistrate of the Second Class only had no jurisdiction to try the case.

As regards the first point the date of agreement was the 2nd of June 1922 and the money paid Rs. 114 was paid on the 7th of June 1922. Work to the value of Rs. 40 was done in June and July 1922 and it should have been completed within one year of the date of agreement, *i. e.* before June 7th, 1923, as appears from the statement of the complainant. The accused neglected to do any further work after July 1922. In reference to this the Trying Magistrate explains that he overlooked the Amending Act XII of 1920, because he is not supplied with copies of such Acts and when he sent for Act XII of 1859 from the library of the District Magistrate he was not supplied with a copy of the Amending Act, XII of 1920. It is very reasonable explanation on his part and I consider that he was in no way to blame for the oversight. At the same time the defect is one which goes to the root of his order and on that ground alone the order must be set aside.

As to the second point the learned Honorary Magistrate respectfully points out that the District Magistrate is in error in holding that he had no jurisdiction to try the case. He refers to the end of Schedule III of the Code of Criminal Procedure by the last entry and the penultimate entry in which an offence punishable under a law other than the Penal Code with imprisonment for less than one year is triable by any Magistrate and less than three years by any Magistrate of the Second Class or by a more Senior Magistrate, etc. The learned Honorary Magistrate does not, therefore, appear on this ground to have committed any error in trying the accused. A third point that I notice myself is that the learned Honorary Magistrate having convicted the accused has ordered him to pay or in default to go to Jail for three months. It seems to me clear that under section 2 of Act XIII of 1859 as amended by Act 1920 the Magistrate should have ordered him to re-pay "within such period" as he, the Magistrate, thought fit. It is clear that some period of grace, which period is in the discretion of the Magistrate, was intended to be allowed to the accused. For this oversight the learned Honorary Magistrate is again not to be blamed as the provision occurs in Act XII of 1920 of which he had no copy. For the reason that the complaint was not made within three months of the accused's default I set aside the order. The accused having been released on his own bond under the orders of the District Magistrate need not surrender and his bond is discharged.

K. S. D. *Sentence reduced.*

PATNA HIGH COURT.

CRIMINAL REVISIONS NOS. 423 AND 443 OF 1923.

August 15, 1923.

Present:—Mr. Justice Foster.

RAM BAHAL SINGH AND OTHERS—2ND PARTY—PETITIONERS

versus

RANG BAHADUR SINGH—1ST PARTY—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 145, 146—Court, duty of—Collection of evidence as to possession—Attachment of property.

Under section 145, Criminal Procedure Code, a Magistrate should be extremely reluctant to attach the property in dispute and it is his duty to collect information about possession whether false or true and to sift it before making use of section 146, Criminal Procedure Code, as an order under this section is almost the same as an act of confiscation. [p. 368, cols. 1 & 2.]

Application against an order passed by the Sub-Divisional Officer, Dinapur.

Mr. *G. C. Pal*, for the Petitioners.

Messrs. *P. E. Lal* and *Rai Tribhuvan Nath Sahay*, for the Opposite Party.

JUDGMENT.—These are petitions preferred both by the first and the second parties in a proceeding under section 145

of the Criminal Procedure Code which has been decided by the learned Sub-Divisional Officer of Dinapore. The property in dispute is 6·43 acres. It is the first party's case that they purchased quite recently from one Saudagar whose name was entered in the Record of Rights as the *raiyat* in respect of this area. The second party claim to have purchased from Mr. Jugeshwar Prasad, a Pleader of the Patna District Court. Both parties are co-sharers in the village. But it is the case of the second party that the land is *zerait* belonging to his vendor's *takhta*, and it is the case of the first party that the land was the *raiyati* land of Saudagar, his vendor. There has been some litigation, and some years ago Mr. Jugeswar Prasad brought a suit against Saudagar Singh claiming a declaration that the entry in the Record of Rights was incorrect. In that suit Saudagar Singh filed a petition admitting that he had nothing to do with the land. Of recent years the predecessor of the first party has as co-sharer been obtaining decrees against Saudagar for rent and, as I said before, had purchased the holding from Saudagar last year. Now the Magistrate calls this a most complicated case and after reviewing some of the arguments of the parties as to possibility of their claim he states that

"in view of the conflicting documentary evidence and the extreme paucity of oral evidence as to possession (all the witnesses on both sides admitting that they know no details of possession worthy of note) it is quite impossible to come to any decision as to who is in possession of the disputed land."

Thereupon the Magistrate passed an order in accordance with section 146 of the Criminal Procedure Code.

Now, I am not satisfied that this order is one that has faithfully followed the spirit of the law. In my opinion it should be held as a very important principle in cases under section 145, Criminal Procedure Code, that a Magistrate should be extremely reluctant to attach the property in dispute. It is quite intelligible that he might be in a position to say with confidence that he was unable to satisfy himself as to the possession of the parties in cases where the land is jungle or waste. But where, as here, there is land admittedly subject year by year and season by season to cultivation, is appears to me that the Magistrate is only admitting his own weakness when he states that he cannot come to a decision. He has before him two parties quite ready with information. The information may be true or false, but it is his duty to collect information and sift it. After, all, the order under section 146 is almost the same as an act of confiscation and, therefore, the Magistrate should naturally be reluctant to make use of that section. Much of what I have said as regards the duty of a Magistrate to collect and sift the evidence before proceeding to attachment under section 146 is inspired by what I have seen on the record of this particular case. I am not satisfied that the Magistrate is accurate when he states that the witnesses on both sides have admitted that they know no details of possession worthy of note. Had such an occurrence taken place this case would be indeed an unusal one, but I consider this sweeping statement to be a misdescription of the oral evidence. It has been pointed out to me that the oral evidence does contain specific statements as to possession, and in the arguments of the parties it has been emphasized that the treatment accorded to their oral evidence is not in conformity with the provisions of section 145 (4) of the Code. The Magistrate has not considered the effect of the evidence and he has not taken such further evjdence, if any, as is necessary. It is clear here that before proceeding to seize the property he could have and should have offered to take further evidence, if further evidence was necessary for a decision. I, therefore, set aside the order passed under section 146 of the Criminal Procedure Code in this case. The case will proceed to further hearing.

H. B. *Case remanded.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 148 OF 1922.

November 27, 1923.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Suhrawardy.

ABDUL GAFUR AND OTHERS—DEFENDANTS—APPELLANTS

versus

ALI MIAH—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. I, r. 10 (2)—Addition of parties to suit, when permissible—Court, discretion of—Suit for rent—Question of title, whether can be determined—Transaction in support of title—Defendant, whether can impeach by way of defence—Separate suit, whether necessary.

The provisions of O. I, r. 10 (2), Civil Procedure Code, confer a discretion on the Court to add parties to a suit. This discretion must be exercised in view of the special circumstances of the particular litigation, subject, however, to the general rule that parties cannot be added so as to alter the nature of the suit. [p. 371, col. 2.]

Oh Ling Tee v. *Awkinifee*, 10 W. R. 86 and *Hingu Lal* v. *Baldeo Ram*, 24 A. 553; A. W. N. (1902) 170, referred to.

A person may be added as a party to a suit only in two cases, first, when he ought to have been joined and has not been so joined, or, secondly, when without his presence the question in the suit cannot be completely decided. [*ibid.*]

McCheane v. *Gyles*, (1902) 1 Ch. 911; 71 L. J. Ch. 446; 86 L. T. 217; 50 W. R. 387 and *Moser* v. *Marsden*, (1892) 1 Ch. 487; 61 L. J. Ch. 319; 66 L. T. 570; 40 W. R. 520, referred to.

It cannot be affirmed as a broad proposition of law that a question of title may not be incidentally investigated in a suit for arrears of rent. [p. 370, cols. 1 & 2.]

Where a tenant-defendant disputes the extent of the title of the plaintiff-landlord to the arrears demanded, it is incumbent on the Court to determine the point before the claim is allowed or disallowed. But, subject to this reservation parties should not be added in a suit for rent so as to alter its nature and scope and to transform it into a suit for determination of a complicated question of title to land. [p. 370, col. 2.]

Rahimannessa Bibi v. *Mahadeo Das Mal*, 12 Ind. Cas. 846; 12 C. L. J. 428, followed.

It is an elementary proposition that if the plaintiff relies upon a transaction in support of his title, the defendant is entitled to impeach its validity by way of defence to the claim and is not bound to have recourse to a separate suit for that purpose. [p. 371, col. 1.]

Appeal against a decree of the Officiating Subordinate Judge, Second Court, Chittagong, dated the 7th of June, 1921, modifying that of the Officiating Munsif, Additional Court at that place, dated the 23rd of February, 1920.

Babu *Narendra Kumar Das*, for the Appellants.

Babus *Dwarkanath Chakrabarti* and *Chandrasekhar Sen*, for the Respondent.

JUDGMENT.—This is an appeal by the added defendants in a suit for arrears of rent.

The plaintiff instituted this suit on the 16th April, 1919, against the tenant-defendant for recovery of rent for the period between the 18th October, 1916, and the 13th April, 1919. His allegation was that the tenant held under him an area of one *kani* seven *gandas* of land at an annual rent of Rs. 43-11-6. The defendant filed his written statement on the 17th July, 1919, and urged, amongst other pleas, that the plaintiff alone was not competent to maintain the suit as he was in effect a fractional landlord. The Court thereupon adjourned the case till the 7th August. 1919. On that date, the plaintiff applied for time to add certain persons as defendants. The adjournment was granted, and on the 28th October, 1919, at the instance of the plaintiff, the present appellants were added as defendants. The plaint, however, was not amended as contemplated by O. I, r. 10, sub-r. (4) of the Code of Civil Procedure, and as it now stands, it does not disclose a cause of action against the added defendants. Notice was served upon the added defendants who entered appearance and on the 16th January, 1920, filed their written statement. They denied that the plaintiff had any cause of action against them for the arrears claimed and asserted that they were his co-sharers. They further repudiated the transaction which, it was alleged, had taken place between the plaintiff and their predecessor-in-interest. On these pleadings, no issues were framed. The Court proceeded to try the suit as between the plaintiff on the one hand and the defendants on the other, and, on the 23rd February, 1920, pronounced judgment in favour of the plaintiff to the extent of one-half of the claim. The Trial Court came to the conclusion that the plaintiff had established his title only to a half share of the

property in dispute and that the other half share was held by the added defendants who were described as *pro forma* defendants, that is, defendants against whom no relief was claimed. The plaintiff was dissatisfied with this decision and appealed to the Subordinate Judge. The lower Appellate Court then proceeded to receive additional evidence in the shape of petitions of compromise, dated the 11th April 1918, which had forced the foundation of the consent decree dated the 22nd April, 1919, in a previous litigation between the parties instituted on the 19th April, 1917; these petitions of compromise were deemed essential for the elucidation of the terms of the consent-decree. The Subordinate Judge ultimately allowed the appeal and decreed the claim in full. He came to the conclusion that the transactions between the plaintiff and the added defendants, which were impeached by the latter, must be treated as operative till they had been cancelled in a suit properly framed for that purpose. The added defendants have now appealed to this Court and have contested the propriety of the decision of the Subordinate Judge principally upon two grounds, namely, *first*, that they were entitled to impeach the validity of the transactions whereon the plaintiff relied, by way of defence without recourse to a regular suit; and *secondly*, that the transactions were manifestly inoperative as against the infants concerned, who were but could not, under the Muhammadan Law, be validly represented by their mother as their guardian. We are of opinion that the decree made by the Subordinate Judge cannot be supported.

It is plain that the effect of the addition of the appellants as defendants has been to transform a simple rent-suit into a complex title-suit. This course was rightly condemned by Field, J., in the case of *Lodai Mollah* v. *Kally Dass Roy* (1). To guard against possible misapprehension, we must state at the outset that it cannot be affirmed as a broad proposition of law that a question of title may not be incidentally investigated in a suit for arrears of rent. Where the tenant-defendant disputes the extent of the title of the plaintiff to the arrears demanded, it is incumbent on the Court to determine the point before the claim is allowed or disallowed. This view is supported by the decision in *Rahimannessa Bibi* v. *Mahadeb Das Mal* (2). But, subject to this reservation parties should not be added in a suit for rent so as to alter its nature and scope and to transform it into a suit for determination of a complicated question of title to land.

We are further of opinion that the Subordinate Judge fell into a manifest error when he held that the added defendants were not competent to assail in their defence the validity of the transactions whereon the plaintiff relied. The plaintiff was admittedly the original owner of the land in suit. His case is that on the 7th February, 1906, he transferred one-half of his interest in the property to the predecessors-in-interest of the added defendants. The true nature of this transaction is in controversy. The plaintiff maintains that the transfer was a mortgage in the disguise of a conveyance. The defendants maintain that the transaction was in essence as in form an out and out sale. Apart from this, the plaintiff maintains that the mortgage has been re-paid and that on the 7th and 11th January, 1918, he obtained from the defendants two deeds of release which recite that the mortgage has been satisfied so as to re-vest the full title in himself. The defendants urge that inasmuch as the original transfer was by way of a conveyance, the title could not be re-vested in the plaintiff by a deed of release and that a reconveyance was the only effective means for a re-transfer of the title, as ruled in *Oodey Koowur* v. *Ladoo* (3), *Jadu Nath Poddar* v. *Ruplal Poddar* (4), *Dharam Chand Boid* v. *Manji Shahu* (5), *Narak Lal* v. *Thagoo Lal* (6), and *Mathura Mohan Saha*

(1) 8 C. 238; 10 C. L. R. 581; 4 Shome L. R. 275; 4 Ind. Dec. (N. S.) 152.

(2) 12 Ind. Cas. 846; 12 C. L. J. 428.

(3) 13 M. I. A. 585; 20 E. R. 669; 15 W. R. P. C. 16; 6 B. L. R. 283; 2 Suth. P. C. J. 388; 2 Sar. P. C. J. 628 (P. C.).

(4) 33 C. 967; 10 C. W. N. 650; 4 C. L. J. 22.

(5) 16 Ind. Cas. 440; 16 C. L. J. 436.

(6) 13 Ind. Cas. 455; 22 C. L. J. 380.

v. *Ram Kumar Saha* (7). The defendants further maintain that the deeds of release, in so far as they were executed by the mother of the infants concerned as their guardian, are not valid, because as pointed out by the Judicial Committee in *Imam Bandi* v. *Mutsaddi* (8) and *Mata Din* v. *Ahmed Ali* (9), the mother was not in the eye of law clothed with authority as *de facto* guardian to transfer the interest of the infants. It is with regard to this question that the Subordinate Judge has held that the added defendants could impeach the validity of the deeds of release only in a separate suit specially framed for that purpose. His view is opposed to the decision in *Dwijendra Mohan Sarma* v. *Monorama Dasi* (10) which applied the rule enunciated in *Eastern Mortgage and Agency Co.* v. *Rebati Kumar* (11), *Hem Chandra* v. *Lalit Mohan Kar* (12) and *Mansaram Das* v. *Ahmad Hosain* (13). It is an elementary proposition that if the plaintiff relies upon a transaction in support of his title, the defendant is entitled to impeach its validity by way of defence to the claim and is not bound to have recourse to a separate suit for that purpose. This renders obvious the impropriety of the addition of the defendants as parties to this litigation. The deeds of release affect not merely the property whereof the rent is in dispute in this suit, but other properties as well, so that if they are set aside, other transactions will be re-opened and possibly an order for restitution on equitable terms required. It would not be right and proper to investigate questions of this description in a suit instituted ostensibly for the recovery of arrears of rent alleged to be due to the plainliff from the tenant-defendant.

There is thus no escape from the conclusion that the added defendants should not have been brought on the record under O. I, r. 10, sub-r. (2) of the Code of Civil Procedure. That sub-rule provides that the Court may, at any stage of the proceeding, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added. This provision confers a discretion upon the Court, and that discretion must be exercised in view of the special circumstances of the particular litigation, subject, however, to the general rule that parties cannot be added so as to alter the nature of the suit: *Oh Ling Tee* v. *Awkinifee* (14) and *Hingu Lal* v. *Baldeo Ram* (15). It is further plain that a person may be added as a party to a suit only in two cases, first, when he ought to have been joined and has not been so joined, or, secondly, when without his presence the question in the suit cannot be completely decided: *Mc Cheane* v. *Gyles* (16) and *Moser* v. *Marsden* (17). In this connection reference may be made to the decisions in *Kishen Parshad* v. *Har Narayan Singh* (18), *Gurunaya* v. *Dattatraya* (19) and *Sabduralli* v. *Sadashive Supde* (20) which illustrate the distinction between a proper party and a necessary party. In the case before us,

(7) 35 Ind. Cas. 305; 43 C. 790; 20 C. W. N. 370; 23 C. L. J. 26.
(8) 47 Ind. Cas. 513; 45 I. A. 73; 45 C. 878; 23 C. W. N. 50; 35 M. L. J. 422; 16 A. L. J. 800; 24 M. L. T. 330; 28 C. L. J. 409; 5 P. L. W. 276; 20 Bom. L. R. 1022; (1919) M. W. N. 91; 9 L. W. 518 (P. C.).
(9) 13 Ind. Cas. 976; 39 I. A. 49; 16 C. W. N. 338; 11 M. L. T. 145; (1912) M. W. N. 183; 9 A. L. J. 215; 15 C. L. J. 270; 14 Bom. L. R. 192; 15 O. C. 49; 34 A. 213; 23 M. L. J. 6 (P. C.).
(10) 70 Ind. Cas. 990; 36 C. L. J. 326; (1922) A. I. R. (C.) 150; 49 C. 911; 28 C. W. N. 57.
(11) 3 C. L. J. 260.
(12) 14 Ind. Cas. 515; 16 C. W. N. 715; 16 C. L. J. 537.
(13) 37 Ind. Cas. 380; 21 C. W. N. 63.
(14) 10 W. R. 86.
(15) 24 A. 553; A. W. N. (1902) 170.
(16) (1902) 1 Ch. 911; 71 L. J. Ch. 446; 86 L. T. 217; 50 W. R. 387.
(17) (1892) 1 Ch. 487; 61 L. J. Ch. 319; 66 L. T. 570; 40 W. R. 520.
(18) 9 Ind. Cas. 739; 38 I. A. 45; 33 A. 272; 15 C. W. N. 321; 21 M. L. J. 378; 8 A. L. J. 256; 13 C. L. J. 345; 13 Bom. L. R. 359; 9 M. L. T. 343; (1911) 2 M. W. N. 395 (P. C.).
(19) 28 B. 11; 5 Bom. L. R. 618.
(20) 51 Ind. Cas. 223; 43 B. 575; 21 Bom. L. R. 369.

the added defendants were neither proper parties nor necessary parties. The plaint as framed did not disclose a cause of action against them. There was no allegation that they had prior to the suit set up a claim to realise rent from the tenant-defendant, much less that they had actually intercepted the rent payable by him. We are accordingly of opinion that these defendants should not have been added as parties to the suit: the consequence of their presence has in fact been to convert a simple suit for rent into a complicated title-suit, involving numerous questions of law and fact, such as—Was the original transfer a mortgage or a sale, was a reconveyance necessary to re-vest title in the original owner, could a release operate as a reconveyance, could a Muhammadan mother act as *de facto* guardian and validly alienate the estate of her children and could a release by her be set aside except on equitable terms?

The result is that this appeal is allowed and the decree of the Subordinate Judge set aside. The added defendants will be discharged from the suit and their names will be removed from the record. The case will be remanded to the Court of first instance to be tried as a suit for rent between the original plaintiff and the original defendant. In order to determine whether the plaintiff is entitled to the entire rent or only a share thereof the Court will investigate incidentally the extent of the title of the plaintiff in the land, and how far he has been in actual enjoyment of his right in the immediately preceding years. We are constrained to remand the case to the Court of first instance, because, after the added defendants were brought on the record, the original defendant ceased to take an interest in the controversy; it was to him immaterial whether the rent in arrear was decreed in favour of the plaintiff alone or in favour of the plaintiff jointly with the added defendants. Now that the added defendants have been removed from the record, the original defendant must be allowed an opportunity to contest the claim of the plaintiff. Each party will bear his own costs in all the Courts up to this stage.

N. H. *Case remanded.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1642 OF 1922.

April 25, 1924.

Present:—Mr. Justice Neave.

Musammat BATKA—PLAINTIFF—APPELLANT

versus

Musammat SITMAN—DEFENDANT—RESPONDENT.

Hindu Law—Widow, transfer by—Reversioner, consent of—Transfer whether can be challenged—Estoppel.

A reversioner in whose favour the succession has opened cannot be permitted to challenge the validity of a transfer by a Hindu widow when before her death he had elected to hold the transfer good. [p. 373, col. 2.]

Mahabir Prasad Singh v. *Mata Prasad*, 63 Ind. Cas. 721; 19 A. L. J. 799; 3 U. P. L. R. (A.) 134; 44 A. 44; (1922) A. I. R. (A.) 297 and *Fateh Singh* v. *Rukmini Dewanji Maharaj*, 72 Ind. Cas. 8; 21 A. L. J. 235; 45 A. 339; (1923) A. I. R. (A.) 387, followed.

Second appeal from a decree of the District Judge, Gorakhpur, dated the 14th of September, 1922.

Mr. *Harnandan Prasad*, for the Appellant.

Mr. *St. C. Thompson*, for the Respondent.

JUDGMENT.—This is an appeal from an order of the Additional Judge of Gorakhpur modifying a decree of the Additional Subordinate Judge of that District. The facts of the case are that one Achhaibar died leaving a widow *Musammat* Gulzari and two daughters *Musammat* Lanji and *Musammat* Batka. *Musammat* Gulzari succeeded to her husband's estate which consisted of shares in two villages Katarua and Baldiha. She executed a deed of gift in respect of the Katarua property in favour of her two daughters in equal shares and their names were entered accordingly in the revenue papers.

The share in *Mauza* Baldiha had been mortgaged by Achhaibar. After the death of their mother the two daughters re-

deemed this mortgage, paying equal shares of the mortgage-money. On the 15th August, 1918, *Musammat* Lanji died, and after some litigation in the Revenue Courts the name of her daughter-in-law, *Musammat* Sitman, was recorded as proprietor of half the property in both the villages. The suit out of which this appeal arises was brought by *Musammat* Batka against *Musammat* Sitman for recovery of possession of one-half the property in both Katarua and Baldiha and for mesne profits.

The plaintiff's case was that on the death of her sister *Musammat* Lanji she was the only surviving heir of her father Achhaibar The defence so far as *Mauza* Katarua was concerned was that the plaintiff had consented to the deed of gift executed by their mother under which each daughter had obtained a half share in the property, and was now debarred, from bringing a suit with regard to it. The Baldiha property had been redeemed by the two daughters jointly, mutation had been effected in the names of their sons against their respective shares and the plaintiff was not entitled now to disturb this family arrangement. The First Court held that the plaintiff's consent implied by her taking the share of the property conveyed to her under the deed of gift did not amount to such a ratification of the transfer as would debar her from suing as soon as the succession opened. He, therefore, found that as the plaintiff had failed to prove that the share of the mortgage-money for Baldiha had been paid out of the profits by *Musammat* Lanji the plaintiff was bound to re-pay it to her and on doing this was entitled to a decree.

On appeal, the learned Additional District Judge held on the authority of *Mahabir Prasad Singh* v. *Mata Prasad* (1) that the plaintiff had consented to execution of the deed of gift and was estopped from subsequently challenging it. The finding of the First Court with regard to the property in *Mauza* Baldiha was not disputed in that appeal.

(1) 63 Ind. Cas. 721; 19 A. L. J. 799; 3 U. P. L. R. (A.) 134; 44 A. 44; (1922) A. I. R. (A.) 297.

The present appeal relates only to the Katarua property though there is a cross-objection with regard to *Mauza* Baldiha. It is contended that the deed of gift executed by *Musammat* Gulzari could only have the effect of accelerating the vesting of the estate in her daughters and could confer no absolute title on them. *Musammat* Gulzari had only a life-interest in the property and could give no better title than she herself possessed. It is conceded that if the plaintiff had taken part in the execution of the deed she might have been debarred from challenging it, but the mere fact that she took under it the share which would have come to her in any case when her mother died, does not preclude her from asserting her right to the whole property now.

The deed of gift purports to convey the property in *Mauza* Katarua which had belonged to the donor's husband Achhaibar to her daughters in equal shares "as heirs according to the Shastras". It is admitted that they at once entered into possession and obtained mutation. The question is whether this conduct is tantamount to such a consent as would operate to estop the plaintiff from claiming the whole property on her sister's death. The ruling quoted by the learned Judge and a later Full Bench decision of this Court in *Fateh Singh* v. *Rukmini Dewanji Maharaj* (2) have both affirmed the principle that a reversioner in whose favour the succession has opened cannot be permitted to challenge the validity of a transfer by a limited Hindu owner when before her death he has elected to hold the transfer good. It seems to me that in the present case the plaintiff by her conduct in taking her half share of the property and obtaining mutation in respect of it clearly indicated her approval of the entire deed of gift and cannot now be allowed to treat it as a nullity.

One argument addressed to this Court was to the effect that the defendant-respondent, *Musammat* Sitman, has no *locus standi* in the case as she is not an heir

(2) 72 Ind. Cas. 8; 21 A. L. J. 235; 45 A. 339; (1923) A. I. R. (A.) 387.

of her mother-in-law. This argument proceeded on the assumption that *Musammat* Sitman's husband had predeceased his mother *Musammat* Lanji. No definite allegation to this effect was made in the plaint, while in the written statement there is a clear assertion that *Musammat* Sitman's husband became the owner of the property by right of inheritance on his mother's death. No issue was framed on the point, and it does not appear to have been raised in either of the Courts below. This plea cannot be taken now.

No plea as to the property in *Mauza* Baldiha was taken in the memorandum of appeal to the Court below and it does not appear from the judgment of that Court that the Subordinate Judge's finding on the point was disputed before him. In these circumstances the respondent is not entitled to contest this finding in second appeal. The result is that the appeal and cross-objection are both dismissed with costs including in this Court, costs on the higher scale.

K. S. D. *Appeal dismissed; Cross-objection dismissed.*

CALCUTTA HIGH COURT.

ORIGINAL CIVIL APPLICATION.

July 7, 1924.

Present:—Mr. Justice C. C. Ghose.

In re JATINDRA MOHAN SEN GUPTA—PETITIONER.

Specific Relief Act (I of 1877), s. 45, provisos (a) *to* (e)—*Writ of mandamus—High Court, discretion of—Writ, whether can be granted* ex debito justitiæ *—Application for writ, contents of—Remedy, whether summary—'Property' in proviso* (a), *meaning of —"Franchise", what includes—Legislative Councils, procedure of—President, powers of—Writ, whether can be issued to President to exercise his powers in particular way—Judiciary, whether can interfere with Legislature—English practice—Justice, denial of—Question of law or fact.*

The jurisdiction of the High Court to make orders under section 45 of the Specific Relief Act is entirely discretionary and in dealing with an application under Chapter VIII of the Act, the principles applicable to a writ of mandamus should be followed. [p. 378, col. 1.]

Board of Examiners v. *Probhash Chandra Roy*, 18 Ind. Cas. 527; 40 C. 588; 17 C. L. J. 354; 17 C. W. N. 1225 and *Manindra Chandra Nandi* v. *Provas Chandra Mitter*, 79 Ind. Cas. 1042; 51 C. 279 at p. 292; 39 C. L. J. 58, relied on.

The writ of mandamus is a high prerogative writ and is granted to ampliate justice and to preserve a right where there is no specific legal remedy. Therefore, it cannot be demanded *ex debito justitiæ* but issues only in the discretion of the Court. [p. 378, col. 2.]

Reg. v. *Garland*, (1870) 5 Q. B. 269 at p. 272; 39 L. J. Q. B. 86; 22 L. T. 160; 18 W. R. 429 and *Reg.* v. *All Saints, Wigan, Churchwardens*, (1876) 1 A. C. 611 at p. 620; 35 L. T. 381; 25 W. R. 128, referred to.

In the case of a writ of mandamus, the rights to be enforced must be of a public nature affecting the public at large and also those which although of a public nature specially affect the rights of individuals, and the person applying must show that he has a real and special interest in the subject-matter and a specific legal right to enforce. [*ibid.*]

Reg. v. *Lewisham Union*, (1897) 1 Q. B. 498; 66 L. J. Q. B. 403; 76 L. T. 324; 45 W. R. 346; 61 J. P. 151, referred to.

There must be a sufficient demand to perform the act sought to be enforced and a refusal to perform it. It is not necessary that the word 'refuse' or some equivalent of it, should be used but there should be enough to show that the party withholds compliance and distinctly determines not to do what is required of him. There must also be a possibility of effective enforcement of the writ which will not issue if alternative remedies or remedy are or is open to the applicant. [p. 379, col. 1.]

An applicant for a writ of mandamus must fulfil all the conditions laid down in provisos (*a*) to (*e*) of section 45 of the Specific Relief Act. These conditions are cumulative and all of them must be fulfilled. [*ibid.*]

The Court in such cases is invested with very large powers and the remedy is of a summary nature and coercive in its character and it is elementary that the wider the power, the greater must be the caution with which the power is exercised. [*ibid.*]

Where, therefore, a member of the Bengal Legislative Council applied to the High Court for the issue of a writ of mandamus against the President of the Council ordering him to decide and to disallow a motion about the estimates to be presented to the Council for a supplementary or additional grant on account of the salaries of Ministers, when such grants had been on a previous occasion disallowed by the Council and the petitioner as a member of the Council had exercised his motion in favour of disallowing the motion, and further prayed that his property, franchise and personal right as a member of the said Council and otherwise, would be injured if the President was not directed to decide on the lines indicated above:

Held, (1) that as the applicant paid revenue from which Ministers drew their salaries along with thousand others, a denial of his prayer, did not cause such injury to his 'property,' as was contemplated by proviso (*a*) to section 45 of the Specific Relief Act; [p. 379, col. 2.]

(2) that the word 'franchise' in the proviso did not include the right to vote in the Legislative Council though in its electoral sense it denoted

both the right of voting at elections and the qualifications upon which that right was based; [p. 379, col. 2; p. 380, col. 1.]

(3) that if the applicant's notions of what was legal or illegal under the Rules and Standing Orders, were hurt, that did not mean that his 'personal rights' had been injured. [p. 380, col. 2.]

Whether there has been a denial of justice or not, is a mixed question of law and fact. [*ibid.*]

Application under section 45, Specific Relief Act, for issue of writ of *mandamus* against the President, Bengal Legislative Council, to decide and to disallow a motion regarding Minister's salaries to be introduced in the Council.

Messrs. *N. N. Sircar* and *S. C. Bose*, for the Petitioner.

Messrs. *S. R. Das* (Advocate-General), and *B. L. Mitter*, (Standing Counsel), for the Opposite Party.

JUDGMENT.—This is an application under section 45 of the Specific Relief Act (I of 1877) for an order directing the Hon'ble Mr. H. E. A. Cotton, the President of the Bengal Legislative Council, to decide on the admissibility of a certain motion, being item No. 6 in the list of business to be brought forward at the Session of the Bengal Legislative Council, which commences to-day at 3 P.M., and to disallow the said motion and to forbear putting the same at the said Session of the Bengal Legislative Council, and for such further or other order as to this Court may seem fit and proper, and for an order that the said Mr. Cotton and the other respondents do pay the costs of and incidental to this application. The other respondents are the Hon'ble Mr. A. K. Fazlul Huq and the Hon'ble Mr. A. K. Ghuznavi, being the Ministers in charge of the Departments of Education and Agriculture of the Government of Bengal. The Hon'ble Mr. Donald, who is member of the Executive Council of His Excellency the Governor of Bengal in charge of the Finance Department, was served with notice of this application under Rule 5 of Chapter XXIX of the Rules of this Court (Hechle's Rules, page 356), as it appeared from the list of business circulated to the members of the Bengal Legislative Council that it was he who is to move a supplementary demand for a grant of Rs. 1,71,000 for expenditure under the head 11 General Administration (Transferred) on account of the salaries of the Ministers.

This application was brought on before me on Thursday last, when, in view of the urgency of the matter, I directed that it should be renewed before me on Friday morning on notice to the respondents and to the said Mr. Donald. This was done and I heard at length on Friday the learned Counsel for the applicant and the learned Advocate-General on behalf of the respondents. The arguments were not concluded till after 4 P. M., on Friday and I then stated that I would deliver judgment at the earliest possible moment, namely, at 11 o'clock this morning.

The facts which have given rise to the present application are as follows:—At the last Session of the Bengal Legislative Council on the 18th day of March 1924, a statement of the estimated annual expenditure and revenue of the Presidency of Bengal for the year 1924-25, commonly called the "Budget," was presented and in connection therewith a separate demand for grant on account of the salaries of the Ministers was made under section 72-D. sub-clause 2 of the Government of India Act. The said demand was for a sum of Rs. 2,20,000 under the head "22 (*e*) General Administration —Ministers (Transferred)." At the said last session of the Bengal Legislative Council, to wit, on March 24th, 1924, the said demand for grant on account of the salaries of the Ministers was, on the motion of Maulvi Mohamed Nurul Huq Chowdhuri, a member of the said Bengal Legislative Council, rejected by the said Council, as appears from the official report of the proceedings of the said Council held on March 24th. Although the said demand for grant on account of the salaries of the Ministers was rejected by the said Council, the Ministers have continued to remain in office, and are in office now. On or about June 30th, 1924, the applicant received a printed list of business to be brought forward at the Session of the Bengal Legislative Council which commences to-day, signed by Mr. J. Bartley

Officiating Secretary to the Government of Bengal and Secretary to the Bengal Legislative Council. The said printed list included an item, being item No. 6, which ran as follows:

"Supplementary Demands for grants. —22—General Administration (Transferred). The Hon'ble Mr. J. Donald to move that a sum of Rs. 1,71,000 be granted for expenditure under the head 22—General Administration (Transferred)—on account of the salaries of the Ministers."

The applicant states that no estimate can be presented to the Bengal Legislative Council at the forth coming session for a supplementary or additional grant on account of the salaries of the Minister under Rule 94 of the Bengal Legislative Council Rules and Standing Orders (See page 266 of the Bengal Legislative Council Manual, 1924). The said Rule runs as follows:—

"(1) An estimate shall be presented to the Council for a supplementary or additional grant when (*i*) the amount voted in the Budget of a grant is found to be insufficient for the purposes of the current year; or (*ii*) a need arises during the current year for expenditure for which the vote of the Council is necessary upon some new service not contemplated in the Budget for that year. (2) Supplementary or additional estimates shall be dealt with in the same way by the Council as if they were demands for grants."

The applicant further states that he has been since November, 1923, and is, a member of the Bengal Legislative Council; that he is the owner of immoveable properties in the District of Chittagong for which he pays Government revenue, and that he has also been assessed for payment of income-tax on the income derived from the exercise of his profession as an Advocate of this Court. He states also that he wrote, addressed and sent a letter to Mr. Cotton on July 2nd, 1924, drawing his attention to the facts hereinbefore recited and contending that no estimate could be presented to the Bengal Legislative Council for a supplementary or additional grant on account of the salaries of the Ministers in the events which had happened. The applicant went on to add the following:—"As President of the Council it is incumbent on you to decide on the admissibility of a motion and you have authority to disallow a motion even though such a motion appears in the list of business. I contend that there can be no doubt whatsoever that the motion of the Hon'ble Mr. J. Donald, which is item No. 6 in the said printed list of business, does not comply with the Bengal Legislative Council Rules and Standing Orders and should, therefore, be disallowed. I, therefore, call upon you to decide on the admissibility of the said motion of the Hon'ble Mr. J. Donald and to delete item No. 6 from the said printed list of business and to forbear from putting that motion before the Session of the Council commencing on Monday July 7th, 1924. Unless I hear from you in reply by 11 o'clock to-morrow, I shall assume that you refuse to decide the question of the admissibility of the said motion, or to disallow the said motion or to delete it from the said printed list of business, and I shall take such steps as I may be advised." The applicant states that the said letter was delivered at the office of Mr. Cotton and that he also telegraphed to Mr. Cotton, who was then at Darjeeling, the substance of the said letter.

The applicant goes on to add that nothwithstanding the demand made on Mr. Cotton, the latter has declined to decide on the admissibility of the said motion or to disallow the same or to move at all in the matter and has denied to him the justice, which he alleges he was and is entitled. Lastly, he states that his property franchise and personal right as a member of the said Council and otherwise would be injured, unless Mr. Cotton is directed to decide on the lines indicated above, that he has no other specific or adequate legal remedy in the matter and that the remedy he prays for will be complete.

Mr. Sircar, who appeared in support of the application, made it clear to me at a very early stage of his vigorous address that his contention was that

item No. 6 on the said agenda paper was hit by rule 94 of the said Rules and Standing Orders and that, therefore, Mr. Cotton had no power of jurisdiction to include the said item in the said agenda and that in the events which had happened the applicant was entitled to ask the Court to direct Mr. Cotton to forbear from putting the said item No. 6 before the Bengal Legislative Council for its consideration or, in other words, to ask the Court to direct Mr. Cotton to delete the said item from the said agenda. Mr. Sircar stated that although his first prayer was for an order directing Mr. Cotton to decide on the admissibility of the said motion, being item No. 6 in the said agenda, his principal prayer was that Mr. Cotton should be directed to delete the said item as being an item which was hit by rule 94.

As regards the right of the applicant to an order under section 45 of the Specific Relief Act, Mr. Sircar pointed out that his client paid Government revenue, which was an essential part of the fund out of which the Ministers were to be paid their salaries, and that the money which was taken from his client could only be used for legitimate purposes as provided for by law. In the second place, Mr. Sircar contended that having regard to the fact that at the last Session of the Bengal Legislative Council his client had exercised his right to vote and had voted against the grant of salaries to the Ministers, he would be injured so far as his said right, which according to him was "franchise," was concerned. In the third place the applicant's contention was that he, as a member of the Council, had a right to see that the business of the Council was conducted according to the provisions of law.

In answer to these contentions, the learned Advocate-General on behalf of the respondents, submitted the following points for my consideration:

(*a*) That no Court has ever granted a writ of Mandamus in the form asked for by the applicant, and that the applicant was not entitled to any order directing Mr. Cotton to decide the question of the admissibility of the said motion in a particular manner. (*b*) That Parliament in passing the Government of India Act and in constituting Legislative Council thereunder, had kept in view the English constitutional principle, namely, that the Legislature was supreme and that neither the judiciary, nor the executive should interfere in any way, with the conduct of business in the Legislative Councils. (*c*) That it has not been shown that the demand for justice made by the applicant has been refused by Mr. Cotton. (*d*) That the applicant has not shown that he has some interest in the matter other than such as may belong to the community at large in the question now being debated, it being clear that the "personal right" injury which the Courts aim at preventing or remedying, is a right personal to the individual seeking the remedy and not merely such a right *in rem*, as every member of a society has independently of any act of his own. (*e*) That rule 94 of the Rules and Standing Orders was not exhaustive, and that having regard to rules 21, 38 and 39 of the said Rules and Standing Orders, taken along with the provisions of section 72-D of the Government of India Act, Mr. Cotton had sufficient authority to include the said item No. 6 in the agenda paper.

Before I proceed further I desire to observe that after the conclusion of the arguments in this matter on Friday evening, it was brought to my notice that there had been filed on the date a suit in this Court against the present respondents by certain persons named Kumar Shanker Roy Chaudhuri and Kiran Sanker Roy Chaudhuri on behalf of themselves and all other persons paying revenue or taxes allocated under the Government of India Act to the Governor of Bengal as sources of provincial revenue, praying for a declaration that the motion contained in item No. 6 in the said agenda paper is incompetent and illegal and *ultra vires*, and that it cannot in any way affect the rights of the said plaintiffs and of the other persons for whom they are suing; and further praying for a declaration that the two Ministers are not

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entitled to the status of Ministers and are not legally entitled to discharge any of the duties of their office as Ministers, and praying for an injunction restraining Mr. Cotton from putting the said motion at the Session of the Bengal Legislative Council which commences to-day, and restraining the two Ministers from drawing any monies by way of salary or otherwise in pursuance of the said motion or from discharging any of the duties of the office of Minister. I have referred to the suit, because it may be argued that many of the points which were the subject of debate on this application, and in particular the points (*b*) and (*e*) raised by the Advocate-General are covered by the issues likely to arise in the said suit, and that a pronouncement on the merits raised on this application is inadvisable. I cannot, however, anticipate the course of events in the said suit, and must confine myself to the present application. And in dealing with the present application, the first question which I have got to consider is whether the applicant has satisfied the requirements of the Statutes.

It is well settled that the jurisdiction of the High Court to make orders under section 45 of the Specific Relief Act is entirely discretionary, and in dealing with an application under Chapter VIII of the Specific Relief Act the principles applicable to a writ of mandamus should, generally speaking, be followed: See *Board of Examiners* v. *Probhash Chandra Roy* (1) and *Manindra Chandra Nandi* v. *Provas Chandra Mitter* (2). The writ is of very ancient origin, dating back, at any rate to the time of Edward II. In Bacon's Abridgement it is said to be founded on Magna Charta, by which the Crown was bound neither to deny justice to anybody nor to delay anybody in obtaining justice. It seems originally, according to Mr. High (see High on Extraordinary Legal Remedies) to have been one of that large class of writs or mandates, by which the Sovereign of England directed the performance of any desired act by his subject, the word 'mandamus' in such writs or letters missive having given rise to the present name of the writ. These letters missive or mandates, to which the generic term 'mandamus' was applied, were in no sense judicial writs, being merely a command issuing directly from the Sovereign to the subjects, without the intervention of the Courts, and they have long become entirely obsolete. The term '*mandamus*' seems gradually to have been confined in its application to the judicial writ issued by the King's Bench, which has by steady growth devolped into the writ of mandamus. It is a high prerogative writ and is granted to ampliate justice and to preserve a right where there is no specific legal remedy. And it has been said that the Court, in the exercise of this authority to grant the writ of *mandamus*, will render it as far as it can be the suppletory means of substantial justice in every case where there is no other specific legal remedy for a legal right, and will provide as effectively as it can that others exercise their duty wherever the subject-matter is properly within its control.

The writ of *mandamus*, being a high prerogative writ, it follows that it cannot be demanded *ex debito justicia* but that it issues only in the discretion of the Court. See the observations of Cockburn, C. J., in *Reg.* v. *Garland* (3) and also of Lord Chelmsford in *Reg.* v. *All Saints Wigan, Churchwardens* (4). It follows from the discretionary character of the process that the rights to be enforced must be of a public nature, affecting the public at large, and also those which although of a public nature, specially affect the rights of individuals. The person applying must show that he has a real and special interest in the subject-matter and a specific legal right to enforce. See *Reg.* v. *Lewisham Union* (5). In addition to these conditions precedent to the issue of the writ, it has been laid down from very early times that there

(1) 18 Ind. Cas. 527; 40 C. 588; 17 C. L. J. 354; 17 C. W. N. 1225.

(2) 79 Ind. Cas. 1042; 51 C. 279 at p. 292; 39 C. L. J. 58.

(3) (1870) 5 Q. B. 269 at p. 272; 39 L. J. Q. B. 86; 22 L. T. 160; 18 W. R. 429.

(4) (1876) 1 A. C. 611 at p. 620; 35 L. T. 381; 25 W. R. 128.

(5) (1897) 1 Q. B. 498; 66 L. J. Q. B. 403; 76 L. T. 324; 45 W. R. 346; 61 J. P. 151.

must be a sufficient demand to perform the act sought to be enforced and a refusal to perform it. It is not indeed necessary that the word 'refuse' or any equivalent to it should be used, but that there should be enough to show that the party withholds compliance and distinctly determines not to do what is required of him. There must also be the possibility of effective enforcement of the writ and the writ will not issue if alternative remedies or remedy are and is open to the applicant.

These being the principles applicable to a writ of mandamus, let us turn to section 45 of the Specific Relief Act, which in India embodies these principles. Five conditions are laid down in the section, being provisos (*a*) to (*e*), which the applicant invoking the jurisdiction must satisfy. These conditions are cumulative and all of them must be fulfilled. The Court is invested with very large powers, and the remedy is of a summary nature and coercive in its character. And it is elementary that the wider the power, the greater must be the caution with which the power is exercised.

In view of the importance of the questions raised on this application, I have very anxiously considered the facts to which my attention has been drawn in order to determine if and how far the applicant has succeeded in bringing his case within the purview of section 45 of the Specific Relief Act. In doing this I am relieved of the necessity of considering the questions raised in proviso (*c*), (*d*), and (*e*), because no argument was raised in respect thereof. Provisos (*a*) and (*b*) prescribe the ambit of controversy in this case. Proviso (*a*) requires that the applicant must be some person whose property, 'franchise' or 'personal right' would be injured by the forbearing or doing (as the case may be) of this specific act to be done or forborne. Proviso (*b*) lays down that the applicant must also show that such doing or forbearing is, under any law for the time being in force, clearly incumbent on the respondents.

Has the applicant here shown that his "property" or "franchise" or "personal right" would be injured? As to injury to property, it has been stated before me that the applicant pays Government revenue in respect of his immoveable properties in the District of Chittagong, and that the money so paid by him being part of the fund out of which the salaries of Ministers are met, his "property" would be injured, if in pursuance of Mr. Donald's motion, the supplementary demand for grant is acceded to by the Bengal Legislative Council. I am clearly of opinion that what has been shown by the applicant in this connection is insufficient to make him a competent relator. The applicant pays Government revenue, it is true; but he pays it along with thousands of other people, a fact of which I am entitled to take judicial notice. This by itself cannot, in my opinion, constitute such "injury" to the applicant's "property" as the proviso contemplates.

Next, let us see whether his "franchise" would be injured. "What is the franchise" which the applicant claims? He contends that having regard to the fact that he was one of those, who at the last Session of the Bengal Legislative Council had succeeded by their votes in turning down the demand for grant for Ministers' salaries, the effect of the said vote of the Council in which the applicant had participated would be entirely nullified, if Mr. Cotton is not directed to delete the said item No. 6, or to forbear from putting the same before the Council. I am not at all sure that the word 'franchise' includes the right to vote in the Legislative Council. The right to vote at the election for Parliament or for the Indian Legislative Assembly, or for the various Provincial Legislative Councils is certainly a franchise, but I know of no instance where the word has been held to include the power to vote on matters coming before a Legislative body. The term 'franchise' is defined by Blackstone, following older authorities as a royal privilege or a Branch of the King's prerogative in the hands of the subject. It is also said to be synonymous with the term 'liberty' though the latter is usually applied to the class of franchises conferring immunity of jurisdiction. Franchises are

of various kinds and an excellent account of their origin will be found in Pollock and Maitland's History of English Law. The term 'franchise' in its electoral sense denotes both the right of voting at elections and the qualifications upon which that right is based.

But assume I am wrong in the construction, I am putting on the word 'franchise.' But has there been any 'injury' to the applicant's 'franchise' such as it is? The 'injury to franchise' must be some act interfering with the exercise of the applicant's franchise, namely, his right to vote. How can I say that there will be interference with the applicant's franchise, or right to vote, by Mr. Cotton putting before the Legislative Council for its consideration the motion of Mr. Donald? I am entitled to assume that the proceedings of the Council will be conducted in accordance with the traditions of the Houses of Parliament and that there will be no interference with the rights and privileges of the members of the Council. No question of any injury to the 'franchise' or right exercised in the past can be gone into by me on this application, nor is it possible for me to foreshadow what may happen in the future, nor am I satisfied that even in the event of Mr. Donald's present motion being accepted by the Bengal Legislative Council, there will accrue of a certainty, injury to the applicant's franchise in the manner suggested by him.

Let us next see if there will be any injury to the applicant's personal right? What is personal right? He says that it is his undoubted right to see that the business of the Bengal Legislative Council is conducted in accordance with the provisions of the law. This right the applicant enjoys along with 139 other members of the Legislative Council, the present strength of the Council being 140. Can I say that the applicant has shown to my satisfaction any special circumstances within the meaning of the rule laid down in the case of *In the matter of A. Rasul* (6). The answer to my mind is in the negative.

(6) 24 Ind. Cas. 404; 41 C. 518; 18 C. W. N. 430.

It seems to me clear, therefore, that there is no injury threatened to the present applicant. The applicant seeks for a direction of Mr. Cotton to disallow or delete from the agenda item No. 6 or to forbear from putting the same before the Council. Suppose Mr. Cotton is not so directed. What follows? How would the applicant be heard? Except that it will hurt the applicant's notions of what is legal or illegal under the Rules and Standing Orders, except that it will offend against his view that the motion in question is *ultra vires.* I cannot see what injury will be caused to the applicant's property, franchise and personal right within the meaning of the section.

The conclusion, therefore, I come to on an examination of the applicant's contentions under the head 'proviso (*a*), is that the applicant has failed to satisfy the requirements of the Statute.

There is another ground upon which the application must fail. The applicant has, no doubt, made his demand of justice but I am not satisfied that there has been any denial thereof. I have already said that it is not necessary that the word 'refuse' or any equivalent to it should have been used, and I accept the applicant's contention that refusal may be inferred from conduct. The facts and the dates I have set out negative, to my mind, the argument that Mr. Cotton has been guilty of conduct which shows that he has distinctly determined not to do what has been required of him. Whether there has been a denial of justice or not, is a mixed question of law and fact, and taking into consideration the entire facts and circumstances of the case, and being not unmindful of the grounds of urgency urged on behalf of the applicant. I hold that there has been no denial of justice on the part of Mr. Cotton.

In view of what I have said above, I must reserve for the present any discussion of the merits of the applicant's case as bearing on proviso (*b*) of section 45, or of the intensely interesting questions of constitutional law and procedure suggested by learned Counsel on both sides. At a proper time and on a proper

occasion I shall not fail to express my opinion thereon.

The result, therefore, is that this application fails and must be dismissed with costs.

N. H. *Application dismissed.*

RANGOON HIGH COURT.

FIRST CIVIL APPEAL NO. 112 OF 1923.
January 18, 1924.
Present:—Mr. Justice Lentaigne and Mr. Justice Carr.

AZEE MEAH—APPELLANT
versus
JEEWA—RESPONDENT.

Rangoon Rent Act (Bur. Act II of 1920), ss. 2 (c), 10 (1) and (5)—Daily tenant—Verbal agreement—Transferee for value—Tenant, whether 'landlord'—Ejectment of sub-tenant—Transfer of Property Act (IV of 1882), ss. 105, 106, 107.

A daily tenant under a verbal agreement holds a lease of the premises within the meaning of sections 105, 106 and 107 of the Transfer of Property Act and all leases for whatever term are transfers for value provided the rent is payable. [p. 382, col. 1.]

A lease is a limited transfer of the premises yet it is a transfer thereof and if the rent is payable the lessee is a transferee for value within the meaning of section 10 (5) of Rangoon Rent Act, and is entitled to the benefit of proviso to section 10 (1) of the Act. [*ibid.*]

Where premises are occupied for the purposes of a person's business they are occupied by the person himself even though they are in the actual occupation of his workmen. [p. 382, col. 2.]

First appeal from a decree of the High Court on the Original Side in Civil Regular No. 528 of 1922.

Mr. *Sen*, for the Appellant.
Mr. *Das*, for the Respondent.

JUDGMENT.—This is a suit to eject a tenant and its decision turns mainly on the construction of certain provisions of the Rangoon Rent Act (Burma Act II of 1920) as amended by Burma Act I of 1922.

The plaintiff is tenant of eight rooms in Fraser Street, Rangoon, under a verbal agreement and on a daily rent. He has been the tenant for 16 years or more and for the last six years or more the defendant has been his sub-tenant of one of the rooms, also on a daily rent and under a verbal agreement.

The relevant provisions of the Rent Act are:—

1. Section 2 *(c)*, the definition of "landlord" for the purposes of the Act generally. This definition specifically includes "a tenant who sub-lets any premises" and it is admitted that the plaintiff is a "landlord" within this definition.

2. Section 10 (1), which restricts the right of a landlord to eject his tenant but in the proviso allows him to do so "where the premises are reasonably and *bona fide* required by the landlord for occupation by himself. . . . . ."

3. Section 10 (5), which reads as follows:—"For the purposes of this section, notwithstanding anything contained in clause *(c)* of section 2, the term 'landlord' shall not include any person who has become landlord otherwise than by a *bona fide* transfer thereof for value or by the devolution of the premises upon him under a testamentary disposition or intestacy, or a settlement made before the first day of April 1918."

The plaintiff is a tailor employing a number of men and he claimed that owing to expansion of his business he had to employ additional men and that he required the room occupied by the defendant as a work-room for these additional men. The learned Judge on the Original Side found that the plaintiff had established this claim and that he did "reasonably and *bona fide* require the premises for occupation by himself." But he held that the agreement under which the plaintiff held the premises was not a *bona fide* transfer of the premises to him for value and the plaintiff was, therefore, not entitled to the benefit of the proviso to section 10 (1). Accordingly dismissed the suit.

The learned Judge held apparently, that a lease is a transfer of the premises but said that in this case there was no lease and found himself unable to hold "that a right of occupying a room for 24 hours on payment of a rent of Rs. 7 a day can be construed as a *bona fide* transfer of the premises for value."

It may be noted that the *bona fides* of the transaction is not in question.

I am of opinion that the decision was wrong. Having regard to the terms of sections 105, 106 and 107 of the Transfer of Property Act, I think it must be held that the plaintiff has a lease of the premises. And if any lease, say a lease for a term of years, is a transfer of the premises for value, I think that all leases, for whatever term, are equally transfers for value, provided, of course, that rent is payable, as in this case it is.

Mr. Das, for the respondent, does not really contest this proposition. He argues that a lease is not a transfer of the premises, but merely a transfer of a right to enjoy them. He contends that the word "thereof" in section 10 (5) must mean "of the premises" and, though as it stands the word is grammatically meaningless. I agree with him that it cannot possibly mean anything else. But I hold that though a lease is a limited transfer of the premises yet it is a transfer thereof and that a lessee is a transferee for value within the meaning of section 10 (5) and is, therefore, entitled to the benefit of the proviso to section 10 (1).

Mr. Das supports the decision on other grounds also. He contends, first, that the plaintiff has not proved that he reasonably and *bona fide* requires the room for the purposes of his business. He lays much stress on the fact that the plaintiff did not produce his books, which according to the evidence would have proved his employment of additional men. No doubt these books might have strengthened the plaintiff's case, or might, on the other hand, have broken it down. But the plaintiff was not called upon to produce them and I do not think we can draw any inference adverse to them. Without them there is on the record evidence sufficient, if believed, to prove the contention. The learned Judge who heard the witnesses has believed them and I see no sufficient ground for differing from his finding.

Mr. Das further contends that if the plaintiff does require the room for the occupation of his journeymen that is not "occupation by himself" within the meaning of the proviso to section 10 (1). To allow this contention would, I think, be to place too restricted a meaning on the words. A person occupying residential premises also occupies the kitchen and servants' quarters attached thereto though he in person may never enter them. Occupation of the dwelling house necessarily involves occupation of the necessary offices. The Act applies equally to business premises and where premises are occupied for the purposes of a person's business they are occuppied by that person himself even though he may himself only occasionally enter any particular part of them.

I would, therefore, set aside the judgment and decree of the Court below and give judgment for the plaintiff as claimed with costs in both Courts.

Advocates fee ten gold *mohurs* allowed.

The respondent is allowed time until the 15th April, 1924, to vacate the premises.

S. D. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPLICATION IN APPEAL FROM ORIGINAL DECREE NO. 23 OF 1920.

July 30, 1923.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Cuming.

SIVADAS MUKERJEE—PETITIONER

versus

SURENDRA NATH CHATTERJEE—OPPOSITE PARTY.

Probate and Administration Act (V of 1881), ss. 41, 78—Appointment of administrator—Considerations for Court—Unwilling person as administrator—Security.

A Court in exercising its discretion in appointing an administrator under section 41 of the Probate and Administration Act, will have regard to consanguinity, amount of interest, the safety of the estate and probability that it will be properly administered. It is not to be guided by the wishes or feelings of parties, it is to

look to the benefit of the estate and to that of all persons interested in the distribution of the property. Therefore, it is not in the interest of the property to appoint a person who is in involved circumstances and whose creditors have already taken proceedings against him for the realization of their dues; nor should administration be forced upon a person unwilling to take it or not ready to furnish security to the satisfaction of the Court in accordance with section 78 of the Act.

Application for amendment of judgment under sections 151 and 152 of the Code of Civil Procedure.

Babu *Mohesh Chandra Banerjee*, for the Petitioner.

Babus *Ram Chunder Mozumdar*, *Surendra Nath Ghosal* and *Rama Prosad Mookerjee*, for the Opposite Party.

JUDGMENT.—This is an application made under sections 151 and 152 of the Code of Civil Procedure for amendment of the judgment of this Court in Appeal from Original Decree, No. 23 of 1920.

Section 151 presumes the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Section 152 authorises the Court to correct clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. This may be done by the Court either of its own motion or on the application of any of the parties. Section 153 provides that the Court may, at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding. We have no doubt that in the events which have happened it is open to us to give necessary directions under one or other of these provisions of the Code.

The history of this litigation is set out in our judgment which has been reported: *Surendra Nath Chatterjee* v. *Sivadas Mookerjee* (1). We were called upon to consider in the appeal the question whether the Will executed by Rai Bahadur Krishna Mohan Mookerjee on the 24th June, 1916, and a codicil had been revoked and cancelled. The Trial Court came to the conclusion the Will as also the codicil had been revoked. On appeal we held that the Will had been revoked but that the codicil was in full operation. Our views were summarised in the following passage of our judgment: "Our conclusion is that the second Will executed on the 24th June, 1916, was revoked by the testator on the 14th April, 1918, by the execution of the deed of gift and also by tearing; but that the codicil was not revoked either in law or in fact." After this statement of our conclusion we proceeded to add as follows: "the result is that this appeal is allowed and the decree of the District Judge set aside. We direct that Probate be issued to the appellant in respect of the codicil dated the 24th June 1916." Our attention has now been drawn to the fact that as the Will was revoked, the provision for the appointment of executors disappeared. Consequently, no Probate could be granted in respect of the codicil which did not embody a provision for the appointment of executors. This escaped the notice of the Court and our judgment must accordingly be amended. We direct that the judgment be amended by the substitution of the words "Letters of Administration" for word 'Probate.'

We have been pressed to hold, however, that if Letters of Administration are issued instead of a Probate, the Letters of Administration should be issued in favour of the petitioner Sivadas Mukherjee alone, who is one of the sons of the testator. We have anxiously considered whether we should accede to this prayer and we have with some reluctance come to the conclusion that we should not grant the application. The testator left two sons, Kedarnath Mukherjee, and Sivdas Mukherjee, as also a grandson by a daughter named Surendra Nath Chatterjee. By his Will, he had appointed all these persons as executors; and if we had not held that the Will had been revoked, the Probate would have issued, in the normal course of events,

(1) 69 Ind. Cas. 867; 35 C. L. J. 488; (1922) A. I. R. (C.) 182.

to these three persons as executors. Probate, however, cannot be granted in the events which have happened, and the Court is called upon to consider who should be appointed administrator. The rule for the appointment of an administrator is formulated in section 41 of the Probate and Administration Act, 1881, which is in the following terms: "When a person has died intestate, or leaving a Will of which there is no executor willing and competent to act, or, where the executor is, at the time of the death of such person, resident out of the Province, and it appears to the Court to be necessary or convenient to appoint some person to administer the estate or any part thereof other than the person who, under ordinary cirumstances, would be entitled to a grant of administration, the Judge may, in his discretion, having regard to consanguinity, amount of interest, the safety of the estate and probability that it will be properly administered, appoint such person as he thinks fit to be administrator." It will be observed that one of the elements to be taken into consideration is consanguinity; judged by this test, a claim by either of the sons of the testator is entitled to preference over that of the grandson by daughter. There are, however, other elements which must be taken into consideration, such as safety of the estate and the probability that it will be properly administered. The principle which underlies this statutory provision was formulated by Sir John Nicholl in the case of *Earl of Warwick* v. *Greville* (2): "The selection rests with the discretion of the Court; that discretion, however, is not to be arbitrarily or capriciously assumed, but to be a legal discretion governed by principle and sanctioned by practice; in execising it, the Court is not to be guided by the wishes or feelings of parties, but is to look to the benefit of the estate and to that of all the persons interested in the distribution of the property. The first duty of the Court then is to place it in the hands of that person who is likely best to convert it to the advantage of those who have claims, either in paying the creditors, or in making distribution; the primary object is the interest of the property." Now, in the case before us, there is no room for doubt that Sivadas Mukherjee is in involved circumstances and that his creditors have already taken proceedings against him for the realisation of their dues. Kedarnath Mukherjee has expressed no desire to act as an administrator and the Court would be reluctant to force administration upon an unwilling person. In these circumstances, Surendra Nath Chatterjee, the grandson, is obviously the person who should be entrusted with the administration of the estate. He has expressed his readiness to furnish security to the satisfaction of the Court in acccordance with section 78 of the Probate and Administration Act which provides that "every person to whom any grant of Letters of Administration is committed, and, if the Judge so direct, any person to whom Probate is granted, shall give a bond to the Judge of the District Court, to enure for the benefit of the Judge for the time being, with one or more surety or sureties, engaging for the due collection, getting in and administering the estate of the deceased, which bond shall be in such form as the Judge from time to time by any general or special order directs."

We direct accordingly that Letters of Administration with copy of the codicil annexed be issued to Surendra Nath Chatterjee and that he do furnish security to the extent of Rs. 2,000 (two thousand) with two sureties for Rs. 1,000 each. His first duty will be to distribute the assets amongst the legatees in terms of the codicil of the 24th June, 1916, and to provide for the performance of *Devasheba* in accordance with the first clause thereof. Our attention has been drawn to a scheme of *Devasheba* which was prepared by the testator on the 24th June, 1916. This was not incorporated in the codicil and consequently we cannot include it in the grant. But, for the sake of convenience, the scheme as framed by the testator, may, for the present, be adopted as the scheme for

(2) (1809) 1 Phill. 123 at p. 125; 161 E. R. 934.

the management of the *Devasheba* subject, however, to this reservation that if the scheme in any respect contravenes the provisions of the codicil, the scheme must to that extent be modified.

The result is that our original judgment is amended by the substitution of the words 'Letters of Administration' for 'Probate' and Surendra Nath Chatterjee is appointed administrator on the terms and conditions mentioned. The decree based on the judgment will be amended accordingly. Each party will pay his own costs of these proceedings. The administrator will be entitled to take his costs out of the estate. We assess the hearing fee at one gold *mohur*. Let the Probate already issued be amended by the District Judge so that it may be read as Letters of Administration instead of Probate. The administrator will act under the direction of the District Judge.

S. D. *Decree amended.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 258 OF 1923.
July 2, 1924.
Present :—Mr. Justice Kanhaiya Lal.
SAGWA AND OTHERS—DEFENDANTS—APPELLANTS
versus
BHAGWAN DAS—PLAINTIFF—RESPONDENT.

Landlord and tenant—Occupancy tenant—Self-sown tree—Right in fruit or wood—Custom—Contract.

An occupancy tenant is entitled to the fruits or to the fallen wood of a self-sown tree unless some custom or contract to the contrary is proved.

Harbans Lal v. *Maharaja of Benares*, 23 A. 126; A. W. N. (1901) 15 and *Nathan* v. *Kamla Kuar*, 13 A. 571; A. W. N. (1891) 167; 7 Ind. Dec. (N. S.) 361, followed.

Second appeal from a decree of the Subordinate Judge, Meerut, dated the 4th December, 1922.

Mr. *S. D. Sinha*, for the Appellants.

Dr. *K. N. Katju*, for the Respondent.

JUDGMENT.—The dispute in this appeal relates to a mango tree standing on the border or near the boundary of an occupancy plot No. 492 *khasra* occupied by the defendants. The plaintiff is the *zamindar* of the village. The tree recently dried up and fell down. The plaintiff thereupon sought to appropriate the fallen wood. The defendants interfered. The plaintiff accordingly filed the present suit for an injunction to restrain the defendants from interfering with the appropriation by the plaintiff of the fallen wood of the said tree, or if the wood has meanwhile been removed, for the recovery of Rs. 18 on account of the value of the same. The Courts below decreed the claim, holding that according to the general custom the *zamindar* was entitled to the wood of the said tree. A copy of the *wajib-ul-arz* of the village was produced, which describes the rights of grove-holders but says nothing in particular about the rights either of the *zamindar* or of the tenant to the fallen wood or dried timber of the stray trees standing on the occupancy holding. As pointed out in *Harbans Lal* v. *Maharaja of Benares* (1) the trees on a holding partake of the nature of the holding and in the absence of a contract or custom to the contrary a tenant has the same rights in respect of them as he has in the holding. The plaintiff does not allege that the tree in question had been planted by him. The defendants asserted that they had planted it, but they failed to prove their allegation. The tree in question must, therefore, be deemed to have been a self-sown tree growing on the occupancy holding; and a tenant is as much entitled to the fruits or to the fallen wood of such a tree as he is to the produce of the land. In *Nathan* v. *Kamla Kuar* (2) it was held that a *zamindar* claiming a right to the fallen wood of self-sown trees, which had been growing on an occupancy holding, must prove some custom or contract, by which he is entitled to take such wood. The plaintiff in this case has failed to establish that he has any such right. This appeal is, therefore, allowed and the claim of the plaintiff is dismissed with costs here and hitherto.

S. D. *Appeal allowed.*

(1) 23 A. 126; A. W. N. (1901) 15.
(2) 13 A. 571; A. W. N. (1891) 167; 7 Ind. Dec. (N. S.) 361.

JNANENDRA NATH *v.* DUKHIRAM.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE
No. 150 OF 1922.
May 9, 1924

Present:—Mr. Justice Suhrawardy and Mr. Justice Graham.

JNANENDRA NATH MUSTAPHI —DEFENDANT—APPELLANT

versus

DUKHIRAM SANTRA—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 158-B (2) —Land laws, scheme and policy of— Raiyat, *position of—Under-*raiyat, *whether can acquire occupancy rights—Under-*raiyati *tenure, whether transferable—Previous possession, when can form basis of suit—Evidence Act (I of 1872), s. 115—Subsequent conduct—Estoppel.*

The scheme and policy of the land laws of Bengal is to originally divide persons having interest in agricultural land into two classes, *viz.*, those in actual occupation or cultivating tenants and those entitled to rent from such tenants. There may be several degrees of rent-receivers, but there is one class of cultivating tenants who are called *raiyats.* [p. 388, col. 1.]

In theory the *raiyat* is supposed to be in actual occupation of the land and actually cultivating it. By virtue of this character, the *raiyat* is permitted to acquire a right of occupancy, or the right to remain in occupation of the land. [*ibid.*]

Though he is allowed to sub-let in the eye of law, the *raiyat* is the actual occupant of the land, occupying it through his lessee, as by sub-letting he does not become a middleman. [p. 388, col. 2.]

Kalee Churn Singh v. *Ameerooddeen*, 9 W. R. 579, relied on.

The Bengal Tenancy Act, however, has been less favourable to an under-*raiyat* and has taken away his right of acquiring a right of occupancy under any condition except by local usage or custom. He is no better than a tenant-at-will with no tangible interest in the land except that of holding it till the end of the agricultural year. [*ibid.*]

The right of an under-*raiyat* is not transferable. [*ibid.*]

Akhil Chandra Biswas v. *Husain Ali*, 20 Ind. Cas. 698; 19 C. W. N. 246; 18 C. L. J. 262, *Amirunnisa* v. *Jinnat Ali*, 27 Ind. Cas. 271; 20 C. L. J. 548; 42 C. 751; 19 C. W. N. 43, *Biswambhar Mandal* v. *Nasrat Ali*, 57 Ind. Cas. 912; 32 C. L. J. 46, *Yakub Ali* v. *Mea Jan*, 29 Ind. Cas. 686; 43 C. 164, and *Gopal Mandal* v. *Tapai Sankhari*, 45 Ind. Cas. 545; 46 C. 43; 28 C. L. J. 84; 22 C. W. N. 618, referred to.

The interest of an under-*raiyat* is not heritable. [p. 389, col. 1.]

Jamini Sundari v. *Rajendra Nath*, 11 C. W. N. 519 and *Meher Ali* v. *Kalai Khalasi*, 29 Ind. Cas. 461; 27 C. L. J. 579; 19 C. W. N. 1129, referred to.

Mere previous possession, unless perfected into adverse possession, cannot form the foundation of a suit for recovery of possession. [*ibid.*]

Subsequent conduct or word cannot operate as estoppel. [p. 390, col. 1.]

Asmatunnessa v. *Harendra Lal*, 8 C. L. J. 29, followed.

Appeal against a decree of the Subordinate Judge, Second Court, Hughly, dated the 8th August 1921, modifying that of the Munsif, Second Court, dated the 11th March 1919.

Babus *Bireshwar Bagchi* and *Nirode Baran Ray*, for the Appellant.

Babus *Amarendra Nath Bose* and *Nanda Gopal Bannerjee*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for declaration of title and recovery of possession of a *raiyati* holding and for a declaration that the plaintiff's right thereto was not affected by the decree in Rent Suit No. 418 of 1915, or the sale thereof under that decree. The appellant purchased the *raiyati* in execution of the said rent-decree for the sum of Rs. 540.

The plaintiff rested his claim to the land on a two-fold basis. He claimed it as the *nishkar* land of one Tincowrie Mukerji which he had purchased at a road-cess execution sale, and also alternatively by virtue of private purchase from one Tushtu Das, who held a *korfa* tenancy of the disputed lands under the defendants, Mustaphis. The Trial Court found that the plaintiff had failed to establish either claim, and dismissed the suit with costs to the contesting defendant. On appeal the learned Subordinate Judge of Hughly confirmed the finding of the Munsif so far as it related to the *lakheraj* title, but allowed the appeal so far as the plaintiff's right by purchase from Tushtu Das was concerned, and the suit was remanded to the Court of first instance for a finding whether the notice contemplated by section 158B (2) of the Bengal Tenancy Act had been served on the co-sharers.

Against that order of remand there was an appeal to this Court with the result that by consent of the parties the decree of the lower Appellate Court, so far as it related to the effect of the de-

fendant's rent-decree and directed that the suit be remanded to the Trial Court to be decided in accordance with the directions therein contained, was set aside. As regards the *lakheraj* title claimed by the plaintiff the judgment was directed to be treated as final so far as the lower Appellate Court was concerned, and in lieu of the decree and of the portion of the judgment set aside an order was made under r. 25 of O. XLI of the Code of Civil Procedure directing the Trial Court to determine the question whether notices under section 158B (2) of the Bengal Tenancy Act were duly served by the respondent on the co-sharer landlords. A direction was made that the Trial Court would be at liberty to take such additional evidence as the parties might wish to adduce on the point and it was ordered that the appeal would remain on the file of the lower Appellate Court which on receipt of the finding of the Court of first instance would dispose of the appeal in the usual way and make a decree embodying the decision already arrived at as regards the *lakheraj* title claimed by the plaintiff, and the decision which might be ultimately arrived at as regards the effect of the rent-decree. Opinion was expressly reserved upon any questions of law arising between the parties.

In accordance with these directions the case went back to the Trial Court and the learned Munsif recorded a finding that there was no evidence or materials before him to show that any notice under section 158B (2) of the Bengal Tenancy Act was served and he accordingly answered the question referred to him in the negative. The appeal then came again before the Subordinate Judge and in the result was partly decreed with proportionate costs the judgment and decree of the Trial Court being confirmed so far as the *lakheraj* title claimed by the plaintiff was concerned, and the appeal to that extent being dismissed with proportionate costs, but the plaintiff's right as purchaser of Tushtu's under-*raiyati* right to the extent of a 13-annas 4-pies share of the disputed land was declared, and he was given a decree for recovery of possession of that share jointly with the defendant No. 3 (now appellant), the judgment and decree of the Court of first instance being to that extent set aside. The defendant No. 3 then filed this appeal.

A preliminary objection has been taken on behalf of the respondent to the hearing of the appeal on the ground that the defendant No. 3 having obtained all that he could expect to get and not being in any way aggrieved by the decree, the appeal is incompetent. We do not think there is any substance in this contention. The effect of the decree is that the plaintiff will get possession of a 13-annas 4-pies share of the disputed land jointly with the defendant No. 3. Apart from the question raised by the appellant that his share has been wrongly calculated we are of opinion that when a person is compelled to hold land jointly with another who he alleges is not his co-sharer, he can hardly be held to be not aggrieved by the decree. The appellant moreover is forced by the decree to accept the plaintiff as his under-tenant against his will. We hold accordingly that the appeal is competent.

Coming to the merits of the case, the main question involved is, whether the plaintiff as purchaser of the under-*raiyati* from Tushtu, who held it under the defendants who are occupancy *raiyats*, can maintain this suit. In other words, is the interest of an under-*raiyat* transferable in law? The learned Subordinate Judge has observed that "no tangible and satisfactory evidence was given or offered to show that Tushtu's interest was transferable." He has, however, referred to several cases and held that there is no authority for the view that the interest of an under-*raiyat* is not transferable. He is of opinion apparently that there is no difference as regards transferability between an occupancy right and the right of an under-*raiyat*. In support of this view he has relied upon section 183, Bengal Tenancy Act, which enacts that an under-*raiyat*

may by custom or usage acquire right of occupancy. He has, therefore, come to the conclusion that the interest of an under-*raiyat* is transferable with the consent of the landlord and that consequently none but the landlord can question the validity of the transfer. On the facts of this case he has held that the defendants as purchasers of the under-*raiyati* in execution of their decree for rent against Tushtu which, according to him, passed the right, title and interest of the judgment-debtor, cannot question the transferability of the under-*raiyati* or the plaintiff's title by private purchase from Tushtu, but as landlords they are entitled to do so. As one of the defendants, *viz.*, defendant No. 3, the appellant has appeared and contested the suit, he has dismissed it as against him and decreed it as against the other defendants who have not appeared. The learned Vakil for the plaintiff-respondent has adopted the same line of argument and urged that the right of an under-*raiyat* is transferable with the consent of the *raiyat*.

The scheme and policy of the land laws of Bengal is to originally divide persons having interest in agricultural land into two classes, *viz.*, those in actual occupation or cultivating tenants and those entitled to rent from such tenants. There may be several degrees of rent-receivers, but there is one class of cultivating tenants who are called *raiyats*. In theory the *raiyat* is supposed to be in actual occupation of the land and actually cultivating it. By virtue of this character, the *raiyat* is permitted to acquire a right of occupancy, or the right to remain in occupation of the land. It was found that in every case it was not possible for the *raiyat* to cultivate the land himself and he was allowed to cultivate it by hired labourers or by under-tenants: *Baboo Dhunpat Singh* v. *Baboo Gooman Singh* (1). "He must hold land under cultivation either by himself or others who must take from him under his supervision as a superior cultivator": *Ram Mungul Ghose* v. *Lukhee Narain Shaha* (2) and *Karoo Lal Thakoor* v. *Luchmeeputy Doogur* (3). Though he is allowed to sub-let in the eye of law, the *raiyat* is the actual occupant of the land, occupying it through his lessee, as by sub-letting he does not become a middleman: *Kalee Churn Singh* v. *Amceroodd in* (4). The under-*raiyat* accordingly did not stand on a much higher footing than hired labourers and the *raiyat* is supposed to be cultivating the land through his under-*raiyat*. Such was the status of the under-*raiyat* though under the old law he could acquire a right of occupancy in lands sub-let to him otherwise than for a term or from year to year (section 6, Act X of 1859), but ordinarily he could not do so as his sub-lease was generally for a term or from year to year: *Domunoollah Sircar* v. *Mahmoadie Nushyo* (5). The Bengal Tenancy Act, however, has been less favourable to an under-*raiyat* and has taken away his right of acquiring a right of occupancy under any condition except by local usage or custom. He is no better than a tenant-at-will with no tangible interest in the land except that of holding it till the end of the agricultural year. When it was held under the old law, which was more partial to the under-*raiyat*, that his interest is not saleable, there is less reason to suppose that it is so under the Bengal Tenancy Act. There is ample authority for the view that the right of an under-*raiyat* is not transferable: *Akhil Chandra Biswas* v. *Husain Ali* (6), *Amirunnessa* v. *Jinnat Ali* (7) and *Bishambhar Mandal* v. *Nasarat Ali* (8). See also *Yakub Ali* v. *Mea Jan* (9) and *Gopal Mondal* v. *Tapai Sankhari* (10). It is now settled law that the interest

(1) W. R. (1864) Act X, Rul. 61.

(2) 1 W. R. 71.
(3) 7 W. R. 15.
(4) 9 W. R. 579.
(5) 11 W. R. 556; 3 B. L. R. A. C. 178.
(6) 20 Ind. Cas. 698; 19 C. W. N. 246; 18 C. L. J. 262.
(7) 27 Ind. Cas 271; 20 C. L. J. 548; 42 C. 751; 19 C. W. N. 43.
(8) 57 Ind. Cas. 912; 32 C. L. J. 46.
(9) 29 Ind. Cas. 686; 43 C. 164.
(10) 45 Ind. Cas. 545; 46 C. 43; 28 C. L. J. 84; 22 C. W. N. 618.

of an under-*raiyat* is not heritable: *Arip Mondal* v. *Ram Ratan Mandal* (11), *Jamini Sundari* v. *Rajendra Nath* (12) and *Meher Ali* v. *Kalai Khalasi* (13). It may not be wrong to say that one of the ordinary incidents of a transferable interest is its heritability. It has again been held that an under-*raiyat* cannot maintain a suit for possession based upon title but can recover possession on the strength of his previous possession. *Banka Behary* v. *Raj Chandra Pal* (14) and *Gour Mandal* v. *Balaram Manji* (15). It is not necessary for us to consider how far these decisions can be supported, as according to the view consistently held by this Court, mere previous possession, unless perfected into adverse possession, cannot form the foundation of a suit for recovery of possession. But these cases show that the right of an under-*raiyat* is so un-substantial that it gives him no title to recover possession even from a trespasser.

For the view that the right of an under-*raiyat* is transferable with the consent of the superior holder, the *raiyat*, reliance has been placed on the case of *Bonomali* v. *Koylash* (16). The head-note of the case is not quite consistent with the decision for one of the learned Judges, Jackson, J., in the course of his judgment observed: "I would only add that I never heard before that the question as to the possibility of selling a *korfa* tenant's right could be raised, and it appears to me to be contrary to the nature of things that such a thing could happen." It is worthy of note that this was the view held of the law before the Bengal Tenancy Act. Garth, C. J., confined his decision to the facts of that case which was a suit against the *raiyat*. That decision, moreover, does not support the respondent's contention that an under-*raiyati* is transferable with the consent of the *raiyat*. According to the head-note, it lays down the contrary proposition that it is not transferable without the consent of the *raiyat*. If it is not transferable without the consent of the *raiyat*, it does not necessarily or logically follow that it is transferable with his consent. The reason is that the transfer of an interest, which is not transferable in law, may be binding on various legal grounds on a person having the right to challenge the validity of the transfer. It is attempted in this connection to establish an analogy between an occupancy right and the interest of an under-*raiyat*. As has been observed in *Amirunnessa* v. *Jinnat Ali* (7), every right is not transferable and as remarked in *Akhil Chandra Biswas* v. *Husain Ali* (6), an under-*raiyati* is not *ipso facto* transferable. In the Special Bench case of *Chandra Benode* v. *Alla Bux* (17), it was held on a reference to several sections of the Bengal Tenancy Act that the law recognised the transferability of an occupancy right though subject to certain qualifications. In the case of an undert-*raiyati*, the Bengal Tenancy Act is not only silent regarding its transferability, but affords sufficient indications to the contrary. It is contended that as an under-*raiyat* may by custom acquire a right of occupancy, he should be placed, so far as the present question is concerned, on the same footing, as an occupancy *raiyat*. We are unable to discover how this provision will help to place an under-*raiyat*, who has not acquired a right of occupancy by custom on the same level with an occupancy *raiyat*. Besides, if it is loosely said that the interest of an under-*raiyat* is transferable with the consent of his landlord, it may not necessarily indicate the transferability of such an interest. It may signify that the landlord is willing to accept the transferee as his tenant in lieu of the old tenant, practically a case of fresh settlement.

But conceding the correctness of this proposition of law which has found favour with the learned lower Court and

(11) 31 C. 757; 8 C. W. N. 479.
(12) 11 C. W. N. 519.
(13) 29 Ind. Cas. 461; 27 C. L. J. 579; 19 C. W. N. 1129.
(14) 2 Ind. Cas. 202; 11 C. W. N. 141.
(15) 43 Ind. Cas. 864; 22 C. W. N. 61.
(16) 4 C. 135; 2 Ind. Dec. (N. S.) 87.
(17) 58 Ind. Cas. 353; 48 C. 184; 24 C. W. N. 818.

has been strenuously maintained by the learned Vakil for the respondent, it is difficult to see how it can be applied to the facts of this case. The plaintiff purchased the under-*raiyati* in 1911, while the defendants purchased it at an auction-sale in 1916. It is not the plaintiff's case, nor is there any evidence or finding that the defendants consented to the sale to the plaintiff. But it is argued that the conduct of some of the defendants in not appearing in the suit and contesting the plaintiff's claim is tantamount to consent. We fail to appreciate the logic of this argument. Even if express consent were given by some of the defendants long after the plaintiff's purchase, it could not be said that the sale to the plaintiff was with the landlord's consent; at most it might amount to recognition of the plaintiff by the non-contesting defendants. But this theory too cannot be sustained on the facts of this case. The rent-suit was brought to which all the defendants including the absent defendants were parties against Tushtu, thus negativing any suggestion that they ever consented to the transfer by Tushtu to the plaintiff, or that they ever recognised the plaintiff as their tenant or the transfer to him. Moreover, it is the plaintiff's case that he was dispossessed by defendants Nos. 1 and 3.

Lastly, it is attempted to invoke the principle of estoppel. It is said that, as the defendants themselves purchased the under-*raiyati* in execution of their decree, they are estopped from denying the tranferability of the under-*raiyati*. The law of estoppel is contained in section 115 of the Evidence Act. It is not the plaintiff's case that he was misled by any act or word of the defendants in purchasing the under-*raiyati*. Subsequent conduct or word cannot operate as estoppel: *Asmat-un-nessa* v. *Harendra Lal* (18). But it is submitted that the question of transferability of the under-*raiyati* does not arise in this case between the plaintiff who is a purchaser from the under-*raiyat* and the defendants who are purchasers of the same under-*raiyati* in execution of a decree. In support of this contention reliance has been placed on the case of *Ayenkddin* v. *Sirish Chandra* (19). That case has no bearing on the present question as it related to an occupancy right transferable with the consent of the landlord. It was discussed and distinguished in *Asmat-un-nessa* v. *Harendra Lal* (18). The authority of *Lala Deosaran* v. *Bateswar Mondal* (20) has been rightly questioned by the learned Subordinate Judge in view of the decision in *Kanchan Mandar* v. *Kamala Prosad Chowdhury* (21). We agree with the view taken by the learned Subordinate Judge that the defendant in the capacity of landlord is entitled to question the validity of the sale of the under-*raiyati* to the plaintiff. In this view of the matter the learned Subordinate Judge has dismissed the plaintiff's suit to the extent of the share of the defendant No. 3. The logical result of his findings is that the under-*raiyati* in this case is not transferable, and that the defendant No. 3 as a landlord is entitled to question the plaintiff's right as purchaser from Tushtu. We think that the learned Subordinate Judge is right in these findings and there being no cross-appeal by the plaintiff they must be taken to be correct. The only point on which we differ from the Court below is its view that an under-*raiyati* is transferable with the consent of the superior holder, and that the defendants Nos. 1 and 2 not having contested the suit the plaintiff is entitled (it is not stated upon what specific ground) to a decree to the extent of the interest of those defendants in the holding. The present suit is for declaration of title and recovery of possession. In our opinion the plaintiff has failed to prove his title and is therefore not entitled to any relief. In view of the opinion we have formed on the question of plaintiff's title, it is not necessary to consider the other points urged by the appellant.

The result is that the appeal is allowed, the decree of the lower Appellate

(18) 8 C. L. J. 29.

(19) 11 C. W. N. 76.
(20) 32 Ind. Cas. 1003; 23 C. L. J. 559.
(21) 29 Ind. Cas. 733; 21 C. L. J. 441.

Court set aside and that of the Court of first instance restored with costs of all the Courts to be paid by the plaintiff to defendant No. 3.

K. S. D. *Appeal allowed.*
N. H.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 920 OF 1922.
April 22, 1924.
Present:—Mr. Justice Wallace.
CHINTAKAYALA KAMMAIAH NAIDU GARU—PLAINTIFF—PETITIONER
versus
ATHITI MUSALIAH (DEAD) THROUGH HIS LEGAL REPRESENTATIVE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Madras Local Boards Act (V of 1884), s. 73—Licensee to tap trees under Inamdar *if "tenant"—Liability to pay land-cess.*

A licensee under the holder of an *inam* in a *zemindari* for a period of years of the right to tap trees in the *inam* lands is not a "tenant" within the meaning of section 73 of the Madras Local Boards Act so as to render him liable to his licensor for the land-cess payable by the latter under the Act.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise a decree of the Court of the District Munsif, Vizagapatam, in Small Cause Suit No. 242 OF 1922.

Mr. *B. Satyanarayana*, for the Petitioner.

Mr. *P. Somasundaram*, for the Respondent.

JUDGMENT.—The question in this case is whether a licensee under the holder of a Dharimalla *inam*, in a *zemindari*, for a period of ten years with a right to tap date trees is a tenant within the meaning of section 73 of the Madras Act V of 1884, so as to be liable to his licensor for the land-cess payable by the latter under the Act. The plaintiff is an intermediate landholder and had under decree Exhibit B to pay Rs. 131-2-6 to his landlord as land-cess for *Faslis* 1324 to 1326 plus costs of suit and he seeks to recover half of that sum from the licensees the defendants.

The word "tenant" in the Act is defined to include all persons who occupy lands under a landholder. This definition is not illuminating, and considerations of the meaning of the word as used in other enactments do not afford much assistance either. It has no doubt been held *e. g.*, that the *ryotwari* holder of a tree *patta* is an occupier of land within the meaning of section 6 of the Madras Forest Act (see *Reference under section 39 of the Madras Forest Act* (1). It would be unsafe to infer from that that a licensee of the right to tap date trees in a *zemindari inam* is a tenant within the meaning of the definition in Act V of 1884.

I think the question has to be looked at from a different point of view. The tax which plaintiff has to pay to the *zemindar* is a "tax on the annual rent value of land." It is calculated under section 64 (3) of the Act "on the annual rent payable to the land-holder by his tenants", and the landholder is bound to furnish the Collector under section 65, with a statement of the annual rent value of the lands occupied by his tenants or by himself. The word "rent" is not defined in the Act, and it is not clear whether or not it is intended to mean only the rent payable by an estate tenant as defined in the Madras Estates Land Act. I think it may be taken that the Local Boards Act does not contemplate any radical difference between the method of calculation of the rent value on *ryotwari* land and of the rent value of land held under any other tenure. Now on the case of *ryotwari* lands it is clear that the rent value is based on the assessment payable to Government for the land. Every one knows what that is, and I do not think it could be seriously argued that, if a *ryotwari* holder leased out date trees on his holding for tapping, the amount of that lease could be taken into account for the purpose of calculating the rent value of the land under section 64 (1) of the Act. A *ryotwari* holder is bound so long as he holds the land and therefore so long as he holds the right to lease out the trees upon it to pay the assessment on the land. It is that and

(1) 12 M. 203; 1 Weir 758; 4 Ind. Dec. (N. S.) 492 (F. B.).

not the lease amount on which the tax will have to be calculated.

I do not see why any different principle should be applied to lands in an estate. The lease of trees on these lands does not abolish the rent payable on the lands to the land-holder and it is not suggested in this case that the land rent has been abolished. It is asserted that the lands are uncultivable, but only because of a tradition that people who cultivate them do not prosper. The assessed land rate then still remains to provide the basis on which the tax leviable under this Act shall be calculated and the tax can be calculated legally on nothing else. If, as a matter of fact, the tax has been calculated on any other basis then the landholder himself will have to take action to have the mistake rectified.

It follows then that the amount payable under a license for tapping date trees on land which is already subject to land rent is not a proper basis for calculation of the rent value of the land, and is not "rent" as used in section 64 of the Act. Even if a licensee be, in a manner of speaking, the tenant of the licensor, the latter cannot recover from the tenant anything not taken legally from him by the Collector and, as set out above, the Collector cannot to my mind, legally collect from the landholder as tax under section 64 of the Act any tax based on the amount of the license.

I, therefore, agree with the District Munsif that the suit must fail and dismiss the revision petition with costs.

V. N. V. *Petition dismissed.*

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 13 OF 1923.

November 22, 1923.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Rankin.

HASIM ALI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ABJAL KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 13—Criminal Procedure Code (Act V of 1898), s. 145, proceedings under, relevancy and admissibility of, in civil cases—Co-sharer—Adverse possession—Limitation—Declaratory decree for unknown share.

In a suit for possession the fact that there was a proceeding under section 145, Criminal Procedure Code, that there was an inquiry into the matter and that there was a decision adverse to the allegations of the plaintiff, is a relevant fact and is admissible in evidence on general principles as well as under section 13 of the Evidence Act. [p. 394, col. 1.]

Dinomoni Chowdhurani v. Brojomohini Chowdhurani, 29 I. A. 24 at p. 29; 29 C. 187; 6 C. W. N. 386; 12 M. L. J. 83; 1 Bom. L. R. 167; 8 Sar. P. C. J. 224 (P. C.), referred to.

In order to establish title by adverse possession in favour of one co-sharer against another, it must be established by unambiguous evidence that there was a complete ouster to the knowledge of the co-sharer. That is to say, the possession of one co-sharer can be said to be adverse against another only if there is an open denial of title and limitation can run, if at all, only from that date. [p. 394, col. 2.]

A decree cannot be given for a declaration of title to a share the extent of which cannot be determined on the evidence on the record. [p. 395, col. 1.]

Letters Patent appeal against the judgment of Mr. Justice Walmsley, dated the 9th February 1923, in Appeal from Appellate Decree No. 41 of 1921, against the decision of the Subordinate Judge, Chittagong, dated the 4th October, 1920, reversing that of the Munsif, Patiya, dated the 17th December, 1918.

FACTS appear from the following judgment of

Walmsley, J.—This appeal is preferred by the plaintiffs. It arises out of a suit which they brought to establish their exclusive right to a tank and, if necessary, for recovery of possession. The tank admittedly belonged to three brothers and the plaintiffs say that, by descent, by purchase and by partition between the defendants Nos. 7 to 17, they acquired 8/9th of the entire interest and also that they acquired a right to the remaining 1/9th by adverse possession against the heirs of Samed Ali who was one of the three sons of one of the original three owners. The learned Munsif decreed the suit finding that, among the defendants, only defendant No. 17 had any interest left and he gave the plaintiffs joint possession with the defendant No. 17 leaving the extent of the said defend

ant's share undetermined. On appeal the learned Subordinate Judge found that the plaintiffs had failed to prove that they had acquired title to Samed Ali's share by adverse possession. The defendants Nos. 1 to 6 are the sons of Faiz Ali who bought Samed Ali's share from his grandson. The Judge says that it was the duty of the plaintiffs to prove "an open and notorious ouster and clear adverse possession for more than 12 years" and that he does not find any such evidence on the plaintiffs' side in the record. Rest is a finding of fact and unless it was arrived at by an improper method of reasoning, it is conclusive.

The learned Counsel for the appellants contends that the learned Subordinate Judge was wrong in referring to the order passed in a proceeding under section 145, Criminal Procedure Code. To understand the case, it is necessary to mention that in 1890 the plaintiffs excavated the tank whereupon Samed Ali's sons, the predecessors of the present defendants, brought a suit to recover possession. This suit they did not prosecute. In 1898, there was Record of Rights prepared and neither the name of Samed nor the names of his sons appeared in the record. Then, in 1917, the present defendants' father made his purchases from Samed Ali's grandson and early in 1917 there were proceedings under section 145, Criminal Procedure Code. The Magistrate after hearing the evidence, said that the second party, that is to say, the present defendants had given better evidence by their possession and his conclusion was that both parties are entitled to joint possession. But judgment is clearly admissible for the purpose of showing that there were proceedings, that the present parties were parties to those proceedings and that a particular result ensued upon those proceedings and I think that that is the manner in which the learned Judge has used the judgment; and, looking at the facts which he has mentioned, I cannot say that he has committed any error in arriving at the conclusion at which he did arrive that the plaintiffs had failed to prove twelve years' adverse possession extinguishing the defendants' interest. At the last moment, to save something from the wreckage, the learned Counsel for the plaintiffs asked that, instead of the suit being dismissed altogether, a declaration should be made of the plaintiffs' title. To this, there are two objections. The first is that the plaintiffs did not ask for such a suitable declaration and it does not appear that any injury were to be done to them by refusing to give it and the record is that there is the undetermined share of the defendant No. 17. I think it will be objectionable to pass a decree in the plaintiffs' favour declaring that they have a title to 8/9th of the tank jointly with another man, the defendant No. 17 whose interest is an uncertain quantity.

The result is that, in my opinion, the appeal should be dismissed with costs.

Babu *Narendra Kumar Das*, for the Appellants.

Moulvi *Mahammad Nurul Huq Chowdhury*, for the Respondents.

JUDGMENT.

Mookerjee, J.—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Walmsley in a suit for confirmation or recovery of possession of a tank on establishment of exclusive title thereto.

The plaintiffs set up a three-fold title, namely, title by inheritance, title by purchase and title by adverse possession. The Court of first instance held that title was established not in respect of the entire tank but with regard to a share in it; and unable to determine the precise extent of that share, the Court gave the plaintiffs a joint decree along with the seventeenth defendant. On appeal the Subordinate Judge reversed this decision and dismissed the suit. That decree has been affirmed by Mr. Justice Walmsley.

The appeal raises three points for consideration, namely, first, whether reliance should have been placed upon the proceedings in a case under section 145, Criminal Procedure Code; secondly, whether the alleged title by

adverse possession had been established; and thirdly, whether the plaintiffs were entitled to a declaration of title to an unascertained share.

As regards the first point, it appears that the appellants were the first party in a proceeding under section 145, Criminal Procedure Code, in 1916. Their case then, as now, was that they were entitled to the exclusive possession of the tank and that there was a likelihood of a breach of the peace as the second party (predecessors-in-interest of the defendants) claimed wrongful possession jointly with them. Upon investigation, the Magistrate came to the conclusion that the plaintiffs were not in exclusive but in joint possession, and that there was no likelihood of a breach of the peace. On these grounds proceedings were discontinued on the 22nd March, 1917. It is plain that the fact, that there was a proceeding under section 145, Criminal Procedure Code, that there was an inquiry into the matter and that there was a decision adverse to the allegations of the plaintiffs, is a relevent fact, and the Subordinate Judge has properly treated this as evidence. The view of the Subordinate Judge is supported by the decision of the Judicial Committee in *Dinomoni Chowdhurani* v. *Brojomohini Chowdhurani* (1). In that case Lord Lindley pointed out that orders for possession under the provisions of the Criminal Procedure Code relating to disputes regardiug immoveable properties are Police orders made to prevent breaches of the peace and decide no question of title; but such orders are admissible in evidence on general principles as well as under section 13 of the Indian Evidence Act to show the fact that such orders were made. Consequently, the first point must be decided against the appellants.

As regards the second point, the Subordinate Judge held that the alleged title by adverse possession had not been established. The parties are co-owners and in order to establish title by adverse possession in favour of one co-owner against another, it must be established by unambiguous evidence that there was a complete ouster to the knowledge of the co sharer. This is settled beyond controversy by recent decisions of the Judicial Committee which affirm the principle that the possession of one co-sharer can be said to be adverse against another, only if there is an open denial of title, and limitation can run, if at all, only from that date; see the observations of Lord Macnaghten in *Corea* v. *Appuhami* (2), of Lord Dunedin in *Muttunayagam* v. *Brito* (3), of Lord Buckmaster in *Hardit Singh* v. *Gurmukh Singh* (4), of Viscount Cave in *Varada Pillai* v. *Jeevarathnammal* (5), and of Lord Atkinson in *Arab Ali Khan* v. *Mahmud Ali Khan* (6), see also *Balaram Guria* v. *Syama Charan Mondal* (7), *Joynarain Sen Ukil* v. *Suchitra Debya* (8), *Jagannath Marwari* v. *Chandni Bibi* (9), and *Kailas Chandra Nag* v. *Bijoy Chandra Nag* (10). The Subordinate Judge has accurately analysed the evidence to show that it does not support the theory of exclusive possession and complete ouster.

As regards the third point, Mr. Justice Walmsley has correctly held that the plaintiffs cannot claim a decree for declarations of title. The specific title alleged by them has not been established. On the other hand, the difficulty remains that the extent of their share

(1) 29 I. A. 24 at p. 29; 29 C. 187; 6 C. W. N. 386; 12 M. L. J. 83; 4 Bom. L. R. 167; 8 Sar. P. C. J. 221 (P. C.).

(2) (1912) App. Cas. 230; 81 L. J. P. C. 151; 105 L. T. 836.

(3) (1918) App. Cas. 895; 87 L. J. P. C. 146.

(4) 47 Ind. Cas. 626; 28 C. L. J. 437; 58 P. W. R. 1918; 61 P. R. 1918; 24 M. L. T. 389; 20 Bom. L. R. 1064; (1919) M. W. N. 1; 9 L. W. 123; 1 U. P. L. R. (P. C.) 8 (P. C.).

(5) 53 Ind. Cas. 901; 46 I. A. 285; 43 M. 214; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 2 U. P. L. R. (P. C.) 61; 22 Bom. L. R. 444 P. C.

(6) 67 Ind. Cas. 444; 35 C. L. J. 554; 20 A. L. J. 545; (1922) A. I. R. (P. C.) 84; 43 M. L. J. 104; 31 M. L. T. 94; 24 Bom. L. R. 951.

(7) 60 Ind. Cas. 298; 33 C. L. J. 344; 24 C. W. N. 1057.

(8) 65 Ind. Cas. 8; 33 C. L. J. 592; 26 C. W. N. 205; (1922) A. I. R. (C.) 8.

(9) 67 Ind. Cas. 31; 34 C. L. J. 432; 26 C. W. N. 65.

(10) 72 Ind. Cas. 680; 34 C. L. J. 434; (1923) A. I. R. (C.) 18.

cannot be determined on the evidence as it stands. In such circumstances, it is impossible to make a decree in favour of the plaintiffs in respect of an unknown share; see *Hemendra Nath Roy* v. *Upendra Narain Roy* (11), *Nabin Chandra Ghosh* v. *Nilkamal Mukhopadhyaya* (12), *Basa Veswaraswami* v. *The Bellary Municipal Council* (13).

The result is that the decree made by Mr. Justice Walmsley is affirmed and this appeal is dismissed with costs.

S. D. *Letters Patent Appeal dismissed.*

(11) 32 Ind. Cas. 437; 43 C. 743; 22 C. L. J. 419; 20 C. W. N. 446.
(12) 36 Ind. Cas. 11; 25 C. L. J. 537.
(13) 17 Ind. Cas. 158; 38 M. 6; 12 M. L. T. 405; 23 M. L. J. 479; (1912) M. W. N. 1080.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1041 OF 1921.
March 31, 1924.
Present:—Mr. Justice Phillips.
MUTHUSAMI NAIDU—PLAINTIFF—APPELLANT
versus
RAYALU NAIDU—DEFENDANT—RESPONDENT.

Surety and debtor—Contribution—One surety receiving counter-security from principal debtor.

A surety who has received from the principal debtor a counter-security for the liability which he undertook jointly with other co-sureties is liable to bring in for the benefit of such co-sureties whatever he has received from that source.

Steel v. *Dixon*, (1881) 17 Ch. D. 825; 50 L. J. Ch. 591; 45 L. T. 142; 29 W. R. 735, relied on.

Second appeal against a decree, dated the 21st January 1921, of the District Court of Trichinopoly, in Appeal Suits Nos. 226 and 246 of 1920, preferred against a decree, dated the 8th February 1920, of the Court of the District Munsif, Srirangam, in Original Suit No. 129 of 1918.

Mr. *K. R. Narayanasami Iyer*, for the Appellant.

Mr. *V. C. Seshachariar*, for the Respondent.

JUDGMENT.—In this case the plaintiff, the defendant and one Subba Konar were sureties for one Muthukrishna Naidu in respect of two promissory-notes for Rs. 500 each. Subsequently the defendant obtained a hypothecation bond from the principal debtor, Muthukrishna Naidu, for Rs. 3,500. Part of the consideration was an undertaking by the defendant to discharge the promissory-notes for which he and the plaintiff were jointly sureties. Subsequently a suit was filed on these promissory-notes, and decree was obtained and in execution, Rs. 615 was realised from the plaintiff. Meanwhile the defendant obtained a decree on his hypothecation bond and has purchased most of the properties belonging to the mortgagor. The plaintiff's suit is to recover the money which he had to pay on account of the suretyship. The District Munsif decreed the suit on the ground that the defendant having undertaken by the hypothecation bond B-I to discharge the promissory-notes was bound to contribute the money to the plaintiff. The District Judge on appeal has dismissed the plaintiff's suit on the ground that it was based on unfounded representations and arrangements and was misconceived. On the finding that the defendant has received from the principal debtor a counter-security for the liability, which he undertook jointly with the plaintiff, he is liable to bring in for the benefit of the plaintiff and his co-sureties, whatever he has received from that source. This principle is laid down in *Steel* v. *Dixon* (1) and it is not suggested that the above facts would not be applicable in this case. In neither of the lower Courts does this particular aspect of the case seem to have been considered although apparently there were the necessary materials for it. It is now argued for the respondent that certain other facts might have been elicited if the parties had known exactly the case they had to meet. In view of the fact that the plaint is not very clearly drafted, and does not in terms contain the plea which is taken here. I think it is only fair to the defendant to give him an opportunity of

(1) (1881) 17 Ch. D. 825; 50 L. J. Ch. 591; 45 L. T. 142; 29 W. R. 735.

meeting the case, by adducing further evidence, if he thinks fit. The District Judge's decree is set aside and the appeal is remanded for fresh disposal. If necessary, the Judge can send it back to the Trial Court for further evidence.

Costs to abide the result, Court-fee paid on the second appeal to be refunded.

V. N. V. *Appeal remanded.*

CALCUTTA HIGH COURT.

LETTERS PATENT APPEAL NO. 15 OF 1923.

November 22, 1923.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Rankin.

DHARANI MOHAN RAY—PLAINTIFF—APPELLANT

versus

ASUTOSH MUKERJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 105, 105A, 106, 107, 108, 109 and 109A—Fair annual rent settled by Revenue Officer—Decision of Revenue Officer, force of—Decree of Civil Court—Decision of Revenue Officer not challenged by way of revision or appeal—Finality of decision—Question decided by Revenue Officer, whether can be re-opened.

Where in a proceeding under section 105, Bengal Tenancy Act, for assessment of fair rent, the tenant contends that he holds the land rent free, and the Revenue Officer assesses an annual rent, by compromise or otherwise, the decision of the Revenue Officer, by virtue of provisions of section 107 (1) of the Act, has the force and effect of a decree of a Civil Court in a suit between the parties, and if it is not challenged by way of a revision or appeal, under sections 108 and 109A of the Act, it operates as a final decree as deciding between the parties, (*i*) that the tenant holds the land subject to the payment of rent; (*ii*) that the fair annual rent is that fixed by the Revenue Officer. [p. 398, col. 1.]

So long as the decision of a Revenue Officer, in proceedings under section 105A, Bengal Tenancy Act, remains in force, effect must be given to it under section 107 of the Act. [*ibid.*]

It is not open to defendants to raise by way of defence, under section 109, the very question which was decided by the Revenue Officer under section 105 of the Act. That section does not whittle away the effect of section 107 of the Act, and applies only to cases where no decision has been pronounced by the Revenue Officer concerned. [p. 398, col. 2.]

Rajendra Narain Mazumdar Choudhury v. *Sheikh Kalim*, 67 Ind. Cas. 813, 26 C. W. N. 758; 49 C. 875; (1922) A. I. R. (C.) 575 and *Gokul Mandar* v. *Padmanand Singh*, 29 I. A. 196; 29 C. 707; 6 C. W. N. 825; 4 Bom. L. R. 793; 8 Sar. P. C. J. 323 (P. C.), distinguished.

Letters Patent appeal against the judgment of Mr. Justice Walmsley, dated the 9th February, 1923, in Appeal from Appellate Decree No. 68 of 1921, against the decree of the First Subordinate Judge of 24-Perganahs, dated the 24th August, 1920, affirming that of the First Munsif, Barasat, dated the 30th August, 1919.

FACTS appear from the following judgment of

Walmsely, J.—This appeal arises out of a rent suit. It is preferred by the defendants. The Record of Rights was prepared in 1912 in which the defendants' holding was shown as liable to settlement of rent and, in another column, there was an entry that it was *niskar*. The landlord thereupon made an application under section 105 of the Bengal Tenancy Act for settlement of fair rent. The defendants urged that their holding was rent-free. The decision went against them. When the present suit was instituted, the defendants again raised the contention that their tenancy was rent-free. Both the Courts below have held that they are liable to pay rent and have passed a decree for Rs. 3-9 as. per annum—the sum obtained in the proceedings under section 105. Two points are raised on behalf of the appellants. The first is that the landlord's application under section 105 was made more than two months after the final publication of the Record of Rights and it is said that the order passed in it was in consequence a nullity. The second point is that, in any case, the Courts below have taken a wrong view as to the effect of the order under section 105 in a subsequent suit for rent.

So far as the first point is concerned, the Courts below say that there is no evidence before them to prove that more than two months elapsed before the landlord made his application. The only evidence produced was a certified copy of an order-sheet and that shewed that the first order was passed on the 10th June

nearly six months after the final publication. The view apparently taken by the Courts was that the application might have been filed months before any order was recorded in the order-sheet. Whether that view is correct or not, I do not think I should say in second appeal that the Courts below are wrong in saying that the defendants have failed to prove that the application filed by the landlord was filed out of time. Consequently, I need not go into a discussion of the question whether the order made by the Settlement Officer was, in consequence, a nullity. I would only point out that the defendants not merely contested the case but they introduced in it questions referred to in section 105 of the Tenancy Act.

The next point urged on behalf of the defendants has, in my opinion, much more substance. Both the Courts below refer to the decision in the proceedings under section 105 as binding against the defendants. They do not say so, but it is obvious that they were thinking of the provisions of section 109. In this they are wrong. On several occasions it has been held that section 109 does not preclude a defendant in his defence from raising questions which might not have been raised by the plaintiff in a suit. I do not think it necessary to quote any decision on this point.

The result is that the appeal must be allowed, the judgment and decree of the lower Appellate Court set aside and the case remanded to that Court for a re-hearing in order that the Judge may consider whether the evidence proves that the defendants are liable to pay rent and at what rate of rent, if they are liable. In coming to his conclusion, the learned Judge will bear in mind that the judgment in the proceedings under section 105 of the Bengal Tenancy Act is not conclusive on the matter.

I am asked to direct that the parties should be allowed an opportunity of adducing further evidence. It is a matter on which I express no opinion. It will be for the learned Judge of the Court of Appeal below to decide whether they should be so allowed or not.

Costs will abide the result.

Babu *Mrityunjay Chatterjee*, for the Appellant.

Dr. *Dwarka Nath Mitter* and Babu *Narin Chandrakar*, for the Respondents.

JUDGMENT.

Mookerjee, J.—This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Walmsley in a suit for arrears of rent.

The plaintiff-appellant instituted this suit against the defendants-respondents for recovery of arrears of rent due in respect of a tenancy held at Rs. 3-9 per annum. The defendants contended that they were not liable as the tenure was rent-free. This contention was overruled and the suit was decreed by the primary Court. On appeal, the decision was affirmed by the Subordinate Judge. The judgment of the two Courts went against the defendants on the ground that they were bound by a decree in a proceeding under section 105, Bengal Tenancy Act, and that they had failed to establish what they had asserted, namely, that the decree was made without jurisdiction. On appeal to this Court the defendants urged that they were not precluded by the provisions of section 109, Bengal Tenancy Act, from proving that they held the land rent free. This contention was accepted by Mr. Justice Walmsley and he remanded the case for enquiry whether the evidence proves that the defendants are liable to pay rent, and if so, at what rate. We are of opinion that this order cannot be supported.

It appears that the Record of Rights in this case was finally published on the 16th December, 1912. This record contained an entry to the effect that the defendants held the land without payment of rent, but that the land was liable to be assessed with rent. The landlord thereupon instituted a proceeding under section 105, Bengal Tenancy Act, for assessment of fair rent. The tenants contended that they held the land rent free. Consequently the question contemplated by section 105A clause (*a*) arose, namely, whether the land was or was not liable to payment of rent. It thereupon became incumbent upon the Revenue Officer to try and decide that issue and to settle rent under section 105 if he should hold that the land was

liable to payment of rent. It is not clear what took place before the Settlement Officer. But this much becomes obvious on an examination of the Record of Rights that on the 15th November, 1913 rent was assessed at the rate of Rs. 3-9 per annum. It has been stated that this order was made by consent of parties ; but that is immaterial for our present purpose, because under clause (6) of section 105, where the parties agree amongst themselves, by compromise or otherwise, as to the amount of the fair rent, it is incumbent upon the Revenue Officer to satisfy himself that the amount agreed upon is fair and equitable, and it is only if he is so satisfied that he can record the amount agreed upon as the fair and equitable rent: if he is not so satisfied, he has to settle a fair and equitable rent as provided in sub-sections (4) and (5).

The real question is, what is the effect of such a decision by the Revenue Officer. The answer is furnished by section 107. Sub-section (1) of that section provides that in all proceedings under section 105, section 105A and section 106, the Revenue Officer shall, subject to rules made by the Local Government, adopt the procedure laid down in the Code of Civil Procedure for the trial of suits ; and his decision in every such proceeding shall have the force and effect of a decree of a Civil Court in a suit between the parties and, subject to the provisions of sections 108 and 109A shall be final. Sub-section (2) next provides that a note of all rents settled under section 105 and of all decisions of issues or disputes under section 105 A or section 106 shall be made in the Record of Rights finally published under sub-section (2) of section 103A and such note shall be considered as part of the record. This was done in the present case. Section 108 provides for revision of the order of the Revenue Officer and section 109A provides for a first appeal to the Special Judge and a second appeal to the High Court. In the case before us, there is nothing to indicate that the decision of the Revenue Officer was challenged by way of either a first appeal or a second appeal. The decision of the Revenue Officer consequently operated as a decree of a Civil Court in a suit between the parties ; and it has the force and effect of a final decree which decides two vital elements of the relationship between the parties; first, that the defendants hold the land subject to the payment of rent ; and secondly, that the fair rent payable is Rs. 3-9 annas annually.

But section 109 has been invoked in order to show that it is open to the defendants to raise by way of defence the very question which was decided by the Revenue Officer under section 105. In our opinion section 109 has no application to a case of this description. That section provides that, subject to the provisions for an appeal, a Civil Court shall not entertain any application or suit concerning any matter which is or has already been the subject of an application made, suit instituted or proceedings taken under sections 105 to 108 both inclusive. This does not whittle away the effect of section 107 and applies to cases where no decision has been pronounced by the Revenue Officer concerned. The decision in *Rajendra Narain Mazumdar Choudhary* v. *Sheikh Kalim* (1) does not affect the present question and was pronounced under entirely different circumstances ; there the objection was sought to be raised by way of defence in a suit instituted before the publication of the Record of Rights. Nor is the matter affected by the decision of the Judicial Committee in *Gokul Mandar* v. *Padmanand Singh* (2). It is not necessary for us now to consider whether it is or is not possible for the defendants to get rid of the decision of the Revenue Officer which operates as a final decree. This much is incontrovertible that under section 107, so long as that decree remains in force, effect must be given to it, and if effect is given to it, there is no escape from the conclusion that the claim for rent must be decreed on that basis.

The result is that this appeal is allowed the decree of Mr. Justice Walmsley set

(1) 67 Ind. Cas. 813; 26 C. W. N. 758; 49 C. 875; (1922) A. I. R. (C.) 575.

(2) 29 I. A. 196; 29 C. 707; 6 C. W. N. 825; 4 Bom. L. R. 793; 8 Sar. P. C. J. 323 (P. C.).

aside and that of the Subordinate Judge restored with costs of two hearings in this Court.

S. D. *Letters Patent appeal allowed.*

MADRAS HIGH COURT.

CIVIL SUIT No. 257 OF 1921.
April 2, 1924.
Present:—Mr. Justice Kumaraswami Sastri.

AGNES ISABELLA CAMPBELL AND ANOTHER—PLAINTIFFS
versus
C. AUDIKESAVULU NAYADU AND OTHERS—DEFENDANTS.

*Mortgage (English)—Redemption—*Post diem *interest—Limitation Act (IX of 1908), Sch. I, Arts. 147 and 132—Transfer of Property Act (IV of 1882), ss. 58 (d), 76 (h)—Accounts.*

In a suit for redemption of an English mortgage, in which a definite term is fixed for repayment of the principal and interest, the plaintiffs are bound to pay *post diem* interest up to the date of redemption, after taking credit for sums which the mortgagee got from the mortgaged property during the period he was in possession, unless the terms of the document show that the intention of the parties was that no interest should be paid subsequent to the date when the mortgage-money became due. [p. 401, col. 2.]

(Case-law discussed).

The granting of the power of sale in a mortgage is only a remedy which is usually given and the mortgagee is not bound to exercise the power any more than he is bound to sue on the expiry of the due date under the penalty of his losing subsequent interest. [p. 404, col. 1.]

The period of limitation applicable to a suit for redemption or recovery of possession of immoveable property under mortgage is 60 years under Art. 148 of the Limitation Act and liability to pay *post diem* interest is not, therefore, confined to twelve years only under Art. 132. [p. 400, col. 2.]

The Transfer of Property Act only codifies the general principles of equity and section 76 (*h*) applies as to the manner in which accounts are to be taken in regard to an English mortgage, executed before and sought to be redeemed after the Act. [p. 404, col. 2.]

Mr. *I. V. Ramanuja Rao*, for the Plaintiffs.

Messrs. *V. Radhakrishnayya, S. Alasingarachari* and *V. S. Govindachari*, for the Defendants.

JUDGMENT.—The plaintiffs sued to redeem the property mentioned in the plaint, which was mortgaged on the 17th of July, 1874, to secure the sum of Rs. 8,450 with interest at 12 per cent. per annum. The mortgagee was in possession of the property. A decree was passed on the 2nd of March, 1922, declaring that the plaintiffs are entitled to redeem the mortgage and directing accounts to be taken of the amount due to the defendants for principal and interest, of the rents and profits of the mortgaged property, of the sums paid for rates, taxes and other public charges, of the sums paid by the defendants for the due management of the property, and the sums paid for necessary repairs. The matter was referred to the Official Referee who has submitted a report. Objections have been taken by the plaintiffs but the defendants have filed no objection. The objections pressed before me are that, as there was no provision for payment of interest after July, 1879, the Official Referee was wrong in giving *post diem* interest at the bond rate and the defendants are only entitled to interest by way of damages at 6 per cent. for six years, and that instead of applying the income received by the mortgagee first in reduction of public charges, repairs and then of the interest payable, the Official Referee has taken an account of each year adding up the total charges and the interest, etc., deducting from the amount so arrived at, the income for the year leaving a balance against the mortgagors and has allowed upon that balance 12 per cent. per annum. This is in effect giving compound interest.

The first objection relates to *post diem* interest and this turns upon the terms of the mortgage. The deed of mortgage recites that the mortgagors grant and convey the property specified in the mortgage to the mortgagee, "to have and to hold the said premises unto and to the use of the mortgagee", his heirs and assigns subject to the following proviso: "provided always that if the said John William Coxe, E. W. Coxe, J. H. Coxe, T. P. Coxe and Agnes Isabella Coxe, their heirs, executors, administrators, re-

presentatives or assigns shall pay unto the said Canckoo Iyaloo Naidu, his executors, administrators, representatives or assignes the sum of Rs. 8,450 on or before the first day of July, 1879, together with interest for the same in the meantime at the rate of 12 per cent. per annum without any deduction, then the said Canckoo Iyaloo Naidu, his heirs or assigns will, upon the request and the cost of the said John William Coxe..... their or any of their heirs, executors, administrators, representatives or assignes reconvey the hereditaments hereby granted to the use of the said John William Coxe ... ... their or any of their heirs and assigns or as they, or he shall direct; but if default shall be made in payment of the said sum of Rs. 8,450 or the interest thereon in the manner aforesaid, or any part thereof respectively on the first day of July, 1879, it shall be lawful for the said Canckoo Iyaloo Naidu, his executors, administrators, representatives or assigns without any further consent on the part of the said John William Coxe.....their or any or either of their heirs or assigns to sell the hereditaments hereby granted together or in parcels and either by public auction or private contract with power upon any such sale to make any stipulations as to title or evidence of title or otherwise which the said Cankoo Iyaloo Naidu, his executors, administrators or assigns shall deem proper and also with full power to buy in or rescind any contract for sale of the said premises and to re-sell the same without being responsible for any loss occasioned thereby." The deed goes on to provide that the mortgagee, his executors, administrators representatives or assigns "shall hold the monies to arise from such sale upon trust in the first place thereout to re-imburse himself, for themselves or pay and discharge all the costs and expenses attending, incurred in or about such sale or otherwise in respect of the premises and in the next place to apply such monies in or towards satisfaction of all and singular the monies for the time being, owing on the security of these presents and to pay the surplus (if any) of the said premises unto the said John William Coxe, E. W. Coxe, J. H. Coxe, T. P. Coxe and Agnes Isabella Coxe, their or any or either of their executors, administrators, representatives or assigns." The deed goes on to state that the mortgagors will pay the mortgagee the sum of Rs. 8,450 together with interest for the same in the meantime at the rate of 12 per cent. per annum on the first day of July, 1879, without any deduction.

The deed is thus a deed of English mortgage falling within the definition of section 58 (*e*) of the Transfer of Property Act which runs as follows:—"Where the mortgagor binds himself to repay the mortgage money on a certain date and transfers the mortgage property absolutely to the mortgagee but subject to a proviso that he will re-transfer it to the mortgagor upon payment of the mortgage money as agreed, the transaction is called an English mortgage". In cases of English mortgage the article of Limitation Act which is applicable to suits on the mortgage is Art. 147 which runs as follows:—

"By a mortgagee for foreclosure or sale —60 years—when the money secured by the mortgage becomes due".

The period of limitation prescribed under Art. 148 which relates to suits against mortgagees to redeem or to recover possession of immoveable property mortgaged is also 60 years. Art. 132 which applies to mortgages other than English mortgages provides for a period of twelve years.

If, therefore, the mortgagee's heirs filed a suit against the mortgagor's heirs for the sale of the property, 60 years would be the period of limitation and not twelve years under Art. 132. There is, therefore, no force in the contention of the Vakil for the plaintiffs that assuming that *post diem* interest can be granted and it is a charge on the property, interest cannot be given for more than twelve years as the remedies on the mortgage would become barred by that date under Art. 132.

The contention of the Vakil for the plaintiffs is that the mortgage-money was re-payable on the first of July 1879, that in default, the remedy given to the mortgagee is to sell the property by

public auction or private contract, that the preamble to the mortgage shows that there was a previous mortgage which gave the right of sale and the mortgagee was going to exercise that right, that the mortgage in question was executed *inter alia* to prevent the sale, that part of the consideration was the giving up of the right to bring the property to immediate sale by the mortgagee, that the power of sale is not an ordinary incident attached to every mortgage but an extra power conferred, and that where such a power is conferred it must be taken that the parties provided a remedy to be enforced at once if the mortgage money be not paid. He referred to *Chajmal Das* v. *Brij Bhukan Lal* (1), *Mathura Das* v. *Raja Narindar Bahadur* (2), *Bindesri Naik* v. *Ganga Saran Sahu* (3), and *Badi Bibi Sahibal* v. *Sami Pilll* (4). It is argued that there is no presumption that *post diem* interest is to be paid in all cases, that where from the express terms of the document it is clear that *post diem* interest is not payable, it cannot be granted by the Court except by way of damages for breach of contract, to pay which damages could not form a charge on the property and would be subject to the usual rule of limitation applicable to suits for damages and that it is only when the document is not clear and two views are possible, Courts can follow the rule which gives the lender interest on his money.

The contention for the defendants is that where a person promises to pay on a certain date and fails to do so, there is a presumption that the parties intended that interest which was payable till that date should continue to run till payment that where a power of sale is given, a mortgagee exercising it after the date of default would be entitled to retain in his hands interest up till that date even though his remedy by way of a suit on the mortgage may be barred, that the mortgagor who seeks to redeem cannot be in a better position, that so far as limitation is concerned, *post diem* interest, whether given as interest or damages, should be paid until at least the right to sue on the mortgage is barred and that in the present case the mortgagee is entitled to *post diem* interest as allowed by the Official Referee and reference has been made to *Ghantayya* v. *Papayya* (5), *Moti Singh* v. *Ramohari Singh* (6), *Daudbhai Rambhai* v. *Daudbhai Allibhai* (7), *Motan Mal* v. *Muhammad Bakhsh* (8), *Dingle* v. *Coppen* (9) and Fisher on Mortgages Chapter IV.

So far as *post diem* interest is concerned, though there is a conflict of authority as regards the earlier Madras cases, I think the later decisions lean in favour of granting *post diem* interest unless the terms of the document show that it was the intention of the parties that no interest should be paid subsequent to the date when the mortgage money falls due.

In *Chajmal Das* v. *Brij Bhukan Lal* (1) their Lordships of the Privy Council were not prepared to dissent from the view of the High Court that *post diem* interest was not payable in respect of the mortgage sued on and that damages could be awarded "at the rate which could *prima facie* be the same as that provided by the bond during the two years although there is no rule of law making the rate necessarily the measure of damages."

In *Mathura Das* v. *Raja Narindar Bahadur* (2) the deed of mortgage dated the 17th of January 1880 provided for payment of the principal within one year with interest at Re. 0-1-6 per mensum. The borrower agreed that he would not transfer the mortgaged property until payment of both the principal and interest and that the amount paid should be first credited to the payment of interest and the balance, after that, should

(1) 17 A. 511; 22 I. A. 199; 6 Sar. P. C. J. 624; 8 Ind. Dec. (N. S.) 652.
(2) 19 A. 39; 23 I. A. 138; 1 C. W. N. 52; 6 M. L. J. 214; 7 Sar. P. C. J. 88; 9 Ind. Dec. (N. S.) 25 (P. C.).
(3) 20 A. 171; 2 C. W. N. 129; 25 I. A. 9; 7 Sar. P. C. J. 273; 9 Ind. Dec. (N. S.) 471 (P. C.).
(4) 18 M. 257; 6 Ind. Dec. (N. S.) 529.
(5) 23 M. 534; 8 Ind. Dec. (N. S.) 775.
(6) 24 C. 699; 1 C. W. N. 437; 12 Ind. Dec. (N. S.) 1135.
(7) 14 B. 113; 7 Ind. Dec. (N. S.) 533.
(8) 66 Ind. Cas. 771; 3 L. 200; 4 U. P. L. R. (L.) 55; (1922) A. I. R. (L.) 254; 42 P. L. R. 1922.
(9) (1899) 1 Ch. 726; 68 L. J. Ch. 337; 79 L. T. 603; 47 W. R. 279.

go to reduce the principal. A suit was filed in 1891. The defendant contended that interest was not payable after the expiry of one year and that in any event such interest was not chargeable on the property and could not be claimed for more than six years as damages for breach of promise to pay. The Subordinate Judge awarded only one year's interest and held that the claim for interest by way of damages for breach of promise to pay would be barred within six years. The Allahabad High Court affirmed this decree. On appeal their Lordships of the Privy Council reversed the decree of the High Court and held that the mortgagee was entitled to *post diem* interest at the bond rate and observed: "The provision for applying payments to reduction of interest points strongly to the expectation of the parties that the transaction will not be closed when the fixed day of payment arrives. The construction of the High Court ascribes to the parties an intention that however, payment may be delayed beyond the fixed day, the debt shall carry no interest, that the creditor shall have no remedy provided by contract, but shall be driven to treat the contract as broken and to seek for damages, which lie in the discretion of a Jury or a Court, and are subject to a different law of prescription". They were of opinion that in the, contract sued on the words 'the amount' in the clause "that if the mortgagor fails the morgagee may proceed to realise *the amount*" obviously meant the amount of principal and interest up to the time of realisation.

In *Bindesri Naik* v. *Ganga Saran Sahu* (3) the suit was on two deeds of mortgage. The first provided for the re payment of the debt in two years with interest at Rs. 1-8 a month and the second provided that the debt should be re paid on the day when the first loan would become due and at the same rate of interest. Both the mortgages were by conditional sale. The High Court held that *post diem* interest was not payable under the terms of the documents; but their Lordships of the Privy Council were of opinion that the clause that in default of punctual payment at the end of each year the mortgagees were to be at liberty to treat the unpaid interest as principal and to recover it from the mortgaged property showed that the parties contemplated *post diem* interest as being chargeable. Both these cases proceeded on the construction of the particular document and I can find no general rule enunciated which would apply to all cases of *post diem* interest.

In *Badi Bibi Sahibal* v. *Sami Pillai* (4) the deed of mortgage was executed in 1875. Interest was to run at 7 per cent per annum and the sum was payable on the 30th of October, 1878. It was held by Muthusami Aiyar and Best, JJ., relying on *Cook* v. *Fowler* (10), *Gudri Koer* v. *Bhubaneswari Coomer Singh* (11) and *Mansab Ali* v. *Gulab Chand* (12) that since the instrument did not provide for interest *post diem*, any claim in the nature of a claim for such interest could be allowed by way of damages only and was not a charge on the land and that it was barred by limitation.

In *Thayar Ammal* v. *Lakshmi Ammal* (13) Best and Subramania Aiyar, J J., held that *post diem* interest was only claimable as damages and that it was barred by limitation. The suit was on a mortgage dated 16th February, 1880, and it was filed in 1893. Subramania Aiyar, J., in an elaborate judgment held that where a mortgage document does not provide for *post diem* interest, the plaintiff can only claim it as damages for withholding the money and that such a claim would be barred under section 116 of the Limitation Act if the suit is filed more than six years after the date when the principal money became payable. The later decisions of Subramania Aiyar, J., which I shall refer to, however, show that the learned Judge changed his views on the question.

In *Pedda Subbaraya Chetti* v. *Ganga Razulungaru* (14) the suit was on a mort-

(10) (1874) 7 H. L. 27; 43 L. J. Ch. 855.
(11) 19 C. 19; 9 Ind. Dec. (N. S.) 459.
(12) 10 A. 85; A. W. N. (1887) 292; 6 Ind. Dec. (N. S.) 58.
(13) 18 M. 331; 6 Ind. Dec. (N. S.) 579.
(14) 20 M. 149; 7 M. L. J. 18; 7 Ind. Dec. (N. S.) 104.

gage and the principal amount was payable on the 14th of July 1886. The amount secured by the mortgage was arrived at by calculating the principal and interest due on previous loans and the mortgage was expressed to be for securing the payment of that principal together with subsequent interest that may accrue annually. It also provided for compound interest. The learned Judges Shephard and Davies, after referring to the above facts observed: "These provisions are more consistent than otherwise with an intention which in itself is the most probable one when, to use the language of the Judicial Committee, regard is had to the ordinary expectations of persons entering into a mortgage transaction", and *post diem* interest was allowed.

In *Jivanna Pandithar* v. *Appalu* (15) the suit was on a bond executed in December 1881, which provided that interest should be paid every year and that the principal sum should be paid in December 1884. Shephard and Subramania Ayyar, JJ., were of opinion that *post diem* interest should be allowed on the ground that the stipulation for payment of interest annually showed that it was intended that interest should cease when the principal amount became payable.

In *Ghantayya* v. *Papayya* (5) the amount due on the mortgage was payable with interest at 12 per cent. in three annual instalments and on failure of one instalment the whole amount was to become due. There was no provision for *post diem* interest. It was held by Subramania Ayyar and Moore, JJ., that *post diem* interest was payable so long as the principal sum was improperly withheld and that it was certainly more reasonable to hold that the promise to pay interest in a document like the one they were considering was a promise to pay interest so long as the principal sum was improperly withheld and it does not raise any legal presumption in such cases but that it was only the adoption of a rule of construction. The learned Judges were of opinion that the decision of the Privy Council in *Mathura Das* v. *Raja Narindra Bahadur* (2) supported their view and were disposed to follow the view taken by Trevelyan and Banerjee, JJ., in *Moti Singh* v. *Ramohari Singh* (6).

In *Narasimhayya* v. *Srinivasayya* (16) Sadasiva Aiyar and Spencer, JJ., held that *post diem* interest was recoverable in case of mortgages where a definite term is fixed in the bond for repayment on the general promise of the debtor to be liable for interest. The learned Judges were of opinion that they were bound by the decision of the Privy Council in *Mathura Das* v. *Raja Narindra Bahadur* (2) and *Bindesri Naik* v. *Ganga Saran Sahu* (3) and by the decisions of the Madras High Court in *Ghantayya* v. *Papayya* (5) and *Ramanathan Chetty* v. *Nur Muhammad Narakayar* (17) to hold "that *post diem* interest is payable on the general promise by the debtor to be liable for interest though a definite term is fixed in the bond for re-payment of the principal and interest. If the liability under that general undertaking to pay interest is further extended by another undertaking (which may be called appurtenant to the principal undertaking), to pay interest upon arrears of interest and which further undertaking is found in the same document following the provision to pay interest, it is difficult to hold that the parties intended that only the principal undertaking should apply to the question of the liability for *post diem* interest and not the appurtenant undertaking also".

In *Thaithottathil Pokkar* v. *Ramachandra Shenoy* (18) it was held by Sir John Wallis, O. C. J., and Seshagiri Aiyar, J., that *post diem* interest may be granted by way of damages but that compound interest is not chargeable after the date mentioned in the document.

In *Daudbhai Rambhai* v. *Daudbhai Allibhai* (7) a suit was filed in 1882 to redeem a mortgage effected in 1833. There was no period fixed for payment and the First Court decreed interest from the date of the document to the date of

(15) 22 M. 339; 8 Ind. Dec. (N. S.) 241.

(16) 52 Ind. Cas. 313; 36 M. L. J. 118
(17) 11 M. L. J. 183.
(18) 26 Ind. Cas. 126; 16 M. L. T. 478.

redemption. On appeal the District Judge held that interest could only be awarded for a period of six years. In the course of the argument it was contended that the mortgagee could not claim interest for more than twelve years under Art. 132 of the Limitation Act. Scott and Jardine, JJ., held that interest was payable till the date of redemption.

In *Motan Mal* v. *Mahomed Bakhsh* (8) a Full Bench of that Court held that where a mortgage contains no express provision for payment of interest after the due date, there is no presumption one way or the other as to payment of *post diem* interest, that the determination of the question must depend entirely upon the interpretation of the document that the mortgagee is, however, entitled to damages on account of the failure to pay the debt at the stipulated time, the measure of damages *prima facie* being the same, as the interest agreed upon and that in cases where the mortgagee is the plaintiff he can sue to recover *post diem* interest only for the period prescribed by the law of limitation applicable to a suit for compensation for breach of contract but that if the mortgagee is a defendant in an action he is entitled to recover damages for the entire period during which the principal sum remained unpaid.

I am unable to find anything in the mortgage document now in question which necessarily indicates that the parties did not intend to pay *post diem* interest. The granting of the power of sale is only a remedy which is usually given and the mortgagee is not bound to exercise the power any more than he is bound to sue on the expiry of the due date under penalty of his losing subsequent interest.

I think that the plaintiffs who want to redeem the property mortgaged, are bound to pay interest *post diem* upto the date of redemption, credit of course being given to any sums which the defendants got from the mortgaged property during the period they were in possession.

The next question relates to the manner in which accounts are to be taken. The mortgagee being in possession, section 76 of the Transfer of Property Act applies to the period between 1882, when the Act was passed, and the date of the decree. As regards the period prior to that, the Transfer of Property Act only codifies the general principles of equity in such cases and the same principle would apply. Clause (h) of section 76 of the Transfer of Property Act after providing for the expenses incurred by the mortgagee enacts that the receipts from the mortgaged property after deducting the expenses mentioned in clauses (c) and (d) which relate to taxes and necessary repairs, should be debited against him in reduction of the amount (if any) from time to time due to him on account of interest on the mortgage money and that any surplus should be appropriated towards the reduction of the principal. In the present case I think accounts are to be taken in the manner prescribed by the section. There is no warrant for compound interest being allowed. The expenses should be deducted from that income of the property which is found by the Official Referee to have accrued and the balance should be appropriated first towards the interest due and if there is any surplus towards the principal.

The report of the Official Referee will be modified and a final decree will be passed in the light of my above observations. The accounts will be taken till this date. Time for redemption four months. In default of redemption the plaintiffs will be foreclosed. Costs reserved.

V. N. V. *Suit decreed.*

SARAT CHANDRA *v.* TARAK CHANDRA.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 198 OF 1923.

April 8, 1924.

Present:—Mr. Justice Newbould and Mr. Justice B. B. Ghose.

SARAT CHANDRA CHUCKERBUTTY AND ANOTHER—DEFENDANTS—APPELLANTS

versus

TARAK CHANDRA CHATTERJEE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Jurisdiction of Court—Company—Directors preventing co-Director from acting—Suit for injunction, whether maintainable.

A Civil Court can grant an injunction on the application of a Director of a Company restraining his co-Directors from wrongfully excluding him from acting as Director. [p. 406, col. 1.]

Mozley v. *Abston*, (1847) Phillips 790; 16 L. J. Ch. 217; 65 R. R. 520; 41 E. R. 833, distinguished.

Appeal against an order of the District Judge, Faridpur, dated the 28th February 1923, modifying that of the Munsif, Faridpur, dated the 30th November 1922.

Babu *Suresh Chandra Talukdar*, for the Appellants.

Babus *Asitaranjan Ghosh* and *Subodh Chandra Ray Chowdhry*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by four persons as plaintiffs against defendants Nos. 1 to 5, who are stated to be acting as Directors of the Company which was joined as defendant No. 6 on the ground that one of the plaintiffs had been prevented from acting as Director. The facts shortly stated are that at a meeting of the shareholders of the Company which was held on the 32nd *Ashar* 1329, the plaintiff No. 2 and defendants Nos. 1, 2 and 3 were elected Directors. The meeting was subsequently adjourned and the adjourned meeting was held on the 7th *Sraban* following. On that date on account of certain proceedings which we need not state in detail the election of the Directors held on the previous date was re-considered and a new election took place, the result of which was that defendants Nos. 1, 2, 3 and 4 were elected Directors and plaintiff No. 2 was not elected. There was also some other alteration as regards the election of the Assistant Managing Director. Several issues were framed, but the suit was dismissed by the Munsif on the last issue, that is, on the ground that the Court had no jurisdiction to try the suit. The plaintiffs appealed against that decree and the learned Judge on appeal held that the Court had jurisdiction to entertain the suit and remanded the case for the trial of certain issues to the First Court.

The defendants Nos. 2 and 3 have appealed to this Court and on their behalf the contention has been made that the Civil Court has no jurisdiction to entertain such a suit as this. It was also argued that having regard to the facts stated in the judgment of the Court of Appeal below the Court ought not to interfere in this matter.

With regard to the second question, we have only to observe that the learned Judge in the lower Appellate Court took the matter into his consideration as a question distinct from one of jurisdiction, and as we understand his judgment he has left the question open for decision by the Trial Court, that is to say, whether having regard to the circumstances of the case the Court will, in the exercise of its proper discretion, grant the relief claimed by the plaintiffs. That discretion is a judicial discretion to be exercised by the Court in consideration of all the circumstances of the case and it is liable to be reviewed on appeal by the Appellate Court. That matter is not properly before us now and we need not express any opinion on the question. The only question that is properly before us is whether the Civil Court has jurisdiction to entertain the suit. It is contended on behalf of the appellants that although there is no direct provision in the law that the Civil Court has no jurisdiction to entertain such a suit it is a matter of internal management of a Company with which the Court has no jurisdiction to interfere, and he cites in support of his contention the case of *Mozley* v. *Alston* (1) and certain other cases following that case. In that case, however, there were various reasons on which the Lord Chancellor sustained the demurrer of the defendant Company

(1) (1847) 1 Phillips 790; 16 L. J. Ch. 217; 65 R. R. 520; 41 E. R. 833.

and we need not go into the reasons of the judgment in detail. The concluding remark in the judgment shows that the Court did not exercise its equitable jurisdiction on a consideration of the facts of the case. As a matter of fact an injunction may be granted on the application of a Director restraining the plaintiff's co-Directors from wrongfully excluding him from acting as a Director, and we think that there is nothing which can be urged as excluding the jurisdiction of the Court from entertaining the suit. As we have said this question of jurisdiction is quite different from the question whether the Court will exercise its discretionary jurisdiction having regard to the circumstances of a particular case.

We hold that the Court has jurisdiction to entertain the suit as framed, and the appeal must be dismissed with costs. We assess the hearing fee at five gold *mohurs*.

Let the record be sent down without delay.

N. H. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 4 OF 1922.
May 7, 1924.

Present:—Mr. Kendall, A. J. C., and Mr. Pullan, A. J. C.

SITLA SAHAI—DEFENDANT—APPELLANT
versus
DHUM SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage—Usufructuary mortgage—Suit for redemption—Mortgagor receiving earnest-money and undertaking to execute sale-deed in favour of mortgagee—Parties, intention of—Interest in lieu of profits—Mortgagor, whether liable to render accounts—Transfer of Property Act (IV of 1882), s. 77.

A suit for redemption of a usufructuary mortgage was contested on the ground, among others, that the mortgagee had acquired the equity of redemption It appeared that the mortgagor executed in favour of the mortgagee a document reciting receipt of earnest-money and stating that the mortgagor would execute a sale-deed in respect of the mortgaged property six months before the expiry of the term of the mortgage. The mortgage-deed provided that the mortgagee shall appropriate the property in lieu of interest and shall bear no claim for interest against the mortgagor who in his turn would have no claim for profits against the mortgagee :

Held, (1) that the intention of the parties was not to effect a transfer of property but merely to contract for such a transfer; [p. 408, col. 1.]

(2) that this contract of sale had no effect on the status of parties and they remained after it, as before, mortgagor and mortgagee; [p. 408, col. 2.]

(3) that section 77 of the Transfer of Property Act applied to the case and the mortgagee was not liable to render accounts to the mortgagor. [p. 410, col. 1.]

Shafi-un-nissa v. *Fazalrab*, 7 Ind. Cas. 293; 7 A. L. J. 787, referred to.

Narain Das v. *Baij Nath Sahai*, 56 Ind. Cas. 692; 7 O. L. J. 231, distinguished.

Appeal against a decree of the Sub-Judge, Unao, dated the 3rd November 1921.

Messrs. *A. P. Sen* and *H. K. Ghosh*, for the Appellant.

Messrs. *Bisheshwar Nath*, *Lachmi Narain* and *Hargobind Dayal*, for Respondents.

JUDGMENT.—This appeal arises from a suit for the redemption of a mortgage-deed, dated August 14th, 1881, executed by Kalka Baksh Singh in favour of Balbhaddar Prasad, in lieu of a sum stated to be Rs. 9,000. The suit was contested on various grounds, one of which was that the mortgagee or his predecessor-in-interest, had acquired the equity of redemption. This question still remains to be decided. The learned Subordinate Judge gave the plaintiff a decree for redemption, and ordered that an account should be taken in order to ascertain what is due to the defendant for principal and interest on the mortgage-deed in suit, and on a deed of further charge. The defendant appealed on several grounds, but only three of them have been pressed in this Court. The first of these is the one we have already referred to, namely, the plea set forth in grounds Nos. 8 and 9 that the defendant has acquired the equity of redemption. If the appellant is successful in this plea, the suit for redemption will, of course, have to be dismissed.

The mortgage-deed in suit was a usufructuary one executed in 1881, but it

appears that there was some delay in putting the mortgagee in possession, as the property mortgaged, the entire village Gaunamau, had previously been mortgaged to one Ram Narain. The appellant's case is that on July 31st 1886, Kalka Baksh, the original mortgagor, executed a document by which he purported to transfer the equity of redemption to the original mortgagee, Balbhaddar Prasad. It may be as well to state that of the plaintiffs in the present suit, only two inherited their rights from the original mortgagor, the plaintiff No. 3, coming in as a transferee of a 14-annas share in these rights from plaintiffs Nos. 1 and 2, while plaintiff No. 4 bases his claim on a deed of transfer of the right of redemption of the property in suit, originally executed by Kalka Baksh in favour of one Baldeo Baksh in 1895, which had come to him by means of one succession and two sales. None of these people have any personal knowledge of the circumstances in which Kalka Baksh, the original mortgagor, is stated to have transferred his equity of redemption to the mortgagee.

The appellant has pointed in the first place to a document, Exhibit A10, dated July 1st, 1886. This is called by him a contract of sale. The respondents have referred to it as a receipt. It is executed by Kalka Baksh in favour of Balbhaddar Prasad, and the main portion of it is to the following effect:—

"You have paid me Rs. 250 as earnest-money. Now I sell to you for Rs. 19,000 the village Gaunamau, *Pargana* Maurawan, which is mortgaged to you with possession under instrument dated 14th, August 1881.".....I will execute the sale deed in respect of Gaunmau on a stamp paper six months before the "expiration of the term of the mortgage and get the same registered. If I in any way evade the execution of the sale-deed, you shall be entitled to summon me before the Registrar as well as the Court, and get me to execute the sale-deed. I write this letter instead of a receipt, and stamp it for your satisfaction" This document, it may be mentioned, was registered on 29th November, 1886. It is not suggested that it could operate as a valid deed of transfer of the property. It is argued, however, that it may be held to operate as an assertion by the mortgagee of his title as vendee with the acquiescence of the mortgagor. The following decisions have been referred to in support of the argument that a deed purporting to transfer property, which is not a valid deed of transfer owing to some legal defect, may nevertheless operate as an assertion of title by the transferee and have the effect of setting up adverse possession:—*Khedu Rai* v. *Sheoparsam Rai* (1), *Mahendra Bahadur Singh* v. *Chandrapal Singh* (2), *Varada Pillai* v. *Jeevarathnammal* (3), *Karnam Kandasami Pillai* v. *Chinnappa* (4), *Usuman Khan* v. *Nagalla Dasanna* (5), *Qadar Bakhsh* v. *Mangha Mal* (6). In continuation of this line of argument, the learned Counsel for the appellant has pointed to evidence showing that in 1887 one Kedar Nath sued Kalka Baksh for specific performance of a contract of sale in favour of the plaintiff, in respect of the property in suit. This contract between Kalka Baksh and Kedar Nath was made on September the 3rd 1886, and according to the allegations in the plaint the sum of Rs. 724-15 was paid by way of earnest-money by Kedar Nath to Kalka Baksh. Gaya Prasad, son of Balbhaddar Prasad deceased, was made a party to the suit. The plaint contains a reference to the document, numbered Exhibit A 10 in the present suit, but alleges that it was not really executed on 31st July 1886, and could, therefore, not be considered as prior to the plaintiff's contract. The appellant points to the written statements of two defendants, which clearly state that on 31st July 1886, Kalka Baksh had sold village Gaunamau for Rs 19,000 to

(1) 40 Ind. Cas. 121; 39 A. 423; 15 A. L. J. 366.
(2) 63 Ind. Cas. 284; 24 O. C. 155; 8 O. L. J. 622.
(3) 53 Ind. Cas. 901; 43 M. 244; (1919) M. W. N. 724; 10 L. W. 679; 24 C. W. N. 346; 38 M. L. J. 313; 18 A. L. J. 274; 2 U. P. L. R. (P. C.) 64; 22 Bom. L. R. 444; 46 I. A. 285 (P. C.).
(4) 62 Ind. Cas. 603; 44 M. 253; 40 M. L. J. 105; (1921) M. W. N. 1; 29 M. L. T. 167; 13 L. W. 423.
(5) 16 Ind. Cas. 694; 37 M. 545; 12 M. L. T. 330; 23 M. L. J. 360; (1912) M. W. N. 995.
(6) 73 Ind. Cas. 889; 5 L. L. J. 175; (1923) A. I. R. (L.) 495; 4 L. 249.

Balbhaddar Prasad. These pleadings are referred to as a second assertion of his title as vendee by the mortgagee, and of acquiescence by the mortgagor-vendor. Reference has also been made to a circumstance of 1895 when Baldeo Baksh Singh, who had acquired the right of redemption of the village in suit in that year, applied to deposit the mortgage-money due to the son of Balbhaddar Prasad under section 83 of the Transfer of Property Act. This application was opposed by the guardian of Balbhaddar Prasad's son on the ground that the latter was the owner of the right of the equity of redemption. The upshot of the argument is that the mortgagee, or his representatives, had been in possession of the equity of redemption with effect from 31st July 1886, and that his title had matured by July 1898. The objections to this view, which have been noticed by the Subordinate Judge, are based, it is said, only on certain admissions made by Balbhaddar Prasad's descendants, long after that gentleman's title as vendee had matured, to the effect that the rights, possessed by them, were only mortgagee rights, there may be some doubt as to the value of these admissions, but in the view we have taken it is unnecessary to go into that. The decisions which have been enumerated above, which go to show that an equity of redemption may be acquired by a mortgagee through the means of adverse possession, have all arisen from cases in which the intention of the parties was to make a transfer of property. In our opinion, the document of 1886 clearly shows that the intention of the parties was not to effect a transfer of property, but merely to contract for such a transfer. The document itself was not stamped as a transfer of property. It is certainly worded in a loose kind of way, to make it appear as if the mortgagor were actually selling the village. The undertaking, however, is to execute a sale-deed six months before the expiration of the term of the mortgage. The mortgage was not to expire until eight years from the date of execution, *i.e.*, 1889, so in any case it was not contemplated by the parties that the actual transfer of the equity of redemption should take place until three years after the contract of sale was made. There is not a shred of evidence to show that the sale-deed was ever executed, or that the consideration money, apart from Rs. 250 earnest-money, was ever paid. The statements made in the proceedings when Kedar Nath brought his suit in 1887, were apparently collusive and it is noticeable that the document, Exhibit A 10, on which the appellant relies, although it purports to have been executed on July 31st 1886, was not registered until Kalka Baksh had executed the other agreement to sell the equity of redemption to Kedar Nath. In short we have no hesitation in deciding that this contract of sale had no effect on the status of the parties, and that they remained after it, as before mortgagor and mortgagee.

The next point taken in appeal is that the respondents were not entitled to demand an account from the mortgagee appellant. This plea is set forth in the 5th, and to some extent in the 6th, and 13th grounds of appeal. It is claimed for the appellant, that according to the terms of the mortgage-deed, all the profits of the mortgaged property in addition to a sum of Rs. 109 a year, as set forth in the 13th clause of the deed, are due to the mortgagee, that he is not under the deed accountable to the mortgagor for anything, that consequently section 77 of the Transfer of Property Act applies to the case, and there is no obligation under section 76 for the mortgagee to render accounts to the mortgagor. In a Bench decision of the Allahabad High Court, *Shafi-un-nissa* v. *Fazalrab* (7), it was held that in the absence of an express stipulation therefor, a usufructuary mortgagee is not liable to render accounts to the representatives of the mortgagor in an action for redemption, even where the rents of the property are to be appropriated in lieu of a portion of interest only. The respondents rely on clauses (*b*), (*d*), (*g*) and (*h*) of section 76 of the Transfer of Property Act. The learned Subordinate Judge

(7) 7 Ind. Cas. 293; 7 A. L. J. 787.

has, in his judgment, considered the question of whether any interest was fixed on the principal mortgage-money, and he has come to the conclusion that interest was calculated and that the parties deducted from it the amount of the profits of the village, and finding that the latter fell short of the interest by Rs. 109 agreed that this amount was to be paid annually by the mortgagor in addition to the profits, as recited in the 13th clause of the deed. He deals with the obvious defect that no rate of interest was fixed in the mortgage-deed by pointing out that a rate of interest is mentioned in clauses 5 and 7 of the deed. Clause 5 provides, that if the mortgagee has to advance *takavi* to the tenants, he can recover the amount at the time of redemption, with interest at 14 annas 6 pies per cent per mensem. Clause 9 provides that if the profits of the mortgagee are decreased owing to the increase of revenue cesses or rates, then the mortgagee may demand the deficiency from the mortgagor every year, and if the amount is not made good, it shall be payable at the time of redemption with interest at the above rate. Further reference is made to interest in clause 7 and clause 11. In this connection the Subordinate Judge remarks, "Any how when there can be no doubt that a rate of interest was fixed on the principal money, but the rate is not expressly mentioned, and we find that a uniform rate was fixed on all other items, it is reasonable to conclude that that was the rate of interest on the principal amount also." He has, however, omitted to notice the fact that the preamble to the martgage-deed contains the clause "the said mortgagees shall now remain in possession of the village mortgaged till the period of mortgage, and after payment of revenue, *mal* and cesses, salary of *patwari* and *chaukidar* and village expenses, shall appropriate to themselves in lieu of interest all income arising out of the said vaillage, neither the mortgagee shall have any claim for interest against me, nor I, the mortgagor any for profits against the mortgagee and his heirs." The series of conditions that follow the preamble merely set forth the various additional liabilities of the mortgagor, and it is laid down in the 8th clause that at the time of redemption the mortgagor or his heirs shall have no claim for mesne profits. In short the deed clearly states that the mortgagee shall appropriate the profits in lieu of interest and shall also receive a sum of Rs. 109 a year in addition. No doubt the deed is an exceedingly hard one from the point of view of the mortgagor, but we have to deal with it as it stands, and it seems perfectly clear to us that section 77 of the Transfer of Property Act will apply. Under the terms of the deed there is nothing for the mortgagee to account for. The plaintiffs-respondents stated in paragraph 2 of the plaint "something in excess is now due to the plaintiffs," and in their prayer for relief, "If after rendition of accounts any sum is found due to the plaintiffs, it may be awarded to the plaintiffs from the defendant." On such vague allegations they base their claim to an account from the mortgagor. Reliance has been placed by the lower Court, and also in arguments before us on a decision of this Court published as *Narain Das* v. *Baij Nath Sahai*, (8) in which it was stated "It would require very clear words to induce a Court to put upon a document such a construction as would entitle the mortgagee to claim interest and such portion of the usufruct as might be in excess of it." In that case, however, there was in the deed a stipulated rate of interest, and it was provided that the annual profits of the mortgaged property, which were estimated at a certain fixed amount, would go towards payment of interest at the stipulated rate; and it was held that the mortgagor was entitled to an account from the mortgagee. Clearly that case is by no means parallel to the present one, where there is no stipulated rate of interest and it is expressly stated that the profits shall be taken in lieu of interest. The mortgagee is not claiming interest in

(8) 56 Ind. Cas. 692; 7 O. L. J. 231.

this suit at all. The Subordinate Judge in decreeing the suit ordered that an account should be taken as to what will be due to the defendant for principal and interest on the mortgage-deed as well as on the deed of further charge. We consider that this order requires some modification. It is true that it does not appear to contemplate any accounting in favour of the mortgagor, and as we hold that section 77 of the Transfer of Property Act applies to the case, and that the mortgagee is not liable to render accounts to the mortgagor, to this extent the decree of the lower Court is correct. The mortgagee in filing his written statement made several claims in addition to the deficit of the annual sum of Rs. 109, which had to be paid under clause 13 of the deed, and the sum due on the deed of further charge which had to be met. These items relate to alleged loss of profits owing to enhancement of revenue, arrears of rent from tenants, etc., which might or might not have been due under the terms of the mortgage-deed, and which have not been proved. They cannot be proved now, and they must not be considered in the account, which will have to be prepared in the Court below, in order to ascertain the exact sum which must be paid before the mortgage can be redeemed. The learned Counsel for the appellant agrees that the terms of the mortgage-deed were very hard, and that these items might be given up, as in any case they would have to be given up, for want of proof. The only items, therefore, that will have to considered will be those for the annual payment of Rs. 109 and the sum due on the deed of further charge, both of which carry interest at definite rate.

The plaintiffs have also appealed on the ground that the Subordinate Judge has found that there was failure of consideration of the mortgage to the extent of Rs. 542-4-2. It is perfectly clear both from the recital in the deed itself, and from the endorsement of the Sub-Registrar, that the entire consideration money was paid to the mortgagor. We have already stated that the property mortgaged was subject to a prior mortgage. The evidence shows that about a year after the execution of the mortgage in suit, both mortgagor and mortgagee sued the prior mortgagee for redemption. Balbhaddar Prasad deposited a sum of Rs. 8,445-8-6 in Court for the credit of the defendant, who contested the suit. When accounts were taken it was found that only Rs. 7,903-4-4 were due to the defendant. The balance of Rs 542-4-2 was subsequently withdrawn by Balbhaddar Prasad. This is all the evidence there is, and on this the lower Court has held that as this sum was taken by Balbhaddar Prasad, it must be deducted from the consideration money of Rs. 9,000. It is obvious that Balbhaddar Prasad had to withdraw the balance of the money because he had deposited it. The transaction was entirely separate from the payment of Rs 9,000 to the mortgagor a year previously, and in addition there is no evidence to show that Balbhaddar Prasad kept this sum. In view of the clear evidence that the sum of Rs 9,000 was paid to the mortgagor, we consider that this reduction should not have been allowed. In connection with this incident, we may deal with the cross-objection filed by the plaintiffs, who claim that in the circumstances given above, the whole sum of Rs. 1,096-11-8, by which the amount paid to the prior mortgagee fell short of the mortgage-money in this suit, should be considered not to have been paid to the mortgagor. We disallow this cross-objection for the same reason that we allow the defendant's appeal as regards the item of Rs. 542-4-2.

There is a further point in which we consider that it would be proper to modify the decree of the lower Court. That decree is in favour of all the plaintiffs. We have remarked earlier in the judgment that there are three sets of plaintiffs, and it appears that the claim of plaintiffs Nos. 1 to 3 and the claim of plaintiff No. 4, (which is based on a sale of the equity of redemption by Balbhaddur Prasad) are mutually ex-

clusive. It may not be absolutely illegal to give a joint decree to all the plaintiffs in these circumstances, and to leave it to them to settle their claims among themselves, but it might be inconvenient and it might lead to further litigation. We have put it to the learned Counsel who appears for all of them, and he agrees that the decree may be given only to plaintiff No. 4.

Subject to these modifications, therefore, we consider that the judgment and decree of the lower Court should be upheld, and we dismiss the appeal. As the appellant has failed in the substantial portion of his appeal, we order that he pay the costs of the plaintiffs-respondents.

K. S. D. *Appeal dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 32 OF 1923.

April 17, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Graham.

PROHLAD CHANDRA DAS AND OTHERS —DEFENDANTS—APPELLANTS

versus

BISWA NATH BERA—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s 6 (e)—Right to sue for accounts, whether assignable—Suit on basis of assignment—Transferability, test of—Right arising out of contract, whether transferable—Title-deed, delivery of—Right, whether transferred—Document, construction of—Intention of parties, when considered.

A right to sue for accounts is not assignable in law and, therefore, a suit on the basis of such assignment for recovery of the sum found due on the taking of accounts is not maintainable. [p. 413, col. 1.]

The test for determining the transferability or otherwise of an inchoate right is whether it can be attached in execution of a decree. [p. 413, col. 1.]

Section 6 (*e*) of the Transfer of Property Act applies not only to rights arising out of torts but also to rights arising out of contract. [*ibid.*]

Abu Mahomed v. *S. C. Chunder*, 1 Ind. Cas. 827; 36 C. 345; 13 C. W. N. 384, referred to.

The mere delivery of a document of title does not constitute a transfer of the right to the property. [p. 414, col. 1.]

Where a document is not itself ambiguous, the intention of the parties should not be taken into consideration. [*ibid.*]

Appeal against an order of the Additional District Judge, Midnapur, dated the 23rd November 1922, reversing that of the Munsif Fourth Court, Midnapur, dated the 29th September 1921.

Babu *Samarendra Kumar Dutt*, for the Appellants.

Babu *Joges Chunder Ray* (with him Babu *Santosh Kumar Pal*), for the Respondent.

JUDGMENT.

Suhrawardy, J.—This appeal arises out of a suit for accounts and is directed against an order of remand made by the learned Additional District Judge of Midnapur.

The facts of the case have been shortly stated as follows in the judgment of the Court of first instance:—

"This is a suit for accounts. The plaintiff's case is that the defendant No. 1 was *gomastha* under the *pro forma* defendant No. 2 in *Mouzas* Barkola and Mirzapore and that he executed a security *kabuliyat* for his work in favour of the *pro forma* defendant on the 7th *Kartik* 1306 *A. S.* mortgaging the plaint schedule properties and on the strength of that *kabuliyat* he did the *gomashta* work from *Kartik* 1306 to *Magh* 1327 *A. S.*, that on the 5th *Falgun* 1327 A. S., the *pro forma* defendant No. 2 sold off to plaintiff all his rights in the two *mouzas* together with his rights to get accounts and papers from defendant No. 1 and to recover from him the sums due thereon, by a registered *kobala* taking due and proper consideration thereof, that on the basis of the security *kabuliyat* this defendant No. 1 was to submit all collection papers and explain those and pay off all sums found thereon and he was to be liable for all rents and decretal dues barred by limitation owing to his default and to get 1 rupee 4 annas monthly pay for his work, that the defendant No. 1 submitted and explained his accounts and papers till 1309 *A. S.* to *pro forma* defendant No. 2 and from 1310 *A. S.* he submitted no accounts and papers to him except a *thoka* only of 1327 *A. S.* and as are per *hisab* given in schedule "*ka*" of

the plaint the plaintiff, on the basis of the *kobala* in his favour, asks for such accounts and papers provisionally valuing his claim at Rs. 937-15 annas 18¾ *gandas*. It is also stated in the plaint that after the plaintiff's *kobala* such accounts and papers were demanded from defendant No. 1 on 11th *Falgun* 1327 A. S. but no such accounts were submitted."

The learned Munsif on a construction of the deed of sale, held (*i*) that the plaintiff did not purchase the rights of defendant No. 2 under the mortgage *kabuliyat* executed by defendant No. 1 in favour of defendant No. 2; and (*ii*) that the plaintiff, if he purchased anything at all, purchased the right to sue for accounts, which is unassignable under section 6 (*e*) of the Transfer of Property Act. In the result he dismissed the suit. On appeal the learned Additional District Judge reversed both these findings and remanded the case for determination on the merits which, in the circumstances of this case, must mean for taking accounts from the defendant No. 1.

When the Courts below have differed on the construction of the deed of sale executed by the defendant No. 2 in favour of the plaintiff, it becomes necessary to closely examine the terms thereof. In the heading of the document it is stated that the sale is in respect of the *mouzas* belonging to defendant No. 2 together with back rents from tenants for a sum of Rs. 720 which is the full consideration for the transfer. In paragraph 2 after a description of the *mouzas* sold and their appurtenances the following passage appears:—

"And *tahbil* (cash) due to me and my dues from the *gomashta* together with the right of taking accounts from the *gomashta* and the right of taking the papers from him."

Paragraph 6 runs thus:—"If the *thoka* or the *karcha* of the year 1327 filed by the *gomashta* be not correct, you will make enquiries yourself and will ascertain the correct amount; you will be entitled to realise the said amount together with the amount realised by the *gomashta* from the date of his *kabuliyat* and the rents which had become time-barred through the negligence of the *gomashta* together with damages according to your calculation or as will be ascertained by Court from the said *gomashta*." Reading these clauses together and regard being had to the general tenor of the deed, it seems clear that what the plaintiff purchased was the right to take account from the defendant No. 1 and to recover such sums as might be found to be due from him upon an account being taken. The deed does not specify any consideration for the transfer of this right and the amount recoverable from the defendant No. 1, if any, is uncertain and dependent upon the taking of accounts. Indeed, as the learned Munsif has observed, the suit is for accounts tentatively valued at a certain sum for purposes of jurisdiction and Court-fee. The observations of the learned District Judge on the point seem to be somewhat inconsistent and inaccurate. He says:—"The present suit is one to recover sums of money realised on behalf of defendant No. 2 but embezzled by defendant No. 1. In view of the allegation that the respondent has submitted no accounts, it is not possible for the plaintiff to say what precise sum is due until an account is taken. Although the plaintiff has been compelled to sue for accounts his claim is really one for a sum of money received on behalf of defendant No. 2 and misappropriated by defendant No. 1." He further observes that the transfer was not of a mere right to sue but of a right to a specific sum of money which has been embezzled. It seems to me, however, that the transfer was not of a right to a specific sum but of a right to call for accounts, and to recover any sum at present indefinite which may be found to be due on the taking of accounts. The learned Vakil for the respondent has argued on the same lines and contends that what the plaintiff purchased was the right to money due from defendant No. 1 which is an "actionable claim." It is conceded that a right to sue for accounts is not assignable in law but it is maintained that the right to a sum of money found due on the taking of accounts is so assignable. I am unable to accede to the proposition of law thus broadly stated. To so hold would be to encourage an evasion of the law which

prohibits the transfer of a right to sue for accounts. One useful test for determining the transferability or otherwise of an inchoate right is whether it can be attached in the execution of a decree. That the right to demand accounts or to an indefinite sum which may or may not be found due on the taking of accounts cannot be attached will not, I think, be disputed.

It has been further argued that section 6, clause (*e*) declares rights to damages arising from torts to be incapable of transfer, but does not prohibit the transfer of rights or obligations *ex contractu*. This is not an altogether correct view of the law. Rights arising out of torts are undoubtedly unassignable but there may also be rights arising out of contracts which offend against the rules as formulated in the section. *Abu Mahomed* v. *S. C. Chunder* (1). This is indicated by the alteration in section 6 (*e*) in 1900 by eliminating the words "for compensation for a harm illegally caused," which formed part of the clause before the amendment.

On a proper construction of the document and regard being had to the frame of the suit it seems to me that the plaintiff is not entitled to maintain the suit since he has purchased, if anything, a mere right to sue for accounts. A number of cases, English and Indian, have been cited by the learned Vakils on both sides but I do not consider it necessary to refer to them, as non of them is exactly in point and every case must be decided with reference to its own particular facts. Some of the reported cases may, however, be briefly referred to. In *Pansulari Venkatasawmi* v. *Mentana Ramachandra Raju* (2) it was held that a mere right to recover damages for the negligence of an agent in failing to collect rent is not assignable. There does not seem to be much difference in principle between failure to collect rent and failure to pay rent collected. A claim for mesne profits is not transferable. *Shyam Chand Koondu* v. *The Land Mortgage Bank of India, Ltd.* (3) and *Kocharla Seetamma* v. *Pillala Venkataramanayya* (4). The principle followed in these cases is applicable in the present case. The learned Additional District Judge has relied on the case of *Madho Das* v *Ramji Patak* (5). There a sum of money was in the hands of the agent on his principal's account to be spent for certain purposes. It was held that that sum or so much of it as had not been actually spent could be attached in execution of a decree. That case, having regard to its particular facts, is no authority for the view which found favour with the learned Judge. The learned Vakil for the respondent has laid great stress on the case of *County Hotel and Wine Co.* v. *London and North-Western Railway Co.* (6) If anything, that case supports the view that we have adopted. There the subject of transfer was an option under a lease and McCardie, J., held that a mere right of litigation cannot be transferred.

In view of the conclusion at which I have arrived above the question whether the plaintiff purchased the right of the defendant No. 2 under the security *kabuliyat* ceases to be of any importance. I may state, however, that I am unable to agree with the view of the learned Additional District Judge on this point also. The *kobala* does not mention the transfer of defendant No. 2's right as mortgagee, nor does it contain any description of the properties covered by the *kabuliyat*. The only mention thereof is to be found in a schedule at the end of the document. The learned Judge held on two grounds that the defendant No. 2 transferred his lien on the property mortgaged to him by the defendant No. 1, (1) that that was the intention of the parties and (2) that the mortgage *kabuliyat* was delivered by defendant No. 2 to the plaintiff at the time of the execution of the *kobala*. I am unable to accept

(1) 1 Ind. Cas. 827; 36 C. 345; 13 C. W. N. 384.
(2) 18 Ind. Cas. 520; 38 M. 138; 24 M. L. J. 298; 13 M. L. T. 218; (1913) M. W. N. 285.
(3) 9 C. 695; 12 C. L. R. 440; 4 Ind. Dec. (N. S.) 1112.
(4) 21 Ind. Cas. 387; 38 M. 308; 14 M. L. T. 319; 25 M. L. J. 410; (1913) M. W. N. 918.
(5) 16 A. 286; A. W. N. (1894) 84; 8 Ind. Dec. (N. S.) 186.
(6) (1918) 2 K. B. 251; 87 L. J. K. B. 849; 119 L. T. 38; 34 T. L. R. 393.

the learned Judge's reasoning. Where the document is not itself ambiguous, the intention of the parties should not be taken into consideration and the mere delivery of a document of title does not constitute a transfer of the right to the property. There are certain well-recognized rules relating to the mode of transfer of interest in immoveable properties and transfer of such interest can be effected in no other way.

In the above view of the matter the appeal succeeds. The judgment and decree of the lower Appellate Court are set aside and those of the First Court restored with costs, three gold *mohurs*.

Graham, J.—I agree.

K. S. D. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 949 AND 1341 OF 1921.

March 26, 1924.

Present:—Mr. Victor Murry Coutts-Trotter, Chief Justice, and Mr. Justice Ramesam.

KUMMATI VEETTIL KOTTAPARAMPATH MALIYAKKAL KUNHIBI PLAINTIFF (DIED) BY HER LEGAL REPRESENTATIVES—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF MALABAR—DEFENDANT—RESPONDENT.

Madras Land Encroachment Act (III of 1905), ss. 6, 14—Notice to quit—Possession not disturbed—Limitation, when commences—"Deeming themselves aggrieved by proceedings", what amounts to.

A person who has had notice of eviction from the Government under section 6 of the Madras Land Encroachment Act but continues to remain in undisturbed possession cannot be held to have been evicted so as to render the period of limitation under section 14 of the Act applicable to a suit by him against the Government. Where there are a series of proceedings against the person under the Act, being mere notices without any further attack against his title and enjoyment, it is open to him to choose the last of such proceedings and "deem himself aggrieved" by that and not by the earlier proceedings.

The mere fact that such a person applied to review an earlier notice to quit does not necessarily show that he deemed himself aggrieved by the notice when he does not allege it in his plaint as his cause of action.

Secretary of State v. *Illikkal Assan*, 32 Ind. Cas. 755; 39 M. 727; 3 L. W. 228; 30 M. L. J. 255; 19 M. L. T. 157; (1916) 1 M. W. N. 167, distinguished.

Second appeals against the decree of the District Court, South Malabar, in Appeal Suit Nos. 3 of 1921 and 1053 of 1920 respectively, preferred against the decrees of the Court of the Principal District Munsif, Calicut, in Original Suit Nos. 691 and 605 of 1919.

Mr. *T. S. Visvanatha Iyer*, in S. A. No. 949 of 1921, Mr. *P. S. Chandrasekara Iyer*, in No. 1341 of 1921, for the Appellant.

The Government Pleader, for the Respondent in both.

JUDGMENT.

S. A. No. 949 OF 1921.

Coutts-Trotter, C. J.—In this case the plaintiff was in occupation of some land cultivating it by a tenant. Government claimed that it was their land, and on the 17th of April 1919 they sent her a notice to quit under section 6 of the Land Encroachment Act, III of 1905. Nothing happened for a time. In May 1919 the plaintiff put in a petition for the review of this notice to the Deputy Collector. On the 18th of September 1919 the Deputy Collector dismissed the review petition. On the 2nd of October 1919 an order which amounted practically to a notice to quit went to the plaintiff. On the 22nd of December 1919 the plaintiff filed the present suit for vindicating her alleged rights of ownership in the Civil Court.

The Courts below have declared that suit to be barred by limitation by reason of section 14 of the Act which says "Nothing contained in this Act shall be held to prevent persons deeming themselves aggrieved by any proceedings under this Act except as hereinbefore provided, from applying to the Civil Courts for redress." (That is what this woman has done). "Provided that the Civil Courts shall not take cognisance of any suit instituted by such persons for any such cause of action unless such suit shall be instituted within six months

from the time at which the cause of action arose." Then followed two Explanations; "The cause of action shall be deemed to have arisen (*a*) in respect of any assessment or penalty, (that is a provision under another section which I have not dealt with) "on the debt on which such assessment or penalty was levied; (*b*) in respect of eviction or forfeiture, on the date of eviction or forfeiture." Section 6 contains the machinery for eviction and it is provided that a notice shall be served on the person in occupation requiring him to vacate the land and, if such notice is not obeyed, by removing or deputing a subordinate to remove any person who may refuse to vacate the same the Collector may give effect to it. How in the teeth of that provision any body can venture to argue that a person who has had notice under section 6 and in spite of it remains in undisturbed possession has been evicted from the land, I cannot understand, and I do not think it can fairly be said that any judgment of this Court has gone that length. But the case is put in another and a slightly, I will not say more plausible but a slightly, less unarguable way. It is said that the illustrations contained in the Explanation to section 14 of the Act are not exhaustive and that a person may be aggrieved by proceedings under this Act when those proceedings do not amount to an assessment, penalty, eviction or forfeiture. Assuming that argument to be sound, the plaintiff in this case put forward as the thing, which she deemed to be aggrieved by, not the notice at all which might have been a mere *brutum fulmen*, which might have resulted in nothing whatever in the future, but by a tangible definite order of the Deputy Collector received by her on the 2nd of October 1919 ordering her to quit. How it can be said that the plaintiff must be deemed to be aggrieved by the earliest stage of the proceedings, when she did not choose to be aggrieved by it, I cannot appreciate. It is argued that though she says she was not aggrieved by the notice she was obviously aggrieved by it because she petitioned the Deputy Collector to withdraw it or to review it. It seems to me that, assuming that to be so, it does not in the least preclude her from saying: "Well, if I was aggrieved by the notice in the sense that I put in a petition against it, that is not what I am questioning in this suit here. I am aggrieved and for the purposes of this suit I am solely aggrieved by the order of the Deputy Collector of the 2nd of October 1919." How anybody can deny her the right to elect as to which stage of the proceedings she should complain against passes my comprehension. In my judgment, the Full Bench decision in *Secretary of State* v. *Illikkal Assan* (1) has no bearing on this point whatever because there was a question as to when there had been an infringement of the plaintiff's right; and the plaintiff had a continuous chain of proceedings which began by his actually paying money out of his pocket in answer to a demand. To my mind, the Full Bench decision has no bearing on this point whatever.

The appeal must be allowed and the suit remanded for re-trial. The appellants will have their costs of this appeal and in the lower Appellate Court in any event. The Court-fee will be refunded to the appellants,

S. A. No. 1341 OF 1921.

Coutts-Trotter, C. J.—Same judgment as in the connected S. A. No. 949 of 1921. There will be a similar order as to costs and refund of Court-fee.

S. A. No. 949 OF 1921.

Ramesam, J.—I entirely agree. Assuming that all the causes of action that may arise under the Act are not exhausted by the Explanation to section 14 and assuming that a declaratory suit filed on account of proceedings taken under the Act also falls under section 14, it is open to the plaintiff to deem herself aggrieved by whichever one of several proceedings taken against her she may choose. In the case in *Secretary of State* v. *Illikkal Assam* (1) the plaintiff actually made a payment. In a case where a penal assessment has been

(1) 32 Ind. Cas. 755; 39 M. 727; 3 L. W. 228; 30 M. L. J. 255; 19 M. L. T. 157; (1916) 1 M. W. N. 167.

paid it may be that it is not open to a plaintiff to say that he does not deem himself aggrieved by that payment, that he can ignore that payment and that he deems himself aggrieved by a later proceeding, because payment of money to another person in token of his proprietorship is practically a loss to himself and a recognition by him of the adverse title of the other. But in a case where there are a series of proceedings, being mere notices without any further attack against the title and enjoyment of the plaintiff, it is open to the plaintiff to choose the last of these things and say that he deems himself aggrieved by this and not by the earlier proceedings. I am aware there are some cases which, though they may not arise under the Act, imply that it is not open to a person seeking a declaration to so choose, but I do not agree with them. In this case, in paragraph 9 of the plaint, the plaintiff has clearly stated that the dismissal of her petition by the Deputy Collector and the communication of the 2nd of October 1919 is the proceeding on which the cause of action arose, which means that she felt herself aggrieved only by this and not by any earlier proceedings, for a declaratory suit. That being so, this second appeal must be allowed and I agree to the order proposed by my Lord the Chief Justice.

S. A. No. 1341 OF 1921.

Ramesam, J.—I agree. It is contended by the learned Government Pleader in this case that there is an admission in paragraph 4 of the plaint that the plaintiff deemed himself aggrieved on the 19th of March 1919; but seeing that a declaratory suit is an optional one and not compulsory, the view I take in such matters is that a person who wishes to file a declaratory suit has the right to say which of several proceedings taken against him (not amounting to adverse possession or enjoyment) is the particular proceeding by which he deems himself aggrieved for the purpose of filing a declaratory suit. In this case, it may be that the plaintiff was aggrieved by several proceedings, but of these she chooses only the proceeding of the 26th of May 1919 as the one by which she felt herself aggrieved for the purpose of filing the declaratory suit and not the earlier proceeding of the 19th of March 1919. That being so, this second appeal is governed by the judgment in S. A. No. 949 of 1921.

V. N. V. *Appeals allowed.*

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 138 AND 139 OF 1923.

November 23, 1923.

Present :—Mr. Justice Walmsley and Mr. Justice Suhrawardy.

KALI CHARAN BANIK—DEFENDANT—APPELLANT

versus

MANI MOHON SAHA BANIK—PLAINTIFF—RESPONDENT.

Stamp Act (II of 1899), ss. 35 (a), 36, Sch. I, Art. V, cl. (c)—Reference to arbitration not stamped—Arbitrators, power of—Procedure—Suit on award—Reference, whether can be challenged—Admission of reference on payment of penalty—Reference to arbitration properly stamped—Refusal of one of several Arbitrators to act—Substitution of another Arbitrator—Document, whether requires stamp.

On a reference to arbitration not duly stamped, the Arbitrators can proceed to levy the duty and penalty under section 35 (*a*) of the Stamp Act, if the defect is brought to their notice, but in the absence of such notice, when once they have taken up their enquiry on the basis of the reference, the admission of the reference before them can no longer be called in question before them in view of section 36 of the Act. [p. 417, col. 2.]

But when a suit is brought on the award subsequently, the jurisdiction of the Arbitrators can be challenged on the ground that there was no valid reference, and it becomes the duty of the Court to investigate the assertion, who again is entitled, on ascertaining the true facts, to proceed under section 35 (*a*) of the Stamp Act. [*ibid.*]

Per *Suhrawardy, J.*—Where on a reference to arbitration duly stamped, one of the Arbitrators declines to act, and another person is substituted in his place by a second document, the latter document is not a reference to arbitration, but a letter of nomination or appointment of the substituted arbitrator. Such a document does not require to be stamped under the Stamp Act. [p. 418, cols. 1 & 2.]

Appeal against an order of the Subordinate Judge, Sixth Court, Dacca,

dated the 30th of November 1922, reversing that of the Munsif, Fourth Court, Dacca, dated the 13th August 1921.

Dr. *Sarat Chandra Basak* and Babu *Kanai Lal Saha*, for the Appellant.

Babu *Rupendra Coomer Mitter*, for the Respondent.

JUDGMENT.

Walmsley, J.—These two appeals arise from two suits. Kali Charan, the appellant, was plaintiff in one suit, and Mani Mohon, the respondent, in the other, and each made the other defendant. The dispute was about a strip of land between their two houses. Kali Charan alleged that the dispute had been referred to Arbitrators and decided in his favour, and he asked to have a decree drawn up in accordance with the award. Mani Mohon asserted that there had not been any valid reference to arbitration and claimed a declaration of his title to the strip of land. He also sought for a declaration of his right of way over an adjoining strip of land.

The Trial Court found in favour of Kali Charan, overruling all Mani Mohon's objections to the reference, and holding with regard to the alleged right of way that such user as had been proved was of a permissive nature.

Mani Mohon appealed and the learned Subordinate Judge endorsed the Munsif's findings about the right of way, but held that the Arbitrators' award could not be made the basis of a decree. On this view he ordered that the cases should be remanded for trial on the merits, and it is against this order of remand in each suit that the appeals are directed.

There is only one point for consideration so far as the award is concerned, and it is this. The parties drew up a reference to Arbitrators and affixed an eight annas stamp. One of the three Arbitrators named in the reference declined to act, and another person was by written agreement appointed in his place. This document did not bear a stamp, and the argument that found favour with the lower Appellate Court was that the absence of a stamp on the later document rendered the whole of the arbitrator's proceedings void and their award invalid. The fact that the Munsif took action under section 35 (*a*) of the Stamp Act (II of 1899) in his opinion made no difference.

It is urged on behalf of Kali Charan that the learned Judge's view is erroneous. It was suggested that the reference might possibly be treated as coming within clause (*c*) of section 35, but that argument is not tenable; for it cannot be said that the agreement was effected by correspondence consisting of two or more letters. More emphasis is laid upon the argument that before the Munsif received the reference in evidence he acted under section 35 (*a*), and that, consequently, the admission cannot again be called in question (section 36). To this argument the answer is that it was the Arbitrators who received the reference in evidence or acted upon it, and that it was only they who could levy the duty and a penalty under section 35 (*a*).

It appears to me that the proceedings before the Arbitrators and the proceedings in Court must be kept distinct. So far as the Arbitrators are concerned they might have proceeded under section 35 (*a*) had the defect been brought to their notice: they did not do so, and when once they had taken up their enquiry on the basis of the reference, the admission of the reference by them could no longer be called in question before them (section 36), and Mani Mohon could not have urged before them that they had no authority to make the award.

Then came the suit on the award, and then I think it was open to Mani Mohon to challenge the jurisdiction of the Arbitrators on the ground that there was no valid reference; and it became the duty of the Court to investigate the assertion, and the Court was entitled on ascertaining the true facts to proceed under section 35 (*a*).

The question has been discussed recently in the case of *Runglal Kalooram* v. *Kedar Nath Kesriwal* (1) and the view taken by the learned Judges was very much in accordance with what I have said above. The earlier decisions that

(1) 77 Ind. Cas. 845; 27 C. W. N. 513.

were cited before us hardly afford any help.

I have dealt with the question on the footing that a second stamp was necessary on the document by which the parties agreed to a different Arbitrator: but I feel considerable doubt about that. It is not necessary, however, for one to deal further with that question because in the view I take the Munsif's procedure removed any defect that there may have been in the reference.

My conclusion is that the First Court was right and the Appellate Court was wrong. I, therefore, set aside the orders of remand, and direct that the decrees of the First Court be restored with costs in all Courts. The hearing-fee in this Court is assessed at one gold *mohur* in each case.

The cross-appeals are concluded by the findings of fact and are dismissed without any order as to costs.

Suhrawardy, J.—I am of the same opinion. As an additional reason for the view that we have adopted, I may refer to the article of the Indian Stamp Act which makes it obligatory that a reference to arbitration should be stamped. It is conceded that the stamp required on a document embodying a reference to arbitration is eight annas under Art. V, clause (c) of Schedule I of the Indian Stamp Act (II of 1899). That Article says that an agreement or a memorandum of an agreement should be stamped with a particular stamp, and in clause (c) it says that where there is no provision otherwise made it must be stamped with a stamp of eight annas. It has also been held that a document authorising an arbitration should be stamped as such, that is, with a stamp of eight annas. It is, therefore, clear that a document which purports to be an agreement to refer a dispute between parties to arbitration should be stamped. That document, in my opinion, is the original document under which the parties agree that the matters in difference between them should be referred to the arbitration of certain persons. Any subsequent variation in the names of the Arbitrators will not be a reference to arbitration but would, in my opinion, be only a substitution of the name of an Arbitrator in place of another or if I may say so, the document asking for the substitution may be called a letter of nomination or appointment for which the Stamp Act does not provide for any stamp. See *Ganga Ram Kushaba* v. *Narayan Babaji* (2). In this view of the matter, I think that the letter to which exception has been taken by the Court of Appeal below was not one which required any stamp duty. I agree in the order that the appeals should be allowed with costs.

N. H. *Appeals allowed.*

(2) 19 B. 32; 10 Ind. Dec. (N. S.) 22.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 38 OF 1923.

February 25, 1924.

Present:—Mr. Justice Lentaigne and Mr. Justice Carr.

MRS. S. G. M. SAMSON AND OTHERS —APPELLANTS

versus

SILVARAN AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, applicability of—Remedy not availed of.

Section 151, Civil Procedure Code, does not apply to a case where another remedy was open and was not availed of. [p. 419, col. 1.]

Civil miscellaneous appeal from an order of the District Court, Yamethin, in C. R. No. 5 of 1923.

Mr. *Halkar*, for the Appellants.

Mr. *P. N. Chari*, for the Respondents.

JUDGMENT.—The appellants were the plaintiffs in a suit pending before an Additional Judge of the District Court of Yamethin, sitting at Pyinmana. It appears that from the 18th December, 1922, consequent on the re-organisation of the Courts, this Judge ceased to sit at Pyinmana and that all cases before him had to go before the District Court at Yamethin, where the District Judge and another Additional Judge sat.

The plaintiffs' case was fixed for the 22nd December and on that date it was called by the Additional District Judge

at Yamethin. Neither party appearing the suit was dismissed for default. In the circumstances the Judge would have exercised a sounder discretion had he postponed orders until he had ascertained that the failure to appear was not due to a mistake arising out of the change of venue. But it may be noted that the suit had been adjourned to give the parties time to negotiate a compromise. On the 29th January 1923, the appellant filed an application supported by an affidavit, to re-open the case. This was allowed by the Judge on the 8th February *ex parte*, without notice to the respondent. Notice for hearing of the suit was then issued. The first notice being unserved a fresh one was issued for the 21st March. On that date the respondent filed an application for review of the order setting aside the dismissal for default.

The Additional District Judge was then very ill and he afterwards died with the result that the application was heard by his successor. The review was allowed and the order setting aside the dismissal of the suit was itself set aside. This order was based on the fact that the application to set aside the dismissal was time-barred under Art. 163, Limitation Act.

It is clear the application was in fact time-barred, and it is also clear that section 5 of the Limitation Act does not apply to such an application and that the Court had the inherent power under section 151 of the Civil Procedure Code to set aside the dismissal of the suit. I do not think that that power extends to a case in which the aggrieved party had had a definite remedy open to him but has failed to resort to it within the time allowed by law and so has lost it.

Moreover, on the petition of the 29th January it does not appear that the appellants are entitled to relief. It is clear from that petition itself and from affidavit annexed to it that the appellants were fully aware that all suits were to be taken up at Yamethin, and that their Pleader was in fact at Yamethin on the 22nd December and attended the Court of the Additional District Judge. He could very easily have found out by which Judge the suit would be heard and even if he failed to do so before it had been dismissed either he or the appellants themselves could very easily have discovered afterwards that it had been dismissed and have filed the application within the period allowed by law.

It is noticeable that no affidavit by the Pleader himself was filed.

I would dismiss this appeal with costs. Advocate's fee three gold *mohurs*.

N. H. *Appeal dismissed.*

CALCUTTA HIGH COURT.

In re APPEAL FROM ORIGINAL DECREE No. 234 OF 1922.

August 10, 1923.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Chotzner.

Haji TELLER RAHMAN—RECEIVER

versus

GOLAM GONE—OPPOSITE PARTY.

Receiver — Account — Vouchers — Uneconomical management—Objection—Proper course for dissatisfied party.

A Receiver should produce vouchers in support of his expenditure. The vouchers will be admitted as evidence of the payment of the sums therein specified, and credit given to the accounting party in the account, unless the other side shows some reasonable ground for impeaching the vouchers; but if any party objects, the affidavit or oral evidence of the person who received the money is required, and if this cannot be had, then proof must be given of his signature to the voucher. [p. 420, col. 1.]

Cookes v. *Cookes*, (1863) 11 W. R. (Eng.) 871; 9 Jur. (N. S.) 843; 3 N. R. 90; 134 R. R. 813 and *Bingham* v. *Clanmorris*, 1 Moll. 20, relied on.

The question that the management by a Receiver has not been economical does not properly arise when he submits his account in order that it may be passed. In other words, questions with regard to the soundness or prudence of the system of management adopted by a Receiver or charges of wilful default or neglect are not matters that can be disposed of in the shape of exceptions to account. [p. 420, col. 2.]

Coomar Sattya Sankar Ghosal v. *Ranee Golapmonee Debee*, 5 C. W. N. 223, relied upon.

The proper course open to a party litigant, who is dissatisfied with the mode of management, is to draw up a scheme and to submit it for the orders of the Court. [*ibid.*]

Babus *Mahendra Nath Ray* and *Mohes Chandra Banerjee*, for the Receiver.

Dr. *Dwarka Nath Mitter* and Babu *Heramba Chandra Guha*, for the Opposite Party.

JUDGMENT.—These are exceptions to the accounts submitted by the Receiver appointed by this Court in respect of the subject-matter of Appeal from Original Decree No. 234 of 1922. The order was made for the appointment of the Receiver on the 26th March, 1923, and we directed him to submit his accounts every three months. The accounts for the first three months are now before us. There is an abstract statement which shows that the receipts exceeded the expenditure by Rs. 138-5 anns. The account books from which the abstract has been prepared have also been produced. The objections taken to the accounts may be grouped under two categories, namely, first, that the vouchers in support of the expenditure have not been produced: and, secondly, that the management has not been economical.

As regards the first objection, it has not been disputed that the vouchers must be produced. The principles applicable are stated in the well-known work by Daniel on Chancery Practice, 1914, Volume I, page 920: "The account is vouched by the production of the proper vouchers such as receipts. It seems that the vouchers will be admitted as evidence of the payment of the sums therein specified, and credit given to the accounting party in the account, unless the other side shows some reasonable ground for impeaching the vouchers; but if any party objects, the affidavit or oral evidence of the person who received the money is required, and if this cannot be had, then proof must be given of his signature to the voucher."

This is supported by the decisions in *Cooks* v. *Cooks* (1) and *Bingham* v. *Clanmorris* (2). A similar view was adopted by this Court in the case of *Baroda Kanta Sarkar* v. *Rashmani Dasi* (3) where it was pointed out that the Receiver must not merely show that he paid certain sums as litigation expenses, but also furnish details of expenditure. The Receiver before us has undertaken to produce the vouchers in the course of a week. When they are produced they will be open to examination by all the parties concerned.

As regards the second objection, we are of opinion that the question does not properly arise when a Receiver submits his acconnt in order that it may be passed. In support of this view reference may be made to the decision of Mr. Justice Sale in the case of *Coomar Sattya Sankar Ghosal* v. *Ranee Golapmonee Debee* (4) where it was pointed out that the questions with regard to the soundess or prudence of the system of management adopted by a Receiver or charges of wilful default or neglect are not matters that can be disposed of in the shape of exceptions to account. In the present case, the Receiver states that he has continued the management of the estate in the condition in which it was handed over to him. In these circumstances, the proper course open to a party litigant who is dissatisfied with the mode of management is to draw up a scheme and to submit it for the orders of the Court.

The matter is adjourned till Friday next.

S. D. *Order accordingly.*

(1) (1863) 11 W. R. (Eng.) 871; 9 Jur. (N. S.) 843, 3 N. R. 90; 134 R. R. 813.
(2) 1 Moll. 20.
(3) 28 Ind. Cas. 25; 20 C. L. J. 113.
(4) 5 C. W. N. 223.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 955 OF 1921.
February 8, 1924.
Present:—Mr. Justice Spencer, Offg. Chief Justice.

NAMININI CHENGAMA NAIDU AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

N. GANGULU NAIDU—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI,

NAMININI CHENGAMA NAIDU *v.* GANGULU NAIDU.

rr. 4, 17, O. XXII, r. 4—Partnership suit—Money-decree against partners—Appeal by some only—Legal representative of non-appealing partner—Abatement of appeal.

No order can be made to the prejudice of any person who is interested in a common interest, such as a partnership, without that person or his legal representative being on the record. [p. 422, col. 1.]

It is not necessary in every appeal arising out of a suit for partition or dissolution of partnership to have all the parties on the record, especially for the purpose of setting aside a money-decree where no taking of accounts *inter se* is required and no relief is claimed from the party not on the record. But if the Court of Appeal finds it necessary to have a party on the record, the Court may order him or his legal representative to be joined and may dismiss the appeal if the appellant fails to comply with the order. [p. 422, col. 2.]

Raj Chunder Sen v. *Ganga Das Seal and Ramgati Dhur* v. *Raj Chunder Sen*, 31 C. 487; 1 A. L. J. 145; 8 C. W. N. 442; 31 I. A. 71; 14 M. L. J. 147; 8 Sar. P. C. J. 623 (P. C.), distinguished.

Renga Srinivasa Chari v. *Gnanaprakasa Mudaliar*, 30 M. 67; 2 M. L. T. 36, *Somasundaram Chettiar* v. *Vaithilinga Mudaliar*, 41 Ind. Cas. 546; 40 M. 846; 6 L. W. 253 and *Sri Nath Pal* v. *Hari Charu Pal*, 7 C. L. J. 266, referred to.

Second appeal against a decree of the District Court, Chittoor, in Appeal Suit No. 61 of 1919, preferred against a decree of the Court of the Subordinate Judge, North Arcot, in Original Suit No. 48 of 1917.

Messrs. *L. A. Govinda Raghava Iyer* and *L. S. Veera Raghava Iyer*, for the Appellants.

Messrs. *B. Somayya* and *T. R. Arunachala Iyer*, for the Respondent.

JUDGMENT.—The plaintiff brought Original Suit No. 48 of 1917 in the Court of the Subordinate Judge of North Arcot to recover Rs. 3,162 as money advanced to a partnership together with interest on profits thereon. The First Court gave him a decree for Rs. 2,845 together with interest on Rs. 1,745 against four defendants. Of these four defendants Nos. 1 and 2 appealed. The third defendant died after the joint appeal by him and the other two defendants had been filed. His legal representative, who was the fourth defendant, did not appeal, and he was not made a party to the appeal of defendants Nos. 1 and 2. The District Judge held that the appeal abated because the legal representative of the deceased was not brought on the record within the time allowed by law. In doing so, he seems to have overlooked O. XLI, r. 4, Civil Procedure Code, which provides that, where there are more defendants than one in a suit and the decree appealed from proceeds on any ground common to all the defendants, any one of the defendants may appeal from the whole decree and thereupon the Appellate Court may reverse the decree in favour of all the defendants. The District Judge relied on the decision in *Raj Chunder Sen* v. *Ganga Das Seal and Rangati Dhur* v. *Raj Chunder Sen* (1) which was a case of an appeal in a partnership suit. The Privy Council held that, as the right to sue did not survive against the other defendants alone and the appeals could not proceed in the absence of a representative of Abhoy Churn Chowdhury, who was one of the partners, the appeals were rightly dismissed by the Calcutta High Court. It appears that in that case Abhoy Churn Chowdhury died, and as the Privy Council observed, accounts had to be taken and there were complicated questions as to the respective relations of the parties *inter se* which had to be decided. These questions could not be decided without the legal representative of Abhoy Churn Chowdhury being on the record. As frequently occurs in a suit for partition or for dissolution of partnership, the decree provided for payment of sums of money to some of the defendants, and Abhoy Churn Chowdhury as a partner was found to have Rs. 1,740 due to him. The partnership account could not be unsettled and a fresh settlement made without all the parties to whom money had to be paid or who should make contributions, being on the record. In *Ranga Srinivasa Chari* v. *Gnanaprakasa Mudaliar* (2) this case has been distinguished as being a ruling on the point that a litigation cannot proceed without representatives of a deceased party to a final and complete adjudication. In *Somasundaram Chettiar*

(1) 31 C. 487; 1 A. L. J. 145; 8 C. W. N. 442; 31 I. A. 71; 14 M. L. J. 147; 8 Sar. P. C. J. 623 (P. C.).

(2) 30 M. 67; 2 M. L. T. 36.

v. *Vaithilinga Mudaliar* (3) a Bench of this Court set aside a decree, as regards the whole of the plaintiff's claim and not merely in respect of the interest of those appellants whose appeals had not abated, observing that the terms of O. XLI, r. 4, Civil Procedure Code, were wide enough to justify such a course. For the respondent it is argued that in every case of a suit for partition or partnership it is necessary to have all the parties on the record and that, if some of them will not join as appellants, they must be made respondents for the purpose of finally settling all the questions at issue. This is too broad a proposition to be accepted. It is common sense and sound law that no order can be made to the prejudice of any person who is interested in a common interest, such as a partnership, without that party or his legal representative being on the record. Under O. XLI, r. 20, if the Court had found that the lower Court's decree could not be varied or reversed without the legal representative of the third defendant being on the record, the Court might have ordered his legal representative to be brought on the record, giving a time for the appellants to bring him on the record, and, if the appellants failed to do so, the Court might have dismissed the appeal. But the District Judge does not put the dismissal of the appeal on that ground. Although the plaint contains an allegation as to the existence of a partnership, the decree that was asked for was for a declaration that the partnership should be dissolved from date of suit, and for the payment of a certain lump sum advanced towards the firm's capital. There was no prayer for taking accounts due to each of the partners. In the written statement the defendants denied that any partnership subsisted. They denied also that the plaintiff paid the sum of Rs. 1,745 at any time to them. If that case is true the defendants had a common interest to have the decree in the plaintiff's favour, which was in the form of a decree for payment of a sum of money by four persons jointly and severally, set aside and no case for taking accounts would arise, that is, on the supposition that no advance was made by the plaintiff and that no partnership agreement with him ever existed, O. XLI, r. 4 lays down the test of the right of some of the defendants to appeal from a decree common to all of them, *viz.*, whether the decree appealed from proceeded on any ground common to all of them. *Sri Nath Pal* v. *Hari Charn Pal* (4) quoted by the respondent is a case in which in a partnership suit, where accounts had to be taken and the plaintiff's share had to be determined, one of the respondents was added in time. As I have already pointed out, the present case is one in which one of the defendants did not join as an appellant. If it was necessary to have him on the record as a respondent the Court might have directed him to be joined, but for the purpose of setting aside a decree for money in the plaintiff's favour against several defendants without any taking of accounts *inter se* it would not be necessary to have a party, from whom the appellants claimed no relief, added. The appellants do not want a decree to be made against the fourth defendant. They do not ask for any interference with his rights. Nothing is due to him under the decree and he thus cannot lose anything by any variation of the decree that may be made in appellant's favour in consequence of this appeal. The setting aside of the money-decree and the dismissal of the plaintiff's whole suit, which the appellants seek to obtain by this appeal is thus not a relief requiring the presence of the third defendant or his legal representative before it can be given. The lower Appellate Court's decree must, therefore, be reversed. This second appeal must be allowed and the first appeal remanded to the lower Appellate Court for fresh hearing and disposal on the merits. The respondent must pay the appellant's costs in this Court. Costs in the lower Court will abide and follow the result. The appellants will get a refund of the Court-fees paid for this appeal.

V. N. V. *Appeal allowed.*
S. D.

(3) 41 Ind. Cas. 546; 40 M. 846; 6 L. W. 253.

(4) 7 C. L. J. 266.

MAUNG THWE v. MA SHWE PON.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 123 OF 1923.

January 21, 1924.

Present :—Mr. Justice Heald and Mr. Justice Lentaigne.

MAUNG THWE—APPELLANT

versus

MA SHWE PON—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Co-defendants—Conflict of interest—Rights inter se, *decision of*—Res judicata.

The decision in a case where there is a conflict of interest between the co-defendants, one of whom actively helps the plaintiff as against the other defendant, and where it is necessary to adjudicate between the defendants *inter se* to give appropriate relief to the plaintiff, operates as *res judicata* in a subsequent suit between the co-defendants. [p. 424, col. 2.]

First appeal against a decree of the District Court, Tharrawaddy, in C. R. No. 51 of 1923.

Messrs. *Cowasjee* and *Das*, for the Appellant.

Mr. *Robertson*, for the Respondent.

JUDGMENT.

Heald, J.—The matters which led to the present dispute have been before the Court many times and may be summarised as follows: There were two claimants to the estate of Shwe Mya and his wife Ma Shwe I, namely, Maung Thwe present appellant, and Tun Pe, who is now dead. Both claimed to be adopted sons and ultimately the Privy Council held both had established their claims and that they were co-heirs. The Chief Court had held that Tun Pe was the sole heir and while the appeal to the Privy Council was pending, Tun Pe, who had been appointed administrator to the estate sold certain lands to the present respondent Ma Shwe Pon. Appellant was in possession of the lands and refused to recognise respondent's title, so respondent filed a suit to recover the lands, and obtained a decree for possession. Before she obtained the decree she had already mortgaged the lands to a Chetty and to Mr. Robertson, who now appears as her Advocate. The Chetty sued on the mortgage and impleaded both respondent and appellant, as well as the second mortgagee. Appellant, who by that time had succeeded to the interest of Tun Pe, pleaded that Tun Pe was not owner of the land, and that in any case the sale was ineffective as having been made *pendente lite*. The Chief Court held that, because Tun Pe was administrator of the estate at the time when he sold the lands the sale was effective, and a mortgage-decree recognising both the mortgagees was passed. Before the final judgment in the mortgage-suit had been given in the Chief Court, respondent, who had been ousted from possession of the lands, had filed another suit against appellant claiming possession on the strength of the sale of them to her by Tun Pe and mesne profits. Appellant again disputed respondent's title on the ground that transfer by Tun Pe was fraudulent; and that an order for possession which he had obtained in certain miscellaneous proceedings of 1918 barred the suit in being *res judicata*. He also pleaded that the mortgagees ought to have been made parties to the present suit, and he denied that respondent had any right to the mesne profits. The lower Court held that because the question whether or not the sale by Tun Pe to respondent was fraudulent had been decided between the parties in respondent's first suit against appellant to recover the lands that question was *res judicata* and appellant could not be allowed to raise it again as a defence in the present suit. It also found that because the mortgagees had been paid off there was no need for them to be joined in the present suit. It held that the order which appellant had obtained in the miscellaneous proceedings was only an interlocutory order which did not finally declare appellant's title to the land, and finding that respondent was owner of the lands, and that, therefore, she was entitled to mesne profits and to interest thereon, it gave her a decree for possession and for Rs. 5,561 with interest thereon from the date of the institution of the suit to the date of realization with costs.

The appellant appeals against that decree on the grounds that the lower Court was wrong in holding that the sale by Tun Pe conferred any title on respondent, that in spite of the decision of the Chief Court he was still entitled to impugn the transfer by Tun Pe, that that

transfer was void as having been effected *pendente lite* and that he was rightfully in possession of the lands as owner.

Respondent filed a cross-objection to the Court's assessment of the mesne profits. Appellant's learned Advocate admitted that all the questions raised in the appeal were decided in the judgment of the Chief Court in the mortgage-suit: but he suggested that they were not *res judicata* because appellant was a party to that suit not in his personal capacity but merely as heir of Tun Pe, and also because that suit was not a suit between him and respondent, but between the Chetty on the one side and him and respondent on the other. I do not think that there is any substance in these suggestions. The substantial issues in the former suit were exactly those which appellant raises in the present suit. Respondent was practically a formal party to the mortgage-suit; she did not deny the mortgage or the Chetty's right to a mortgage-decree. The Chetty as against appellant represented respondent and the matter in dispute was respondent's title. So far as appellant was concerned the decision in that suit finally decided that respondent and not appellant was owner of the lands, and appellant is bound by that decision both in his personal and in his representative capacity. He could not in his representative capacity have raised the issues which he did not raise in that suit because he would have been estopped and it is clear that he actually raised the questions in his personal capacity, the same capacity in which he now desires to raise them again.

I would, therefore, hold that the appeal fails and must be dismissed with costs.

The cross-objection has not been pressed though it has not been abandoned.

The matter of interest is in the Court's discretion. I see no reason to think that the lower Court exercised its discretion wrongly.

The question of the amount of mesne profits which should have been decreed for the season 1918-19 has not been argued and I see no reason to hold that the decision of the lower Court was mistaken.

I would, therefore, dismiss the above objection but make no order for costs in respect of it.

Lentaigne, J.—I concur in the judgment of my brother Heald in this case. I am satisfied that the appellant Maung Thwe was made a defendant in the previous mortgage-suit Civil Regular No. 10 of 1919 not merely as an heir of Tun Pe deceased but also in his personal capacity and this is made clear on a perusal of paragraph 7 of the plaint in that suit. It is also clear that the questions in issue in that suit between Maung Thwe and the other parties were mainly issues which could only arise in his personal capacity. I am satisfied that Ma Shwe Pon and the Chetty were in effect making common cause against Maung Thwe in that suit. Ma Shwe Pon admitted the Chetty's claim against her and against Maung Thwe and that claim was based on Ma Shwe Pon's alleged rights as purchaser of the property both as against Maung Thwe and the exclusion of Maung Thwe. Though she was not taking an active part in the conduct of the case, she knew that the Chetty had a common interest with her and was actively prosecuting her claim and she was justified in allowing him to do so.

The decision in *Kandiyil Cheriya Chandu* v. *The Zamorin of Calicut* (1) is authority for the proposition that the previous decision would operate as *res judicata* if the co-defendant had actively supported the plaintiff in the previous case as against the other defendant; and I see no reason why the same principle should not apply where the active support was limited to filing a written statement admitting the plaintiff's claim and leaving it to the plaintiff to press the claim in which both he and such defendant were jointly interested.

In the case of *Ramachandra Narayan* v. *Narayan Mahadev* (2) West, J., pointed out that, "where an adjudication between the defendants is necessary to give the appropriate relief to the plaintiff,

(1) 29 M. 515.

(2) 11 B. 216; 11 Ind. Jur. 301; 6 Ind. Dec. (N. S.) 142.

there must be such an adjudication—*Cottingham* v. *Earl of Shrewsbury* (3), and in such a case the adjudication will be *res judicata* between the defendants as well as between the plaintiff and the defendants. But for this effect to arise, there must be a conflict of interest amongst the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity the judgment will not be *res judicata* amongst the defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have collectively been defeated in resisting a claim to a share made against them as a group." Though these remarks were *obiter*, I think that they correctly represent the law and I find they have been adopted by another Judge in a case reported in an unofficial report *Sukh Dial* v. *Bhopi* (4). In the previous case in which Maung Thwe and Ma Shwe Pon were defendants, it was necessary that the rights of Maung Thwe and Ma Shwe Pon should be decided *inter se* to enable the Court to grant the Chetty the decree.

For the above reasons and as it is admitted that all questions raised on this appeal were decided by the Chief Court in that suit against the appellant Maung Thwe, I concur in holding that the present appeal fails and must be dismissed with costs.

N. H. *Appeal dismissed.*

(3) (1843) 3 Hare 627; 15 L. J. Ch. 441; 67 E. R. 530.

(4) 71 Ind. Cas. 481; (1923) A. I. R. (L.) 186.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1146 OF 1921.

April 16, 1924.

Present:—Mr. Justice Phillips and Mr. Justice Madhavan Nair.

A. JANOOTHASSAN SAIT BY HIS AUTHORIZED AGENT DADA BEG MAHAMED—PLAINTIFF—APPELLANT

versus

M. S. N. MAHAMAD OHUTHU—DEFENDANT No. 1—RESPONDENT.

*Foreign judgment—Submission to jurisdiction of foreign Court—Power-of-attorney to appear, if amounts to submission—*Ex parte *foreign decree, whether decision on merits—Notice—Service.*

Where a person executes a power-of-attorney in favour of another empowering the latter to conduct litigation on behalf of the former in foreign Courts, there is a contract binding him to appear in those Courts which amounts to submission to the jurisdiction of such foreign Courts. [p. 426, col. 1.]

Ramanathan Chettyar v. *Kalimuthu Pillay*, 18 Ind. Cas. 189; 37 M. 163, relied on.

An *ex parte* decree obtained in a foreign Court in a summary suit similar to that provided for by O. XXXVII of the Civil Procedure Code, must be deemed to be a decree passed upon the merits when no appearance has been put in on behalf of the defendant. [p. 427, col. 1.]

Ex parte decrees are by no means necessarily decrees not passed upon the merits. It is only when a defence has been raised and for some reason or another has not been adjudicated upon that the decision can be said to be not upon the merits. [*ibid.*]

Peruri Visvanatha Reddi v. *Keymer*, 27 Ind. Cas. 386; 39 M. 95; 27 M. L. J. 670, *Keymer* v. *Viswanatham Reddi*, 38 Ind. Cas. 683; 40 M. 112; 15 A. L. J. 92; 21 M. L. T. 78; 32 M. L. J. 35; 5 L. W. 342; 19 Bom. L. R. 206; 21 C. W. N. 358; 25 C. L. J. 233; 10 Bur. L. T. 175; 44 I. A. 6 (P. C.), distinguished.

The Delta, (1876) 1 P. D. 393; 45 L. J. P. 111; 35 L. T. 376; 26 W. R. 46, *Challenge and the Due D'Aumale*, (1904) P. D. 41; 73 L. J. P. 8; 89 L. T. 481; 9 Asp. M. C. 497, *Nouvion* v. *Freeman*, (1890) 15 A. C. 1; 59 L. J. Ch. 337; 62 L. T. 189; 38 W. R. 581, relied on.

Where a foreign Court has held that notice to a defendant was sufficient, that decree must be taken to be correct in the absence of any other evidence to the contrary. [p. 427, col. 1.]

No question as to any irregularity in the service of notice can be raised in the Courts of this country as a ground for questioning the validity of a foreign decree. [*ibid.*]

Pemberton v. *Hughes*, (1899) 1 Ch. 781; 68 L. J. Ch. 281; 47 W. R. 354; 80 L. T. 369; 15 T. L. R. 211, relied on.

Second appeal against the decree of the District Court, Tanjore, in A. S. No. 579 of 1920, dated the 21st March, 1921, preferred against the decree of the Court of the Second Additional Subordinate Judge, Tanjore, in O. S. No. 9 of 1919, (O. S. No. 25 of 1918 on the file of the Court of the Subordinate Judge, Tanjore.)

Messrs. *B. Sita Rama Rao* and *K. Sundara Row*, for the Appellant.

Mr. *T. L. Venkatarama Iyer*, for the Respondent.

JUDGMENT.

Phillips, J.—This is a suit upon a foreign judgment of the Colombo Court against the first defendant. The first defendant and his brother who were trading in partnership executed a power-

of-attorney to one Sheikh Abdul Rahiman under which he was empowered to sue in the Courts of Ceylon and to appear before any Court or Courts of Justice either as plaintiff or defendant etc. The power is a very wide one and gives the agent very full powers to represent the principals. Under the provisions of that power, Abdul Rahiman appointed one Abdul Guddus as his sub-agent during his absence from Ceylon. A suit was filed in 1915 on four promissory-notes against Abdul Rahiman and Abdul Guddus, but upon their pleading that they were merely agents of first defendant's firm, another suit was brought against the first defendant. Notice of the suit was served on Abdul Guddus as first defendant's agent and the judgment on which the present suit is based was passed in his absence.

The first question for consideration is whether the first defendant had submitted to the jurisdiction of the foreign Court, and on this point I must agree with the learned District Judge that he did so by executing the power-of-attorney in favour of Abdul Rahiman empowering the latter to conduct litigation in the Ceylon Courts, namely, in a place where the agent was conducting business for his principals, and it is clearly a contract binding him to appear in those Courts and amounts to submission to the jurisdiction of those Courts. In this connection I would refer to the case reported as *Ramanathan Chettyar* v. *Kalimuthu Pillay* (1).

The next question raised for the respondent is that the foreign judgment sued on was not one obtained on the merits. Ordinarily, a judgment delivered *ex parte* is deemed to be one on the merits, but it is contended here that in summary suits similar to those provided for by O. XXXVII of the Civil Procedure Code an *ex parte* judgment cannot be deemed to be one passed on the merits. Reliance is placed on the case reported as *Peruri Visvanatha Reddi* v. *Keymer* (2) the decision in which was confirmed by the Privy Council in *Keymer* v. *Viswanatham Reddi* (3). In that case a defence had been put in, but it was ordered to be struck out because of defendant's failure to answer interrogatories. The decision given in these circumstances was held to be one not on the merits. There are no doubt some observations in the judgment of this Court which would go to show that a foreign judgment passed in default of appearance is not a decree on the merits, and two cases are therein referred to as supporting this proposition. One of these is *The Delta* (4) and the other is *The Challenge and the Due d'Aumale* (5). In the first of these cases, the foreign judgments had not been delivered when the suit was filed in England and also it was held that the evidence of the French and Italian Advocates examined left it doubtful whether the foreign judgment in that case would have, even in France, or Italy, the force of *res judicata*. In the second case it appears that the defendants had not submitted to jurisdiction. In the judgment of the Privy Council which is reported as *Keymer* v. *Viswanatham Reddi* (3) their Lordships in referring to the question under section 13 (*b*), Civil Procedure Code, state that that section refers to "those cases where for one reason or another the controversy raised in the action has not in fact been the subject of direct adjudication by the Court." From this it would appear that it is necessary in the first place that some controversy should be raised in the action and in the second place that after it has been raised it should not have been finally decided. This principle is the same as that enunciated by Lord Herschell in *Nouvion* v. *Freeman* (6): "In a Court of competent jurisdiction, where according to its established procedure the

(1) 18 Ind. Cas. 189; 37 M. 163.
(2) 27 Ind. Cas. 386; 39 M. 95; 27 M. L. J. 670.
(3) 38 Ind. Cas. 683; 40 M. 112; 15 A. L. J. 92; 21 M. L. T. 78; 32 M. L. J. 35; 5 L. W. 342; 19 Bom. L. R. 206; 21 C. W. N. 358; 25 C. L. J. 233; 10 Bur. L. T. 175; 44 I. A. 6 (P. C.).
(4) (1876) 1 P. D. 393; 45 L. J. P. 111; 35 L. T. 376; 26 W. R. 46.
(5) (1904) P. D. 41; 73 L. J. P. 8; 89 L. T. 481; 9 Asp. M. C. 497.
(6) (1890) 15 A. C. 1; 59 L. J. Ch. 337; 62 L. T. 189; 38 W. R. 581.

whole merits of the case were open, at all events, to the parties, however much they may have failed to take advantage of them, or may have waived any of their rights, a final adjudication has been given that a debt or obligation exists which cannot thereafter in that Court be disputed, and can only be questioned in an appeal to a higher Tribunal." It will be seen that in accordance with this principle, *ex parte* decrees are by no means necessarily decrees not passed upon the merits. It is only when a defence has been raised and for some reason or another has not been adjudicated upon that the decision can be said to be not upon the merits. In other instances of *ex parte* decrees, they must be deemed to be decrees passed upon the merits. In the present case no appearance at all was put in on behalf of the first defendant and the case was allowed to proceed *ex parte* and consequently it must be deemed to have been passed upon the merits.

A further question is raised, namely, that the first defendaut had no notice at all of the suit and that consequently the whole decree is a nullity as coming under section 13 (*d*), namely, "Where the proceedings in which the judgment was obtained are opposed to natural justice". A good deal of argument has been addressed to the question as to whether at the time that the notice was served upon him, Addul Guddus was the agent of the first defendant. It appears that he was appointed as first defendant's agent and had acted as such and there is no evidence to show that that agency had ceased at the time when the notice was served upon him. The foreign Court held that the notice was sufficient, and that the decision must be taken to be correct, in the absence of any other evidence to the contrary. If there was any irregularity in the service of the notice, that point cannot be raised in the Courts of this country as a ground for questioning the validity of the foreign decree, as was held in *Pemberton* v. *Hughes* (7) where it was remarked by Lindley, M. R., at page 790: "If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice." If first defendant had definitely proved that Abdul Guddus was in no sense his agent at the time of the service of the notice and that consequently he was totally unaware of the proceedings in the Colombo Court this might be an answer to the validity of the judgment, but this has not been shown and consequently I must hold that the judgment is valid.

In this view, I think it is unnecessary to discuss the further question raised as to whether the death of first defendant's brother terminated Abdul Rahiman's agency and consequently the sub-agency of Abdul Guddus They were at one time, admittedly first defendant's agents and it is not shown that they had ceased to be so at the time the notice was served on the latter.

The appeal is accordingly allowed and the decree of the Court of first instance restored with costs both here and in the lower Appellate Court.

Madhavan Nair, J.—I agree.

V. N. V. *Appeal allowed.*

(7) (1899) 1 Ch. 781; 68 L. J. Ch. 281; 47 W. R. 354; 80 L. T. 369; 15 T. L. R. 211.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL NO. 85 OF 1923.

March 6, 1924.

Present:—Mr. Justice Lentaigne and Mr. Justice Carr.

MAUNG PE—APPELLANT

versus

MA HNIT AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 34, 151—Decree, execution of—Court, whether can allow interest—Inherent power, exercise of.

If a decree does not allow interest from the date of decree to the date of payment, the Executing Court has no inherent power to allow it

under section 151, Civil Procedure Code, having regard to the provisions of section 34 (2), Civil Procedure Code. [p. 429, col. 2.]

The Courts cannot have inherent power to do any thing which has the effect of nullifying an express provision of law. [*ibid.*]

Appeal from an order of the District Court, Magwe, in C. R. No. 15 of 1919.

Mr. *Ormiston*, for the Appellant.

Mr. *Higinbotham*, for the Respondents.

JUDGMENT.—In Civil Regular Suit No. 28 of 1912 of the District Court, Magwe, before the Additional Judge at Yenangyaung, the respondents obtained a decree for Rs. 42,899-8-0 against the appellant with costs. The decree was dated the 23rd September, 1913. It directed payment of interest on the sum decreed at 6 per cent. per annum from the commencement of the suit to the date of judgment, which was the same as the date of decree.

The appellant appealed to the Judical Commissioner of Upper Burma in Civil Appeal No. 415 of 1913, which was not decided until the 8th March 1917, when the decree was set aside and the suit dismissed. Meanwhile, in Civil Execution No. 19 of 1913, of the District Court, the respondent had applied for execution and certain property was attached. It is noted in the diary under date 8th December, 1913, that the appellant applied for stay of execution under O. XLI, r. 6. This appears to have been an oral application, for no written application is on the file. After considerable delay sale was stayed, the appellant furnishing security, on the 17th August, 1914. The Judge then ordered "attachment may be removed." On the Judicial Commissioner setting aside the decree, the execution proceedings were closed on the 16th April, 1914.

The respondents appealed to the Privy Council, who, on the 30th May, set aside the decree of the Judicial Commissioner and restored that of the District Court.

On the 18th December, 1919, the respondents again took out execution in Civil Execution No. 15 of 1919 of the District Court. In this application they claimed interest at 6 per cent. per annum from the date of institution of the suit to the date of the judgment of the Privy Council. The appellant, the judgment-debtor objected that interest was payable only from the date of institution to the date of the decree of the District Court.

On the 14th June 1920, the Additional Judge directed the appellant to pay into Court the sum of Rs. 49,645-2-0 decretal amount and costs, including interest up to the date of the decree of the District Court. The subsequent interest claimed was disallowed, but no reasons were given for this order. This money was paid in and was afterwards disbursed to the respondents on the 15th July, 1920, and the proceedings were closed.

The respondents then appealed to the Judicial Commissioner in Civil First Appeal No. 580 of 1920.

The learned Judicial Commissioner in his judgment said:

"The appellants claim in execution not only interest up to the date of the District Court's decree which was allowed them by that decree, but also interest up to the date of the Privy Council's judgment. The District Court's judgment is silent as to interest after decree and such interest appears to have been claimed in the application for execution under a misapprehension. However, when it was discovered that the decree did not allow this interest it was contended that appellants were nevertheless entitled to it on the ground that at the instance of the respondent the District Court had improperly stayed execution after the appeal to this Court had been filed, which it had no power to do, and which resulted in the appellants being kept out of their money for a long time."

I would note here that the fact of this contention being raised does not appear on the record of Execution No. 19 of 1913. It may be presumed that the fact was stated to the Judicial Commissioner by the Advocates for both sides who were the same who had appeared before the District Court.

The learned Judicial Commissioner said later.—

"On the merits I would say in the first place that the appellants' claim, though calculated on the basis of interest in the application for execution has been altered verbally into a claim to interest,

as interest could not be entertained either in execution or in a separate suit, as such a claim is barred under section 34. What the appellants allege is that by an order passed by the District Court at the instance of the respondent they were debarred from reaping the fruit of their decree for several years and they claim damages on that account."

The learned Judge held that the question between the parties was one for decision under section 47 of the Civil Procedure Code and remanded the case to the District Court. There was a delay of several months in taking up the case again, due partly to the neglect of the District Court itself and partly to the failure of the respondents to move that Court to proceed with the case.

The District Court then framed and tried issues and finally gave the respondents a decree for Rs. 17,445-12-0 as damages. The damages assessed were equivalent to interest at the rate of 6 per cent. per annum on the amount decreed from the date of the District Court's original decree to the date of payment—3rd July, 1920.

Against this decree the appellants now appeal.

Regarded as one for damages the respondents' claim seems to me entirely unsustainable. Leaving aside the general question of a party's liability for an erroneous order of a Court passed at his instance we find in this case that the order was not passed at his instance. He applied under O. XLI, r. 6 (2) for stay of sale. The Court, as the Judicial Commissioner has pointed out, was bound to stay the sale on the appellant furnishing security, which he did. That the Court went beyond this and removed the attachment was no fault of the appellant.

Moreover this erroneous order of the Court was not what delayed the realization of their money by the respondents. It had, in fact, no effect whatever on that. The sale, as I have said, must have been stayed, and when the Judicial Commissioner reversed the decree of the District Court, the attachment, had it still subsisted, must necessarily have been removed.

The delay was, in fact, due solely to the length of time occupied in the appeals to the Judicial Commissioner and the Privy Council.

Mr. Higinbotham has not supported the decree as one for damages. He urges that the question should be regarded as one in the nature of restitution. His argument is that had the respondents been able to realize the amount decreed within a short period after the original decree they would since have been enjoying the money and should be put into the same position as if they had so realized it. He has cited certain decisions but they all were in cases where actual restitution was in question and not merely hypothetical restitution. They might have been applicable to this case if the respondants had succeeded in realising the amount decreed and had, then on the reversal of the decree by the Judicial Commissioner, been compelled to re-pay the money to the appellant. That, however, did not happen. I am unable to regard this case as one of restitution or as coming within the scope of section 144 of the Civil Procedure Code.

When all is said the reality is that the Court, in execution, has granted interest on the decretal amount from the date of decree to the date of payment, such interest not having been allowed in the original decree. But for section 34 of the Civil Procedure Code I should have been inclined to hold that it is within the inherent power of the Court to do this. But section 34 (2) expressly says that where interest subsequent to the decree is not allowed in the decree it shall be deemed to have been refused. I do not think the Court could be held to have inherent power to do anything which would have the effect of nullifying an express provision of law.

I would allow this appeal and set aside the decree of the District Court, but would direct both parties to bear their own costs throughout.

N. H. *Appeal allowed.*

KUPPAKKAL *v.* MATHAN CHETTIAR.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1176 OF 1921.
March 6, 1924.

Present:—Mr. Justice Venkatasubba Rao.

KUPPAKKAL (DEAD) THROUGH HIS LEGAL REPRESENTATIVE—DEFENDANT No. 1—APPELLANT

versus

MATHAN CHETTIAR AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

Way, right of—Sale of land—Boundary described as pathway.

The purchaser of a piece of land, one boundary of which is given in the sale-deed "as a pathway", is entitled to a right of way over the pathway.

Second appeal against the decree of the District Court, Coimbatore, in A. S. No. 92 of 1921, preferred against the decree of the Court of the District Munsif, Tirupur, in O. S. No. 918 of 1919.

Messrs. *T. R. Venkatarama Sastri* and *C. V. Mahadeva Iyer*, for the Appellant.

Messrs. *A. Krishnaswami Aiyar* and *K. V. Ramachandra Iyer*, for the Respondents.

JUDGMENT. —One Rengasamy Chetty sold to the first defendant under Exhibit I, dated the 26th June 1917, a strip of land about 102 feet long 21 feet wide having a frontage on a public road, out of a large block of building vacant site of which he was the owner. The portion purchased by the first defendant I shall call site No. A. The land exclusive of site No. A may for the purpose of this appeal be regarded as consisting of two parts; (1) The portion south of and contiguous to what was sold to the first defendant opening also on the public road. (This I shall call site No. B); and (2) the bulk of the property at the back of the site No. A and the site No. B to which access from the road was over the said site No. B (this I shall call site No. C.)

Three days subsequent to the sale of site No. A, Rengasami Chetty sold the remainder of the block, sites Nos. B and C, to certain persons from whom the present plaintiffs derive title. On the site No. C, the plaintiffs constructed a ginning factory. The first defendant to start with, built a small house facing the road on her own site, site No. A, leaving the rest of her land at the back of her house as an open space. She then built another house on the vacant land and as it has no frontage on the road, she claimed a right of way over the site No. B.

The short question to be decided is, whether she is entitled to this right of way? The basis of her claim is the fact that in the sale-deed executed in her favour, the southern boundary of the site conveyed to her is described to be "pathway 18 feet in breadth which I am going to set apart." The lower Courts having negatived her right, she has preferred this second appeal. It is found that there were negotiations at the same time in regard to the sale to the first defendant as well as to the plaintiff's predecessors-in-title. Whether the first defendant has acquired the right she claims depends entirely upon the construction of the conveyance in her favour. In regard to the surrounding circumstances, two facts seem, in my opinion, to be of outstanding importance, (1). The land sold to the first defendant was about 102 to 105 feet in length and it was vacant building land. It was not to be expected that the first defendant would only build one house upon it. If more than one house was to be built, the access to the house at the back of the first house would naturally be over the site No. B. (2). Thesites Nos. B and C were not laid out in building plots, but on the contrary they were regarded as forming one block to be conveyed to one purchaser. That being so, there was no significance in describing site No. B as an intended pathway unless it was a pathway intended also for the use of the first defendant.

These two circumstances strongly support the first defendant's case. On a construction of the words relied on, I am of opinion that her contention must prevail. In *Espley* v. *Wilkes* (1), Kelly, C. B. quotes with approval the following

(1) (1872) 7 Ex. 298; 41 L. J. Ex. 241; 26 L. T. 918.

observations of Mansfield, C. J., in *Roberts* v. *Karr* (2).

"If you (the lessor) have told me in your lease this piece of land abuts on the road, you cannot be allowed to say that the land on which it abuts is not a road". In the same case the observations of Lawrence, J., are also cited.

'If a man buys a piece of ground described as abutting upon a road, does he not contemplate the right of coming out into the road through any part of the premises?" The facts of *Espley* v. *Wilkes* (1) are these: The plaintiff demised by a lease under which the defendant claimed "All that plot of land bounded on the east and north by the newly made streets a plan whereof is indorsed on these presents". On the indorsed plan, the site of the new street was shown and was marked as "new streets". The lease contained covenants by the lessee to build two houses on the land. The plaintiff afterwards granted to the plaintiff a lease of the land comprised in the site of one of the proposed new streets and the plaintiff enclosed the land so that the defendant was unable to reach the east side of his premises. In an action against the defendant for pulling down this obstruction, it was held that under the defendant's lease, a right of way was granted along the site of the proposed new streets to his premises. Kelly, C. B., observed that the grantor was estopped from denying that the strips of land, his property, were what he described them to be, that is to say "streets" which they could not be, unless there be a way through and along them. In *Robert* v. *Karr* (2) which is referred to in *Espley* v. *Wilkes* (1), it was held that the grantor and those claiming from him were precluded from preventing the grantee to come out into the road over the strip of land there in question.

In *Furness Ry Co.*, v. *Cumberland Co-operative Building Society* (3), the land which was conveyed was at the date of the conveyance waste building land on the outskirts of a town. The plan showed G and M streets. The site of the intended streets was the property of the vendor. It was held that the conveyance granted to the purchaser a right of way.

In *Gogarty* v. *Horkens* (4), of the two plots demised to the lessee, plot A was described as bounded on the east by "an intended road to be 38 feet wide intersecting the said lot from lot B" and lot B was described as being bounded on the west "by the said intended road 38 feet wide intersecting the said lot from lot A". Upon the map annexed to the lease the aforesaid intersecting passage was delineated as being 38 feet wide and was described as "the proposed new road reserved by" the lessor. It was held that from the words of the lease there was to be implied a grant of an easement of way across the intersecting space. *Harding* v. *Wilson* (5) is an old case which is somewhat inconsistent with the rulings referred to above. But its authority has been doubted both in *Furness Ry. Co.* v. *Cumberland Co-operative Building Society* (3) and *Gogarty* v. *Horkins* (4). I have, therefore, come to the conclusion that the first defendant ought to succeed. The plaintiffs propose to construct a wall on both sides of the pathway; this they cannot do. They cannot have an injunction restraining the first defendant from resisting the construction of this wall. In the plaint it is said that the first defendant has been tying her cattle in the pathway and placing tubs and pots on the way and committing several acts of nuisance. It is clear that the first defendant cannot use the pathway for these purposes. Subject to this reservation the plaintiff's suit must fail.

The second appeal is allowed with costs throughout.

V. N. V. *Appeal allowed.*

S. D.

(2) (1809) 1 Taunt. 495; 10 R. R. 592; 127 E. R. 926.

(3) (1885) 52 L. T. 144; 49 J. P. 292.

(4) (1906) 1 Ir. R. 173; 8 Ir. L. R. 683.

(5) (1823) 2 B. & C. 96; 107 E. R. 319; 3 D. & R. 287; 1 L. J. (o. s.) K. B. 238; 26 R. R. 287.

KUVERJEE *v.* RAMA.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 334 OF 1923.

April 16, 1924.

Present :—Mr. Kinkhede, A. J. C.

KUVERJEE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAMA—DEFENDANT—RESPONDENT.

Co-sharers—Joint possession, decree for—Court, discretion of—Exclusive possession, effect of—Co-owner, when can be turned out—Putting up tappar, *whether implies ouster—Ouster, how determined—Suit for demolition of* tappar *—Special damage.*

The granting of a decree for joint possession is quite discretionary with Courts. [p. 433, col. 1.]

A co-owner who has taken up the exclusive occupancy should not be deprived of such exclusive occupation except on very strong grounds. [*ibid.*]

Kes Patil v. *Sakharam*, 2 C. P. L. R. 72 and *Sheo Narayan Lal* v. *Muhamad Abdul Rafi Khan*, 3 A. L. J. 669, referred to.

The sole occupation of a part of the joint estate by one co-owner does not inevitably imply an ouster of the other co-owner, nor does the erection of substantial building by one co-owner upon a portion of joint property without the assent of the other co-owner constitute conclusive evidence of ouster. [p. 433, col. 2.]

Dwijendra Naraian Roy v. *Purnendu Narain Roy*, 5 Ind. Cas. 171; 11 C. L. J. 189, referred to.

What constitutes ouster in each particular case must depend upon its special facts. [*ibid.*]

Where one co-owner puts up a *tappar* on joint land without the consent of the other co-owner the Court will not order the demolition of the *tappar* unless the plaintiff proves special damage. [*ibid.*]

Padamsing v. *Sahadeo Sao*, 14 C. P. L. R. 76 and *Lala Bishwambarlal* v. *Rajaram*, 3 B L. R. App. 67; 13 W. R. 337n; 16 W. R. 140n; 21 W. R. 373n, followed.

Appeal against the decision of the Additional District Judge, Nimar, in Civil Appeal No. 4 of 1923, decided on the 23rd April 1923.

Mr. *S. B. Gokhale*, for the Appellants.

Mr. *W. R. Puranik*, for the Respondents.

JUDGMENT.—This is a second appeal by the plaintiffs, who are co-sharer *malguzars* of *Mouza* Attar. The respondents are also co-sharers in the village. The village has been imperfectly partitioned. Defendant No. 2 is the Sadar *lambardar* of the village. The *abadi* of the village is, however, held in *shamlat*. One Lachmansing, son of Ramsing, Rajput, was a resident of the said village and had a plot of *abadi* land in his occupation. He left the village and went away. Thereupon the defendants on 1st February 1922 took possession of the whole of the *abadi* plot and put up *tappars* on a portion of it *and also* took forcible possession of the vacant *malguzari abadi* land. Hence this suit for joint possession of the vacant land.

The defence was that the *lambardar malguzar* realised Rs. 25 as *nazrana* and permitted him to occupy the site of the house which was once the property of Lachmansing and that as the defendant was in the possession of *abadi* land much less than his proportionate share of the land, he took possession of the other piece also. In reply, the plaintiffs denied the alleged payment of Rs. 25 as *nazrana* for the lands to the *lambardar* and the alleged consent, if any, is said to be collusive. The Court of first instance found the plea unproved but the plaintiffs' suit was dismissed as not maintainable. The lower Appellate Court addressed itself to the consideration of the question whether in the circumstances of the case plaintiffs were entitled to a decree for joint possession and for the removal of the defendant's *tappars*. After discussing the law applicable, that Court came to the conclusion that plaintiffs were entitled to joint possession of the two plots in suit but declined to order demolition of the *tappars*. Accordingly the plaintiffs got a decree for joint possession of the land but not with a direction for the removal of the *tappars*. The plaintiffs' complaint and second appeal is that the defendant should have been directed to pull down or remove the *tappars*.

The present suit was filed on 22nd September 1922, *i.e.*, 8 months after the cause of action arose. The special defence raised by the defendant that the *lambardar* had consented to his taking the two plots has been held not proved. The position, therefore, is that if one co-sharer out of several, assumes actual occupancy of a portion of the joint property is he liable to be ousted from possession at the instance of the other co-sharer? In other words the question reduces itself to this; whether one co-sharer has not a right to oust another

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co-sharer from actual possession of what is only a portion of the joint property. So far as the plaintiffs' right to joint possession is concerned the defendant doos not deny it and he has no objection to the decree for joint possession being passed against him. What he objected to was a decree asking him to demolish the *tappars* constructed by him. The lower Appellate Court has held that the *tappars* were raised by the defendant before suit and that no objection was taken by the plaintiffs or other co-sharers to their construction and that they could not, therefore, now insist upon their demolition. The lower Appellate Court has further found that plaintiffs have not alleged or proved any special damage or injury which would entitle them to insist upon the demolition of the *tappars* and that plaintiffs have also failed to take timely action for restraining the defendant from erecting the *tappars*.

It is a matter of common knowledge that the granting of a decree for joint possession is quite discretionary with Courts. If the lower Appellate Court after taking into consideration all the facts and the circumstances of the case has thought fit to refuse a decree directing the defendant to pull down the superstructure, it is contended that this Court, sitting as a second Appellate Court, ought not to interfere in such a discretionary matter, unless it appeared that the lower Appellate Court has exercised its discretion arbitrarily which would call for such interference in second appeal.

The ordinary rule seems to be that the co-owner who has taken up the exclusive occupancy should not be deprived of such exclusive occupation except on very strong grounds. In *Kes Patil* v. *Sakharam* (1) it was held that one co-sharer cannot sue another co-sharer as a trespasser to oust him from land which belongs to both of them. In *Sheo Narayan Lal* v. *Mahommed Abdul Rafi Khan* (2) it has been held that where an occupancy tenant executed a *zarpeshgi* lease in favour of one of the co-sharers and died without leaving an heir, the co-sharer in possession could not be ousted by the *lambardar* in as much as he in his position as a co-sharer was entitled to possession of land in suit. In *Dwijendra Narain Roy* v. *Purnendu Narain Roy* (3) it was pointed out that no inflexible rule of law that the sole occupation of a part of the joint estate by one co-owner inevitably implies an ouster of the other co-owner can be laid down, and further, that it could not be also laid down as a universal proposition of law that the erection of a substantial building by one co-owner upon a portion of a joint property without the assent of the other co-owner, is conclusive evidence of ouster. What constitutes ouster in each particular case must, therefore, depend upon its special facts. In *Padamsing* v. *Sahadeo Sao* (4) Ismay, J. C., referred to *Lala Bishwambarlal* v. *Rajaram* (5) as an authority for the view that where two parties were joint owners of land and one of them erected a wall upon the land without obtaining the consent of his co-sharer the Court could very well refuse to order demolition of the wall in the absence of evidence to show that injury had been done to the co-tenant of the builder by its erection.

In the case before me there is a finding by the lower Appellate Court that there is neither plea nor proof of any injury or special damage having been caused to the plaintiffs. It appears that the *tappars* have been constructed at the cost of at least Rs. 150 as admitted by the plaintiffs-appellants in the lower Appellate Court. Finding that the defendant was spending his money over the construction of the *tappars* it was the plaintiffs' duty to have objected to it, at the very outset, and thus prevented him from making his outlay. They could not remain quiescent, while defendant was constructing an expensive superstructure for the beneficial enjoyment of a portion of the joint property. Plaintiffs were bound to have made their election

(1) 2 C. P. L. R. 72.
(2) 3 A. L. J. 669.
(3) 5 Ind. Cas. 171; 11 C. L. J. 189.
(4) 14 C. P. L. R. 76.
(5) 3 B. L. R. App. 67; 13 W. R. 337n; 16 W. R. 140n; 21 W. R. 373n.

at the earliest opportunity; not having done so they induced by their conduct and in action a belief in the mind of the defendant that they have waived or abandoned their right. Under these circumstances I do not think this is a fit case for interference in second appeal in what was a purely discretionary matter. I, therefore, decline to order the demolition of the *tappars* errected by the defendant.

I, therefore, dismiss the appeal with costs. The costs in the Courts below will be paid as already ordered.

K. S. D. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 88 of 1922.

March 25, 1924.

Present:—Mr. Justice Jackson.

MAHABOOB SARFRAZVANTHU *Sri Rajah* PARTHASARADHI APPA RAO BAHADUR ZAMINDAR GARU—PLAINTIFF—APPELLANT

versus

Munshi MUHAMMAD ABDUL WAHEB SAHEB—DEFENDANT—RESPONDENT.

Execution of decree—Executing Court going behind decree—Endorsement not to proceed against particular property of judgment-debtor—Estoppel.

An Executing Court cannot go behind the decree and rely on a collateral judgment, even of a superior Court, against the decree.

A decree holder is not estopped from executing his decree against a property merely because, on some previous occasion his agent endorsed on a notice of sale that the property need not be sold.

Sree Raja Bommadevara Venkata Narasimha Nayudu v. *Ravi Venkatappiah*, 54 Ind. Cas. 647; 37 M. L. J. 591 at p. 592, *Bommadevara Naganna Naidu* v. *Ravi Venkatappiah*, 76 Ind. Cas. 594; 45 M. L. J. 657; (1923) M. W. N. 554; 21 A. L. J. 726; (1923) A. J. R. (P. C.) 167; 33 M. L. T. 262; 25 Bom. L. R. 1290; 18 L. W. 913; 46 M 895; 28 C. W. N. 568; 39 C. L. J. 312 (P. C.), referred to.

Appeal against the order, dated the 27th February 1922, of the District Court, Kistna, at Masulipatam, in A. S. No. 242 of 1921, preferred against an order, dated the 5th July 1921, of the Court of the Deputy Collector, Bhimavaram, in Execution Petition No. 1046 of 1920, in Summary Suit No. 77 of 1917.

Mr. *P. Venkataramana Row*, for the Appellant.

Mr. *P. Somasundaram*, for the Respondent.

JUDGMENT.—This is an appeal against the order of the Court of the District Judge of Kistna at Masulipatam (in Appeal Suit No. 242 of 1921) preferred against the order passed in Execution Petition No. 1046 of 1920 in Summary Suit No. 77 of 1917 on the file of the Court of the Deputy Collector of Bhimavaram.

The appellant is decree holder in Summary Suit No. 77 of 1917. A collateral High Court judgment had decided that his judgment-debtor had never had possession of the property for the rent of which, the appellant has obtained a decree. Accordingly the lower Court held that the decree was superseded following *Sree Raja Bommadevara Venkata Narasimha Nayudu* v. *Ravi Venkatappiah* (1). That ruling has now been reversed by the Privy Council in *Bommadevara Naganna Naidu* v. *Ravi Venkatappiah* (2) and the respondent no longer attacks the decree on this ground. The old principle stands good that an Executing Court cannot go behind the decree. Respondent contends, however, that the decree holder is estopped from executing his decree against this particular property, because on some previous occasion his agent endorsed on a notice of sale that the property need not be sold as there were other claimants to it. It is difficult to see how this could amount to estoppel, and the point was not apparently pressed in either of the lower Courts. The judgment-debtor adduced no oral evidence and relied upon the ruling in *Sree Rajah Bommadevara Venkata Narasimha Nayudu* v. *Ravi Venkatappiah* (1). If persons other than the judgment-debtor have a right to the property, they have their usual remedies.

(1) 54 Ind. Cas. 647; 37 M. L. J. 591 at p. 592

(2) 76 Ind. Cas. 594; 45 M. L. J. 657; (1923) M. W. N. 554; 21 A. L. J. 726; (1923) A. I. R. (P. C.) 167; 33 M. L. T. 262; 25 Bom. L. R. 1290; 18 L. W. 913; 46 M 895; 28 C. W. N. 568; 39 C. L. J. 312 (P. C.).

I find that the decree is not invalidated by the High Court judgment in Second Appeal No. 1805 of 1916 and order the Executing Court to restore it to file and proceed according to law.

The parties will bear their own costs.

V. N. V. *Appeal allowed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 244 OF 1924.

March 20, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Graham.

BIRESH CHANDRA DAS AND OTHERS —PETITIONERS

versus

Sm. HARI DASI BOSE AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115, O. XLI, r. 5—Decree—Stay of execution—Application made long after appeal—Court, duty of—Revision.

Petitioner applied for stay of execution of a decree against which an appeal was pending. The application was dismissed by the District Judge on the ground that the application was made very late. Petitioner applied for revision of the order:

Held, (*Graham, J.* disenting), that the District Judge did not give proper consideration to the matter and though he had jurisdiction over the subject-matter he exercised it in an irregular way; [p. 436, col. 2.]

(2) that the High Court had jurisdiction to interfere with the order in revision under section 115, Civil Procedure Code, and the order was liable to be set aside. [p. 437, cols. 1 & 2.]

C. D. M. Hindley v. *Joynarain Marwari*, 54 Ind. Cas. 439; 46 C. 962; 24 C. W. N. 288, followed.

Per *Suhrawardy, J.*—When an application is presented to a Court, it is its duty to look into the matter to give its consideration to it and to come to decision on all the materials which have been placed before it. If the Court does not do so, though it may have jurisdiction over the subject-matter of the litigation, it fails to exercise that jurisdiction in a regular way, and the High Court has power to interfere to set it right. [p. 436, col. 1.]

Per *Graham, J.*—The power conferred by O. XLI, r. 5 of the Civil Procedure Code upon Appellate Courts is discretionary, though of course that discretion must be judicially exercised. The rule contemplates that an application for stay of execution should be made as soon as possible after the filing of the appeal. [p. 438, col. 1.]

Rule against an order of the Additional District Judge, Howrah.

Babus *Brojolal Chuckerbutty* and *Bijan Kumar Mukerji*, for the Petitioners.

Babu *Hari Charan Ganguly*, for the Opposite Party.

JUDGMENT.

Suhrawardy, J.—This Rule is directed against an order of the Additional District Judge of Howrah rejecting an application by the petitioners for stay of execution of a decree against which an appeal is pending in that Court. The suit was for joint possession of an 8-annas share in the property in dispute. It was decreed in the Court of first instance and the order passed was for the delivery of *khas* possession to the plaintiffs. The petitioners are the defendants and they have preferred an appeal against that decree which is pending in the Court of the Additional District Judge of Howrah. The learned Judge passed the following order on this application: "Stay is opposed. It is pointed out that the suit was instituted in 1920 and not decreed until 1923 and that 9½ months have elapsed between the filing of appeal and the petition for stay. In the circumstances the petition is rejected."

This Rule has been issued on the ground that the learned Judge has acted with material irregularity in the exercise of his jurisdiction inasmuch as he has not considered this application on its merits but has based his judgment on two facts only, namely, that the suit was pending in the First Court for about three years and in his Court for about 9½ months.

With regard to the time taken in the Court of first instance, it is rightly argued, to my mind, that the defendants cannot be held responsible for it. The conduct of the suit was in the hands of the plaintiffs, and no material has been placed either before the Judge or before us for holding that the defendants were in any way responsible for the lengthening of the proceedings in that Court.

With regard to the time during which the appeal was pending before the learned Judge, it is not, in the first instance, in excess of the ordinary period

generally taken up in hearing appeals in the Courts below and, secondly, the execution was not applied for during this period. The petitioners have been deligent in presenting this petition. The execution was applied for on the 15th of January 1924. Notices upon the petitioners were served on the 29th of January and this application was presented on the 31st of January. It appears, therefore, that the materials upon which the learned Judge has based his order do not support it.

It is argued by the opposite party that this is a matter into which we have no jurisdiction to enter under section 115 of the Code of Civil Procedure and reference has been made to the well-known case of *Amir Hassan Khan* v. *Sheo Baksh Singh* (1) and to other cases that followed it. It is not necessary to refer to the numerous decisions upon this point as every case has been decided on its own merits and the principles in the various cases have been invoked in order to support the decision in each case. I may refer, however, to the last pronouncement of their Lordships of the Judicial Committee of the Privy Council on this point in the case of *Balakrishna Udayar* v. *Vasudeva Aiyar* (2). Their Lordships there observe that section 115 of the Civil Procedure Code concerns itself with questions of jurisdiction, namely, the refusal to exercise jurisdiction, the irregular exercise of it or the illegal assumption of it. The present case seems to me to be one of illegal exercise of jurisdiction. When a petitioner presents a petition before a Court, it is the duty of the Court—a duty which is cast upon it by the law of the land—to look into the matter, to give its consideration to it and to come to decision on all the materials that have been placed before it. If the Court does not do so, though it may have jurisdiction over the subject-matter of the litigation, it fails to exercise that jurisdiction in a regular way, and in a case like that this Court as the Court of superintendence, has power to interfere to set it right. I will not refer to the many cases in which this course has been adopted, but I will only make reference to the case of *C. D. M. Hindley* v. *Joynarain Marwari* (3).

I would have felt considerable hesitation in interfering with the order of the lower Court, but I am greatly influenced by the fact that, on the face of it, the execution of the decree may cause great injury to the petitioners and create unnecessary complications. The suit, as I have observed, is one for declaration of the plaintiff's title to 8-annas of the property and for joint possession. The decree that has been passed by the First Court is for *khas* possession. It is not for me to say whether the Court will stay execution in this case but it certainly raises a point in favour of the petitioners in support of their application for a stay of execution. In my judgment, the learned Judge did not not give proper consideration to this matter and, therefore, though he had jurisdiction over the subject-matter, he exercised it in an irregular way within the meaning of the Privy Council case to which I have referred.

I would, therefore, make this Rule absolute, discharge the order of the lower Court and send the case back to that Court for a consideration of the petitioners' application.

Graham, J.—I have the misfortune to differ from my learned brother, and I do so with great diffidence and reluctance.

We are invited in this Rule, in the exercise of our revisional powers under section 115 of the Civil Procedure Code to set aside an order of the learned District Judge of Howrah rejecting an application for stay of execution of a decree pending appeal. The order complained of, which is dated the 18th February 1924, is in the following terms:

(1) 11 C. 6; 11 I. A. 237; 4 Sar. P. C. J. 559; Rafique and Jackson's P. C. No. 83; 5 Ind. Dec. (N. S.) 760 (P. C.).

(2) 40 Ind. Cas. 650; 44 I. A. 261; 40 M. 793; 16 A. L. J. 645; 2 P. L. W. 101; 33 M. L. J. 69; 26 C. L. J. 143; 19 Bom. L. R. 715; (1917) M. W. N. 628; 6 L. W. 501; 22 C. W. N. 50; 11 Bur. L. T. 48 (P. C.)

(3) 54 Ind. Cas. 439; 46 C. 962; 24 C. W. N. 288.

"Stay is opposed. It is pointed out that the suit was instituted in 1920 and not decreed until 1923, and that 9½ months have elapsed between the filing of appeal and the petition for stay. In the circumstances the petition is rejected."

The grounds on which the order is assailed are, firstly, that the lower Court exercised its jurisdiction illegally and with material irregularity in rejecting the application for stay of execution of the decree pending the hearing of the appeal, secondly, that the lower Court exercised its jurisdiction illegally in rejecting the petitioner's application on the ground of delay inasmuch as, under the circumstances of the case, no conceivable delay could be imputed to them, thirdly that the lower Court committed an error of law in acting upon the principle that it was the duty of the appellants to make an application for stay immediately after the filing of the appeal even though the decree-holder had taken no steps to execute the decree, fourthly, that there being no circumstances present which would justify the Court in rejecting the application for stay, the Court below exercised its jurisdiction illegally and with material irregularity in rejecting it on a wrong ground, fifthly, that the Court below looked at the case from a wrong angle altogether and exercised its jurisdiction illegally in failing to advert to the questions of law and fact which were necessary to be decided in a case like this, sixthly that the Court below ought to have held that the plaintiffs being entitled under the decree only to the land and not to the house erected upon it the effect of execution of the decree would be to demolish the house which was erected upon the suit land, and, lastly, that the Court below should have held that the decree cannot be executed at this stage unless the land is demarcated by proper partition.

The point for determination is whether any case has been made out for our interference.

Now section 115 of the Civil Procedure Code enables the High Court in a case in which no appeal lies to call for the record of any case, if the Court by which the case was decided, appears to have exercised a jurisdiction not vested in it by law, or to have failed to exercise a jurisdiction so vested, or to have acted in the exercise of its jurisdiction illegally or with material irregularity. It is not claimed that the learned Additional District Judge exercised a jurisdiction not vested in him by law, and it is clear that he had jurisdiction to make the order in question. But it has been urged on behalf of the petitioners that he acted illegally and with material irregularity in refusing to grant a stay of execution by reason of an erroneous view of the law, that the reasons given for such refusal are inadequate, and that in fact the learned Judge has not properly considered the application.

In my judgment, these contentions are without substance. In the first place it is to be observed that the power conferred by O. XLI, r. 5 of the Civil Procedure Code upon Appellate Courts is discretionary, though of course that discretion must be judicially exercised. This Court will not, however, ordinarily interfere unless there has been an arbitrary exercise of the discretion so conferred, or unless some other good ground is made out for interference. The learned Additional District Judge has given two reasons for rejecting the application, namely, first, that the suit was instituted in 1920 and not decreed till 1923, and secondly, that 9½ months elapsed between the filing of the appeal and the filing of the application for stay. The first may not be good reason, since it is not clear that the petitioners were necessarily responsible for the delay in the disposal of the suit. The second reason, however, namely the delay in making the application, is a good ground and a ground upon which the Court could properly refuse to grant a stay (*Vide* O. XLI, r. 5 (3) (*b*) of the Civil Procedure Code). In regard to this, however, it has been urged by the learned Vakil for the petitioners that, in point of fact, no delay could be imputed to them, inasmuch as the

application for execution was made on the 15th of January, and, upon notice thereof being served upon them on the 29th of January, they immediately applied on the 31st of January, that is to say, two days later, for a stay of execution. The argument appears to be that the petitioners were not bound to apply for a stay until execution was applied for, that it would have been premature for them to do so, and that in the circumstances there cannot be said to have been any delay in making the application.

It seems to me to be open to doubt whether this is a correct view of the matter. Rule 5 of O. XLI says that an appeal shall not of itself operate as a stay of proceedings under a decree, but the Appellate Court may for sufficient cause order stay of execution, and then sub-section (3) (*b*) goes on to lay down that no order for a stay shall be made "unless the Court making it is satisfied that the application has been made without unreasonable delay." The Rule, therefore would appear to contemplate that an application for stay of execution should be made as soon as possible after the filing of the appeal. Nor does there seem to be anything unreasonable in this view. When once the decree has been passed it may be fairly presumed that sooner or later it will be put into execution, and an application to that end may be made at any time so that the appellant, if he wants a stay of execution, should make his application at as early a stage as possible. In this particular instance the appellants allowed 9½ months to elapse before applying for a stay.

In rejecting the application it cannot, in my opinion, be said that the learned Additional District Judge has exercised a jurisdiction not vested in him by law, or that he has acted in the exercise of his jurisdiction illegally, or with material irregularity. There cannot be any doubt that he had jurisdiction to decide the matter and he did decide it. Whether he decided it rightly or wrongly seems to me to be beside the point. The principle applicable to such cases has been laid down in numerous reported decisions of the Courts: *Amir Hassan Khan* v. *Sheo Baksh Singh* (1). *Shew Prosad* v. *Ram Chunder* (4), *Ram Singh* v. *Salig Ram* (5), *Amritrao Krishna Deshpande* v. *Balkrishna Ganesh Amrapurkar*(6), and *Madhavrao Ganeshpani Oze* v. *Gulabbhai Lallubhai* (7). Whether the learned Additional District Judge came to right decision or not to be acted within his jurisdiction, and, even if we have the power to revise the order, as I think we undoubtedly have, there is, in my opinion, no sufficient ground for interference.

For these reasons I would discharge the Rule.

Suhrawardy, J.—Under section 36 of the Letters Patent my judgment, as that of the Senior Judge, should prevail. The Rule is made absolute, the order of the lower Court is set aside and the case remanded to that Court for consideration of the petitioners' application. Costs will abide the result, hearing fee one gold *mohur*.

Let the record be sent down at once.

K. S. D. *Rule made absolute.*

(4) 23 Ind. Cas. 977; 41 C. 323.
(5) 28 A. 84; A. W. N. (1905) 193; 2 A. L. J. 711.
(6) 11 B. 488; 6 Ind. Dec. (N. S.) 321.
(7) 23 B. 177; 12 Ind. Dec. (N. S.) 116.

MADRAS HIGH COURT.

CIVIL APPEAL No. 139 OF 1921.
July 22, 1924.

Present:—Mr. Charles Gordon Spencer, Officiating Chief Justice, and Mr. Justice Srinivasa Iyengar.

KUPPUSAMI GOUNDAN AND ANOTHER (MINOR) REPRESENTED BY NEXT FRIEND T. MANIKA GOUNDAN—PLAINTIFFS—APPELLANTS

versus

MARIMUTHU GOUNDAN AND OTHERS—DEFENDANTS Nos. 1 TO 3 AND 5 TO 9—RESPONDENTS Nos. 1 TO 8.

Provincial Insolvency Act (III of 1907), ss. 2 (1), 16—Hindu Law—Joint family—Father adjudicated insolvent—Sons' interest whether vests in Official Receiver—Nature of father's powers—Suit by sons for partition—Decree, nature of.

KUPPUSAMI GOUNDAN *v.* MARIMUTHU GOUNDAN.

On the adjudication as an insolvent of an undivided Hindu father what, in addition to his interest, vests in the Official Receiver is not only the power to dispose of the sons' shares for the satisfaction of the debts which are neither illegal nor immoral but the entire property inclusive of the shares of the sons therein. [p. 441, col. 2.]

The Official Assignee of Madras v. *Ramachandra Aiyar*, 68 Ind. Cas. 899; 46 M. 54; 16 L. W. 559; (1922) M. W. N. 653; 43 M. L. J. 569; (1923) A. I. R. (M.) 55, not followed.

Rangayya Chetty v. *Thenikachalla Mudali*, 19 M. 74; 6 Ind. Dec. (N. S.) 757, *Nunna Brahmayya Setti* v. *Chidaraboyina*, 26 M. 214, *Fakirchand Motichand* v. *Motichand Harruckchand*, 7 B. 438; 8 Ind. Jur. 93; 4 Ind. Dec. (N. S.) 294, *Behari Lal* v. *Sat Narain*, 69 Ind. Cas. 486; 3 L. 329; (1923) A. I. R. (L.) 1, relied upon.

Nor is such vesting conditional, contingent upon or proportionate to the debts of the father which are neither illegal nor immoral. [p. 442, col. 2.]

The property, however, so vests only for the purpose of enabling the Receiver to exercise the power of sale which the father had of disposing of the property for discharge of debts of an unobjectionable character. The sons, therefore, can in proper proceedings require to have it determined in respect of which debts such power can be exercised and in respect of which not, and to have made over to them what is left after the administration of the insolvent's estate and the due exercise of the powers by the Official Receiver. [p. 242, col. 2.]

A suit by Hindu sons for partition is not barred by the adjudication of the father as insolvent. In such a suit, the question of the illegality or immorality of the father's debts should be tried and the sons declared separate in status from the father, only the actual division by metes and bounds and the passing of the final decree must be deferred till the completion of the administration of the estate and its divestment from the hands of the Official Receiver. [p. 441, cols. 1 & 2.]

Per *Srinivasa Iyengar, J.*—The power of a father to dispose of his sons' shares also, for the payment of his debts is not in the nature of a latent power which comes into existence on the coming into existence of certain conditions precedent but a potential power over the entire property exercisable by him validly, subject only to the sons successfully questioning the same in proper proceedings. [p. 442, col. 2.]

The vesting of the interest in the Official Receiver on a Hindu father's insolvency must be regarded as in the nature of a trust for the exercise of the father's power of disposal of the family property for his antecedent debts on the one hand and on the other for the ascertainment and delivery over to the sons of the remainder of the property, if any. [p. 443, col. 1.]

Appeal against the decree of the Court of the First Additional Subordinate Judge, Coimbatore, in Original Suit No. 40 of 1919, (Original Suit No. 24 of 1917 on the file of the Court of the Subordinate Judge, Coimbatore).

Mr. *T. R. Ramachandra Iyer*, for the Appellants.

Mr. *T. M. Krishnaswami Iyer*, for the Respondents.

JUDGMENT.

Spencer, offg. C. J.—The two plaintiffs, who are minors represented by their mother, brought a suit to obtain a partition from their father, the first defendant. They made their father's step-mother (defendant No. 2) and her daughter (defendant No. 3) and their father's uncle (defendant No. 7) and two mortgagee-creditors of their father, defendants Nos. 4 and 5 and two mortgagee-creditors of defendant No. 7 (defendants Nos. 8 and 9) parties to the suit. The plaintiff's father was adjudicated an insolvent on December 19th, 1916, and this suit was instituted on March 2nd, 1917, after the first defendant had become an insolvent in law. The Subordinate Judge dismissed the suit on the ground that the suit was not maintainable after the plaintiff's father had become insolvent. He refused to give the plaintiffs an opportunity of proving that the mortgage-bonds in favour of defendants Nos. 4 and 5 were executed to secure debts not binding on the plaintiffs on account of the immorality of their father, on the ground that this matter was *res judicata* owing to the finding in the previous suits Original Suits Nos 13 and 14 of 1917 on the file of the Sub-Court of Coimbatore, which were suits brought by those mortgagees as plaintiffs in which the Court found that the plaint debts had not been proved to be not binding on these plaintiffs, who were defendants Nos. 2 and 3 in those suits.

The first point argued is that the Subordinate Judge was wrong in regarding the decision in the prior suits as *res judicata*. It is clear from the judgment of the High Court in Appeal No. 356 of 1919 that the plaintiffs abandoned their rights to claim a mortgage-decree against these defendants in these suits. The defendants against whom the suit had been dismissed had no right of appeal upon the finding as to

the nature of the debts and, therefore, this question was not finally decided as between the opposing parties to the suit. The lower Court must, therefore, take the suit back on its file and decide issue No. 1 upon such evidence as may be adduced on either side.

The main point upon which we have heard arguments in this appeal is whether the whole estate of which the first defendant was Manager, vested in the Official Receiver upon the first defendant's adjudication as an insolvent. Mr. Ramachandra Iyer tried to pursuade us that it was a condition precedent to the Official Receiver exercising the father's power to sell the joint estate for the discharge of his debts that those debts should be neither illegal nor immoral. Section 16 of the Provincial Insolvency Act III of 1907 declares that upon the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Receiver and that during the pendency of the insolvency proceedings, no creditor shall have any remedy against the person or property of the insolvent in respect of the debt or commence any suit or other legal proceedings except with the leave of the Court. Section 2, clause (*e*) defines 'property' as including any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit. Now there is nothing in these provisions to indicate that the vesting of the property will depend upon the nature of the debts. Therefore, there is no condition precedent to the vesting of the property and it may be ascertained whether the debts were incurred for illegal or immoral purposes in proceedings either before or after the adjudication. The argument that what vests in the Official Receiver, where the interest of undivided members of a joint family is concerned is not the property itself but only a power exercisable over that property is, in my opinion, not sound. The definition in section 2, clause (*e*) corresponds to the provision in section 266 of the Civil Procedure Code of 1882; O. XXI, r. 60 of the Civil Procedure (Code of 1908) by which a creditor may attach in execution all saleable property over which the judgment-debtor has a disposing power which he may exercise for his own benefit. It has been laid down by a Full Bench in *In re Balusawmy Ayyar* (1) that an Official Assignee standing in the shoes of an insolvent father can alienate family property to pay his antecedent debts provided that those debts are not tainted with illegality or imorality. In *Official Assignee of Madras* v. *Ramachandra Aiyar* (2) a Bench of this Court to which the Schwabe, C. J., and Courts-Trotter, J., were parties held that the interest of the sons does not vest in the Official Assignee by reason of the adjudication although it would be competent to him to deal with their shares if the debts of the insolvent were of such a nature as to be binding on their interest. At the hearing of that case the learned Advocate-General conceded (I think erroneously), that the sons' shares did not vest in the Official Assignee and their Lordships adopted what he conceded as being the correct law upon the point. But the decision is one under the Presidency Towns Insolvency Act, and having regard to the manner in which the case was disposed of, should not be treated as a ruling on a point which was not necessary for the decision of the case. So long ago as 1895 Subramania Iyer, J., decided in *Rangayya Chetty* v. *Theni Kachalla Mudali* (3) that after the making of a vesting order, the Official Assignee had power to transfer not only the shares of the insolvent but also those of his co-parceners provided that the debts were shown to have been incurred for purposes binding upon them. This decision was followed in *Nunna Brahmayya Setti* v. *Chidaraboyina* (4) quoting the opinion of Latham, J., in *Fakirchand Motichand* v. *Motichand Harrukchand* (5), although Bashyam Ayyangar, J., was inclined to treat the

(1) 80 Ind. Cas. 108; 47 M. 87; 19 L. W. 86; 46 M. L. J. 86; (1924) M. W. N. 94; (1924) A. I. R. (M.) 411.

(2) 68 Ind. Cas. 899; 46 M. 54; 16 L. W. 559; (1922) M. W. N. 653; 43 M. L. J. 569; (1923) A. I. R. (M.) 55.

(3) 19 M. 74; 6 Ind. Dec. (N. S.) 757.

(4) 26 M. 214.

(5) 7 B. 438; 8 Ind. Jur. 93; 4 Ind Dec. (N. S.) 294.

Official Assignee's powers as derived from section 30 of the Indian Insolvency Act, which deals with powers rather than from section 7 which deals with property. A Full Bench of the Lahore Court has definitely decided upon this point in *Behari Lal* v. *Sat Narain* (6) that on the insolvency of a Hindu father governed by Mitakshara Law not only his own interest in the joint family estate vests in the Official Assignee but also his sons' interests which must be treated as the property of the father so far as the Official Assignee is concerned. I am respectfully inclined to adopt that decision as a correct statement of the law. An unreported decision in Civil Miscellaneous Appeal No. 110 of 1919 by Krishnan, J. and myself was to the same effect *viz.*, that the property which vested in the Receiver upon the adjudication of the judgment-debtor as an insolvent included all property over which he had a disposing power which he might exercise for his own benefit. I think that *Sanyasi Charan Mondal* v. *Asutosh Ghose* (7) which was quoted to us in the arguments has no bearing on this question, as what was dealt with in that case was the power of a Receiver to deal with the interests of a minor who had not been adjudicated as an insolvent in a partnership property, upon which different considerations from those applying to co-parcenerships apply.

It is clear that the present suit is not barred by the adjudication of the first defendant as an insolvent and the lower Court should not have dismissed it on that ground. The plaintiffs may reasonably wish to protect themselves against the father contracting further debts on the security of the joint family property and their only means of protecting themselves is [*vide Sama Rao* v. *Firm of Marwadi Vajinji* (8)] by becoming divided. The suit must, therefore, be remanded for retrial on the issue relating to illegality or immorality of the debts incurred in favour of the 4th and 5th defendants and for declaring the plaintiffs separate from their father in status and fixing the amount of the shares to which they are entitled. As the property has vested in the Official Receiver, it will be impossible to effect a division by metes and bounds until the administration of the estate is completed. The passing of the final decree must, therefore, be deferred pending the divestment of the estate from the hands of the Official Receiver. The Official Receiver will get his costs of opposing this appeal out of the insolvent first defendant's estate. The costs of the other parties to the suit in the lower Court and in the appeal will abide and be provided for in the final decree.

Srinivasa Iyengar, J.—I agree with my Lord the Officiating Chief Justice in the order made by him. Having regard however to the very important nature of the questions raised in this appeal I feel constrained to add some observations of my own. The main question is whether on the adjudication of an undivided Hindu father what vests in the Official Receiver is only the power to dispose of the sons' shares for the satisfaction of the debts which are neither illegal nor immoral or the entire property inclusive of the shares of the sons therein. The decision in *Official Assignee of Madras* v. *Ramachandra Aiyar* (2) though it related to an insolvency under the Presidency Towns Insolvency Act, proceeded on a construction and consideration of language identical in the Presidency Towns Insolvency Act and the Provincial Insolvency Act. It is true that the decision of the learned Judges seems to be based on the concession made by the learned Advocate-General at the very opening of his argument. It is also true that the definition of 'property' contained in section 2, clause (*e*) of the Act was not referred to or its effect on the question before the Court considered.

However, personally speaking in view of the very definite statement of the law set out in the said judgment, I should have been disposed to consider the matter of sufficient importance to deem a reference to the Full Bench necessary in the matter. But in view of the intimation by my Lord the Officiat-

(6) 69 Ind. Cas. 486; 3 L. 329; (1923) A. I. R. (L.) 1.
(7) 26 Ind. Cas. 836; 42 C. 225.
(8) 71 Ind. Cas. 153; 46 M. 64 at p. 69; (1922) M. W. N. 708; 43 M. L. J. 745; (1923) A. I. R. (M.) 36; 32 M. L. T. 9; 17 L. W. 661.

ing Chief Justice in a matter which is essentially one of etiquette, I felt bound not to disagree with his decision that it is not necessary to make any such reference.

The expression 'property' over which or the profits of which any person has a disposing power which he may exercise for his own benefit is by no means easy to construe. It cannot, of course, be said that a father who exercises the power of sale over the joint property in which his sons have also a vested interest for the payment of antecedent debts of his, is not exercising the power of sale for his own benefit because though primarily the benefit accruing from the sale is the creditors,' still the freedom from liability for a personal debt is undoubtedly benefit of the kind contemplated. But the power of sale possessed by the father under the Hindu Law is not an absolute power of sale, and it is possible to regard the power as argued by Mr. T. R. Ramachandra Iyer the learned Vakil for the appellant, as conditional upon the existence of antecedent debts and the requisite that such debts should not have been contracted for illegal or immoral purposes.

Were the matter *res integra*, one would have been inclined to avoid the monstrous result that the family estate including the sons' shares should vest in the Official Receiver or Assignee on the insolvency of the father by holding that the father's power being merely conditional, the vesting of the property in the Official Receiver or Assignee both in quantity and quality would only be such as to tantamount to a vesting merely of the bare power, as held in the case of *Official Assignee of Madras* v. *Ramachandra Aiyar* (2). But the expresson 'property' over which or the profits of which any person has a disposing power which he may exercise for his own benefit, was by no means new to the Indian Legislature and has been bodily copied from section 266 of the Civil Procedure Code of 1882.

Remembering that the Provincial Law of Insolvency is a development of the old Law of Civil Procedure, it seems to me that we are bound to construe that expression in the same manner as it has been construed by Courts in India for a long time beginning at any rate with the case of *Jagabhai Lalubhai* v. *Vijbhukhandas Jagjivandas* (9). That case and the numerous cases that followed it have proceeded on the basis that the power of a father to dispose of his sons' shares also, for the payment of his debts was not in the nature of a latent power which came into existence on the coming into existence of certain conditions precedent but a potential power over the entire property exercisable by him validly, subject only to the sons successfully questioning the same in proper proceedings.

It is, therefore, impossible to hold that when the property of the insolvent is said to vest in the Court or the Official Receiver and property is defined to include all property over which the insolvent has a disposing power, what so vests is not the entire property itself inclusive of the shares of the sons therein but only the power of disposal which a father has.

There would also be enormous difficulties of a practical nature in holding that the power of a father is only a conditional power and that the vesting is contingent upon or proportionate to the debts of the father which are neither illegal nor immoral. But though the entire property inclusive of the shares of the sons vests in the Official Receiver or Assignee, it is clear that it so vests for the purpose of enabling him to exercise the power of sale which the father had of disposing of the property for the discharge of debts of an unobjectionable character, and it follows therefrom that the sons can, in proper proceedings, require to have it determined in respect of which debts such power can be exercised and in respect of which not. And it also follows that the sons can in proper time require that what is left over after the administration of the insolvent's estate and the due exercise of the powers by the Official Receiver or Assignee should be made over to them.

(9) 11 B. 37; 6 Ind. Dec. (N. S.) 24.

The proper way, it seems to me, of regarding the vesting so far as the sons are concerned would be to regard it as in the nature of a trust for the exercise of the father's power of disposal of the family property for his antecedent debts on the one hand and on the other for the ascertainment and delivery over to the sons of the remainder of the property, if any.

I am not at all sure whether it ought not to be held that on the mere making of a vesting order by a Court as regards the father or as for that matter, another co-parcener of the joint family the indeterminate share possessed by the co-parcener becoming defined and definite, there is not brought about in law a status of partition between him on the one hand and the other co-parceners on the other. However that may be, there can be no doubt at any rate that the sons are at least entitled to have the status of division declared and further to have their rights to the residue of the property, if any, ascertained declared and decreed. The lower Court was, therefore, wrong in dismissing the plaintiffs' suit entirely on the mere ground that the plaintiffs' shares became vested in the Official Receiver and that, therefore the plaintiffs had no cause of action whatever.

As regards the other question, namely, whether the finding in the previous suit by the creditors that the debts were neither illegal nor immoral operates as *res judicata* in the present suit, I agree that it is not a case in which the rule of *res judicata* applies. In the case of *Midnapore Zemindari Co., Ltd.* v. *Naresh Narain Roy* (10), their Lordships of the Judicial Committee held that the finding against the occupancy right claimed by tenants in a suit against them which was dismissed as premature should not operate as *res judicata* in a subsequent suit, and the ground of decision is that in the former suit the tenants had no occasion to go further as to the finding against them.

If it should be necessary to bring the case within the terms of section 11, Civil Procedure Code, I should be disposed to regard it not as a case in which there has been no final decision but as a case in which the issue was not substantially in issue between the parties in the previous suit for the reason that though directly and substantially in issue at one stage it ceased to be substantially in issue on the finding of the Court with regard to another issue which was sufficient to dispose of the case.

I, therefore, agree that the appeal should be allowed and that the plaintiffs' suit should be restored and remanded on the terms set out in the judgment of my Lord the Officiating Chief Justice.

V. N. V. *Appeal allowed.*

(10) 64 Ind. Cas. 231; 48 C. 460; 14 L. W. 265; 30 M. L. T. 279; (1922) A. I. R. (P. C.) 241; 48 I. A. 49 (P. C.).

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 94 OF 1923.

August 18, 1924.

Present:—Mr. Dalal, J. C.

BALA DIN (DEAD THROUGH LEGAL REPRESENTATIVE GAJADHAR PRASAD) —PLAINTIFF—APPELLANT

versus

AJUDHIA AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Rent Act (XXII of 1886), s. 108, cl. (10)—Muafidar *becoming under-proprietor—Illegal ejectment—Recovery of possession—Interest of* muafidar, *whether assignable—Transferee of* muafi *rights, position of.*

A *muafidar* who has attained the position of an under-proprietor under section 107 H, Oudh Rent Act, can sue his landlord for recovery of possession as an under-proprietor on his ejectment without any process of law. [p. 444, col. 1.]

The interest of a *muafidar* being untransferable, a transferee of such interest does not acquire such a title as he can enforce in a Civil Court. [p. 444, col. 2.]

Raja Suraj Bakhsh Singh v. *Baldeo Bihari*, 53 Ind. Cas. 459; 6 O. L. J. 490; 22 O. C. 186; 1 U. P. L. R. (O.) 83, referred to.

Second appeal against the decree of the Subordinate Judge, Unao, dated the 8th December 1922, in an appeal preferred against that of the Munsif, North Unao, dated the 3rd October 1922.

St. *G. Jackson*, for the Appellant.

Mr. *S. D. Sinha*, for Respondents Nos. 1 and 2.

BALA DIN *v.* AJUDHIA.

JUDGMENT.—In my opinion injustice has been done to the plaintiff-appellant by reason of the order passed by the Assistant Collector on 20th February 1922. The plaintiff is the purchaser of *muafi* land from certain *muafidars*. He sued those *muafidars* and the *zemindars* Ajudhia and Arjun for possession of one plot out of several purchased by him. The *zemindars* contested the suit and not the transferors. The plaintiff went to the Revenue Court on the ground that he was really the transferee of under-proprietary rights in the plot in suit, that he had been illegally ejected by the *zemindars* and that, therefore, he was entitled to possession under section 108 (10) of the Rent Act XXII of 1886. He correctly chose his Court and was entitled to relief if his allegations were correct. Under certain circumstances stated in Chapter VII-A a *muafidar* assumes the position of an under-proprietor under section 107-H. If a *muafidar* has attained that position he cannot be summarily rejected by the proprietor without any redress, simply on the ground that the *zemindar* himself had not applied for resumption of *muafi* and in such a suit the *muafidar* had not obtained the declaration of under-proprietary title. In my opinion a *muafidar* who has attained the position of an under-proprietor under section 107-H can sue his landlord for recovery of possession as an under-proprietor on his ejectment without any process of law. The learned Assistant Collector rightly took this view and proceeded to decide the question whether the plaintiff had attained the position of an under-proprietor or not. The fault he made was in the order which he passed. When he decided that the plaintiff had not attained the position of an under-proprietor he ought to have dismissed the suit for possession, giving the plaintiff an opportunity to appeal to the District Court against the adverse finding of under-proprietary possession. In the Revenue Court the plaintiff took up the correct position that as a *muafidar* he could not sue in the Civil Court because he was a transferee of the right and a *muafi* right cannot be transferred. After this admission it was wrong of the Assistant Collector to return the plaint to the plaintiff to be presented to the Civil Court. I shall not bind the plaintiff to the admission made by his Pleader in the Civil Court that he did not claim possession as an under-proprietor. The Pleader appears to have made such an admission because he knew that a Civil Court could not decide the question of the ejectment of an under-proprietor. When the suit was tried by the Civil Court of the Munsif of Unao (North) it was rightly held that the plaintiff as transferee of *muafi* right did not acquire such a title as he could enforce in a Civil Court. This point of law can no longer be disputed. A judgment of this Court in *Raja Suraj Bakhsh Singh* v. *Baldeo Bihari* (1) is based on earlier decisions of this Court. The present appeal from the decree of the Civil Court dismissing the plaintiff's suit cannot succeed. Unfortunately an appeal from the decree of the Assistant Collector would not lie to the District Judge even where a question of proprietary title is decided so it is not possible to help the applicant though, in my opinion, the order of the Assistant Collector was incorrect and he ought in reality to have dismissed the suit. If this Court had jurisdiction to interfere I would have remitted the matter back to the Assistant Collector to pass a proper decree.

Under the circumstances of the present case I am not in a position to help the plaintiff-appellant. His appeal is dismissed but I make no order as to costs.

G. H. *Appeal dismissed.*

(1) 53 Ind. Cas. 459; 6 O. L. J. 490; 22 O. C. 186; 1 U. P. L. R. (O.) 83.

DORAIVELU MUDALIAR *v.* NATESA GRAMANI.

MADRAS HIGH COURT.
FULL BENCH.

CITY CIVIL COURT APPEAL No. 40 OF 1922.
April 7, 1924.

Present:—Sir Victor Murray Coutts-Trotter, KT., Chief Justice, Mr. Justice Ramesam and Mr. Justice Wallace.

C. DORAIVELU MUDALIAR, TRUSTEE AND DHARAMKARTHA OF APPARSWAMI TEMPLE, MYLAPORE—PLAINTIFF—APPELLANT

versus

NATESA GRAMANI AND OTHERS—DEFENDANTS NOS. 1, 5, 6 AND 7—RESPONDENTS.

Madras City Tenants' Protection Act (III of 1922), ss. 2 (3), 9—Trustee—Landlord—Idol—Construction of Statutes.

Section 9 of the Madras City Tenants' Protection Act applies to landlords who hold their lands as trustees of a religious institution. [p. 449, col. 2.]

Parthasarathi Aiyangar v. *Doraisami Naicker*, 72 Ind. Cas. 826; 46 M. 823; 44 M. L. J. 91; (1923) M. W. N. 148; (1923) A. I. R. (M.) 308, overruled.

Per *Coutts-Trotter, C. J.*—It is wrong to seek to control a Statute, which is obviously intended to overrule the ordinary law, by general considerations imported from the Hindu Law or what is called the Common Law of India. [p. 449, col. 2.]

Per *Ramesam, J.*—An idol of a temple can be a landlord within the definition of the term "landlord" in section 2, sub-section (3), Madras City Tenants' Protecton Act. [p. 450, col. 1.]

Appeal against the decree of the City Civil Court, Madras, in Original Suit No. 475 of 1921.

This appeal came on for hearing on the 18th February 1924, and having stood over for consideration till the 28th February 1924, the Court (Phillips and Odgers, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

Phillips, J.—This is an appeal against an order under section 9 of the Madras City Tenants' Protection Act, 1922, Act III of 1922, by which the tenant in this suit has been allowed to purchase the land on which he has built a superstructure at a price fixed by the Court.

There are a large number of connected suits and the question at issue is one that involves the rights of a large number of tenants in Madras City *i.e.*, whether Act III of 1922 applies to temple trustees who are landlords of land in the City of Madras. The appellant is the trustee of the Apparswami temple and in the appeal he has raised certain minor pleas which have no great force. In the first place, it is pleaded that the agreement to purchase the land at a price to be fixed by the Court was made before the Act had come into force and that the agreement was not an agreement to abide by the terms of the Act but was only an agreement to have a Commissioner appointed for valuing the land. It is clear, however, that the agreement was really more than a mere agreement to have the land valued, for unless the landlord had agreed to accept the provisions of section 9 of the Act, no purpose could have been served by having the land valued. It is clear that he did consent to the particular procedure being adopted and he is now bound by that agreement unless it is void for other reasons. There is also no force in the contention that a written application should have been presented under section 9. The Act does not specifically provide for a written application, nor have we any proof that no such written application was filed.

The main point on which the appellant relies is the plea that the Act does not apply to trustees of temples and in this he is supported by the judgment in *Parthasarathi Aiyangar* v. *Doraisami Naicker* (1) which clearly is in his favour. I have had the advantage of reading my learned brother's judgment and with all respect I think with him that that decision is open to question. It is a matter of some importance, for this Act was passed "for the protection of tenants in Madras who had constructed buildings on others' lands in the hope that they would not be evicted so long as they paid a fair rent for the land," and we are given to understand that, if the ruling in *Parthasarathi Aiyangar* v. *Doraisami Naicker* (1) is correct, a very large number of tenants who hold under temple trustees will be deprived of the benefits of the Act; and unless it is necessary to hold

(1) 72 Ind. Cas. 826; 46 M. 823; 44 M. L. J. 91; (1923) M. W. N. 148; (1923) A. I. R. (M.) 308.

that an Act which was expressly designed for their benefit has failed in securing its object, I would be inclined to hold otherwise, notwithstanding that an opinion has been expressed to the contrary. I, therefore, agree that the question ought to be referred for the decision of a Full Bench. The arguments of Spencer and Venkatasubba Rao, JJ., proceed mainly on an interpretation of the Explanation to section 9 which runs as follows :—"'Land' means the interest of the landlord in the land and all other interests which he can convey under any power;" and they have come to the conclusion that a trustee has no power to convey the land except for the benefit of the institution or for necessity. With all respect, it appears to me that this explanation cannot bear this interpretation. The Explanation relates to the word "land" as used in section 9 alone, because in section 2 (2) there is another definition of "land." In section 9 we find the following sentences containing the word "land":—"the landlord shall be directed to sell the land for a price to be fixed by the Court":—"the Court shall fix the price of the land":—"on payment of the price the Court shall pass a final order directing the conveyance of the land by the landlord." In all these instances, the word "land" is used with reference to what is to be sold to the tenant and conveyed by the landlord, and, in my opinion, the Explanation is inserted to provide that the whole of the interest of the landlord shall be conveyed to the tenant, not merely his own interest but any other interest which he can convey under any power. For instance, the interest of the Manager of an undivided Hindu family extends only to his own share in the property, but under the Hindu Law he has the disposing power over the shares of the other members. Or, again, a landlord who had not an absolute estate might, by means of a power of attorney or other deed so empowering him, have the right to convey further interests in the land. If that is so, I think that it would be difficult to justify the arguments in the reported case. The power of a temple trustee to alienate temple property is undoubtedly limited, but it is well recognized that, under certain circumstances and for certain purposes, he can alienate the land, one of those purposes being necessity. When, therefore, the Legislature has determined in the interest of the state that a landlord may be compelled to sell his land to a long-standing tenant in order to avoid gross injustice to that tenant, it is difficult to see how this direction does not impose a necessity on a trustee, who is also a landlord, to alienate the land. It can hardly be said, nor do I think that it would be contended that the Act is *ultra vires* of the Legislature and, if it is not *ultra vires*, the Legislature has imposed this necessity on temple trustees. It is not as if this was only instance in which the Legislature had compelled trustees to alienate trust property. Under the Land Acquisition Act, such land can be acquired by Government on payment of the proper compensation. There are clauses in that Act which to a certain extent safeguard the interests of the trust by providing that the compensation money shall be invested for the trust; but the mere fact that the present Act has failed to provide a similar procedure, *viz.*, a procedure whereby the possibility of criminal misappropriation by the trustee will be lessened, cannot be taken as conclusively showing that the Act was not meant to apply to temple trustees. There is really no reason to presume that when a temple trustee obtains possession of cash in lieu of land, he will at once proceed to misappropriate it; he can spend it on the purposes of the trust, or he can invest it so as to secure the income from the fund for the benefit of the trust and I fail to see how any argument that this Act III of 1922 does not apply to temple trustees can be supported by the analogy of the Land Acquisition Act. The Judges of the former Bench were both agreed that temple trustees come within the definition of "landlord" in section 2 (3) of the Act and with that opinion I respectfully agree; but neither my learned brother nor I agree with the further conclusion that the Act is not applicable to temple trustees.

I think that it is necessary that the following question should be determined by a Full Bench; and in view of the fact that a number of cases are pending in which this question is at issue, I respectfully urge that the matter be considered at an early date. The question is, "Does the Madras Act III of 1922 apply to landlords who hold their land as trustees of a religious institution?"

Odgers, J.—The suit from which this appeal arises was in ejectment by the trustee of the Apparswami temple, Mylapore, against a tenant who had erected a superstructure on the temple land. The suit was brought, we are informed, while the bill which became the Madras City Tenants' Protection Act (III of 1922) was under discussion in the Legislative Council. The bill was passed and while the Governor's assent to it was awaited, the City Civil Court Judge entertained an application by the tenants—(there were many suits of which this is one)—to proceed under the Act to enable the tenants to acquire their holdings from their landlord, the trustee of the temple. Commissioners were appointed by consent of all parties and on their report the City Civil Judge made his award, after the bill had become law. The trustee had previously in C. S. No. 194 of 1921 been authorized by the Original Side of this Court to sell certain lands including those in question at certain prices. The prices awarded by the City Civil Judge are somewhat lower than those fixed by the Original Side. In appeal the point is taken that the Act does not apply to a trustee of a religious endowment at all. Reliance is placed on the decision of Spencer and Venkatasubba Rao, JJ., in *Parthasarathi Aiyangar* v. *Doraiswami Naicker* (1). That was a reference by a different Judge of the City Civil Court to the High Court and the question referred was "whether a tenant in occupation of trust lands belonging to a temple or mosque can enforce a compulsory sale under section 9 of the Madras City Tenants' Protection Act and require the temple or mosque to deliver the land to him on a valuation to be made by the Court." Both the learned Judges held that the trustees of religious endowments fell within the definition of landlord in section 2 (3) of the Act; but the difficulty they felt was in construing the Explanation to section 9. It runs as follows:—"'Land' means the interest of the landlord in the land and all other interests which he can convey under any power." They were of opinion that the words "under any power" must be applied to the limited power of a trustee of temple property to alienate, *e. g.*, only for necessity or for the benefit of the institution. The learned Judges set out to enquire as to the interests which such a trustee can convey under any power, *i. e.*, to examine the case-law in support of their hypothesis that the power of alienation is limited. With great deference I think they were wrong.

The Explanation is as to what is meant by the expression "land" in section 9 only. The word occurs in the first sub-section twice "the landlord shall be directed to sell the land" and "the Court shall fix the price according to the market value of the land." In sub-section 3 it occurs once "the Court shall pass a final order directing the conveyance of the land." The Explanation then follows. As I read it the meaning of the Explanation is that the landlord thus conveys not only his own interests in the land but any other interests which he has power to convey. Power is used in its legal sense as in "power of attorney," "power of sale," "power of appointment." The landlord in other words is to convey every kind of right or interest he has in the property whether in his own right or by rights conferred upon him. It, therefore, seems to me that a discussion as to the limited rights of alienation by trustees is wholly inapplicable to the wording of this Explanation. Further in default of any express words or implication to the contrary in a settlement or trust deed, a trustee will take the whole legal estate and I have no doubt that in this case the legal estate is in the trustee of the temple. I have already

said that it was held in *Parthasarathi Aiyangar* v. *Doraisami Naicker* (1) that a trustee falls within section 2 (3) and with that opinion I respectfully agree. It seems to me, therefore, with great respect that to hold that a tenant under a temple or other religious endowment cannot enforce a sale of land to him under section 9 of Act III of 1922 is wrong and I agree that in this difference of opinion the question should be referred to a Full Bench and I also agree as to the terms of the reference as set out by my learned brother.

Messrs. *V. Sivaprakasa Mudaliar* and *C. V. Mahadeva Ayyar*, for the Appellant.

Mr. *N. Chandrasekjustara, Ayyar* for Mr. *K. B. Ranganatha Ayyar*, for Respondent No. 1.

OPINION.

Coutts-Trotter, C. J.—This is a reference made by Phillips, J. and Odgers, J., obviously because they were not satisfied with the correctness of the decision of another Bench of this Court consisting of Spencer and Venkatasubba Rao, JJ., in *Parthasarathi Aiyangar* v. *Doraisami Naicker* (1).

The short point referred to us is, does the Madras Act III of 1922 apply to landlords who hold their land as trustees of a religious institution? The wording of the reference is not very definite, because it is conceded on all hands that the term "landlord" as defined in the Act must cover persons who are landlords by virtue of their capacity as trustees of trust lands with power to let them to tenants. The real point is as to whether the provisions of section 9 of the Madras Act III of 1922 apply to landlords who are trust landlords by virtue of being trustees of religious or charitable institutions.

The Act is a very unhappily drafted one and it is quite clear to us that any reasonable draftsman must have foreseen that a question such as the one we have now to determine was certain to arise and should have provided for it. However, he has not done so here in express terms and it remains to be seen whether, on the one hand, he has done so by necessary implication or on the other hand there are considerations outside the Act which compel us to say that it does not apply to landlords in the position of trustees.

The preamble to the Act is this: "Whereas it is necessary to give protection to tenants who, in many parts of the City of Madras, have constructed buildings on others' lands in the hope that they would not be evicted so long as they pay a fair rent for the land... It is hereby enacted as follows." Then follows the body of the Act. In section 2, sub-section (3) occurs the following definition of "Landlord"—'Landlord' means any person owning any land and includes every person entitled to collect the rent of the whole or any portion of the land, whether on his own account or on behalf of or for the benefit of any other person. (I am only reading the material words.) Then by section 3, it is enacted that every tenant shall, on ejectment, be entitled to be paid as compensation the value of any building, which may have been erected by him, by any of his predecessors-in-interest or by any person not in occupation at the time of the ejectment who derived title from either of them and for which compensation has not already been paid; and that a tenant who is entitled to compensation for the value of any building shall also be paid the value of trees which may have been planted by him on the land. To pause for a moment. It seems difficult to suppose that the Act could possibly have meant to exclude from the scope of this section a tenant who holds under a trustee or trustees of a trust or charitable endowment. The tenant has put up his building on somebody else's land and that somebody else on ejecting him is going to get the benefit of the tenant's work,

and it is enacted in perfectly general language that in such cases the tenant shall have the benefit of his labour in the form of money compensation. It is said in this case that a landlord who is a trustee cannot deal with the trust lands unless it be for the benefit of the trust or for purposes necessary to the trust or endowment. Exactly the same line of reasoning would apply to the compensation provided for by section 3. It is of no benefit to the trust to pay out part of the trust funds whether income or capital, by way of compensation to eject a tenant, but it is a mere act of justice required to be done by the policy of the Act. Now I pass on to the section, which is really material in this case, section 9. Sub-section (1) of that section begins thus:—"Any tenant who is entitled to compensation under section 3 and against whom a suit in ejectment has been instituted," and then provision is made in it that such a tenant shall have power to apply to the Court for an order for the sale of the land on conditions approved by the Court with the object of putting him in the position of a purchaser of his holding. The words are: "Any tenant who is entitled to compensation under section 3." *Prima facie* that would include all tenants who have put up buildings on their landlords' land, whether those landlords are owners of the land or trustees of it. It is said that it is not so, because of the Explanation appended to that section. I have always noticed in Indian Statutes that, when any doubt is raised as to the construction of a section of an Act, it is usually raised by what is somewhat disappointingly called the explanation. So here, the Explanation is, "'Land' means the interest of the landlord in the land and all other interests which he can convey under any power." It is said that this landlord, being a trustee for a charitable or religious endowment, has no interest of his own to convey and can only convey the trust property or the trust land under conditions defined by the Hindu Law which I may summarise as being practically equivalent to a necessity arising out of the circumstances and the position of the trust at the moment; and it is on that ground that the decision in *Parthasarathi Aiyangar* v. *Doraiswami Naicker* (1) proceeded. But it seems to me that it is wrong to seek to control a Statute, which is obviously intended to overrule the ordinary law, by general considerations imported from the Hindu Law or what is called the Common Law of India. A trustee landlord can convey the interest of the trust in certain given circumstances. Two of those circumstances have been already referred to,—necessity and benefit for the trust,—and I think there is added a further one by this new Act III of 1922, namely, when a tenant has been in possession of the land and has put up a superstructure on the land and to eject whom would be in certain circumstances plainly inequitable without compensation, and in other circumstances, such as the one contemplated by the section would be inequitable without giving him an opportunity of acquiring the land for himself on payment. That consideration appears to dispose of this case.

We cannot accede to the contrary opinion of Spencer and Venkatasubba Rao, JJ., in *Parthasarathi Aiyangar* v. *Doraisami Naicker* (1), and must answer the reference, not in the form of a direct answer to the question put but by saying that, in our opinion, section 9 of the Madras Act III of 1922 applies to landlords who hold their land as trustees of religious institution.

Ramesam, J.—I agree.

I think that the matter can also be put in a different way. Both in the case before us and in the case in *Parthasarathi Aiyangar* v. *Doraisami Naicker* (1) the plaintiffs were really the idols in the temple and their Lordships of the Judicial Committee remarked in *Vidya Varuthi Thirtha Swamigal* v. *Balusami Ayyar* (2) that, under the Hindu

(2) 65 Ind. Cas. 161; 44 M. 831; (1921) M. W. N. 449; 41 M. L. J. 346; 3 U. P. L. R. (P. C.) 62; 15 L. W. 78; 30 M. L. T. 66; 3 P. L. T. 245; 48 I. A. 302; 26 C. W. N. 537; 24 Bom. L. R. 629; 20 A. L. J. 497; (1922) A. I. R. (P. C.) 123 (P. C.).

Law, the image of a deity of the Hindu Pantheon is, as has been aptly called, "a juristic entity" vested with the capacity of receiving gifts and holding property. The landlord of the suit land is undoubtedly the idol of the temple within the definition of the term "landlord" in section 2, sub-section (3). That being so, there is no difficulty in applying the Explanation to section 9 to the suit land. The Explanation to section 9 consists of two parts. The first part refers to the interest of the landlord in the land, and the second to all other interests which he can convey under any power. The object of second clause is to add to the first clause and not to cut it down. If any land falls under the explanation of the term as given in the first clause, one need not go to the second clause. In this case the suit land is the land belonging to the landlord, that is the idol in the temple represented by the trustee.

I agree with the answer proposed by my Lord.

Wallace, J.—I fully agree with all that has been said by the learned Chief Justice and I should just like to put my view in another form. If we take the procedure which is laid down in section 9, we find that any tenant, *i.e.*, by definition "any tenant of land, liable to pay rent on it", not excluding a tenant of land owned by a trust, is entitled to move the Court for an order that his landlord shall be directed to sell the land. It is admitted that the trustee of trust lands comes within the definition of the term "landlord." When the Court has made that order and not earlier, as I conceive it, can a trustee landlord come in to object that such an order cannot be valid because he is not entitled in law to sell the land or to alientate it permanently except for necessity. To that the Court re-joins that the order itself has just provided the necessity required and it seems to me that on that the objection of the trustee landlord must vanish, as it cannot be argued that such an order of the Court directing him to sell the land is not a necessity justifying his conveyance of the land. In this view there seems to me nothing in the Act from which one may reasonably conclude that it was not intended to apply to a trustee landlord.

V. N. V. *Reference answered.*

S. D.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 462 OF 1922.

April 16, 1924.

Present:—Mr Justice Krishnan and Mr. Justice Odgers.

THE OFFICIAL RECEIVER, TANJORE —APPELLANT

versus

VEDDAPPA MUDALIAR—RESPONDENT.

*Provincial Insolvency Act (V of 1920), s. 53—Release in favour of father—Subsequent insolvency—Anticipatory fraud—Onus of proof—*Bona fides.

It is not necessary that a man should actually be indebted at the time he enters into a voluntary settlement to make it fraudulent; if he does it with a view to his being indebted at a future time, it is equally fraudulent, and ought to be set aside. A man can commit what may be termed compendiously "anticipatory fraud" and effect a transfer of his properties with a view to get into debt and prevent his creditors getting at his property. [p. 451, col. 1.]

Steleman v. *Ashdown*, 26 E. R. 688, *Thomas Pillai* v. *Mathurama Chettyar*, 4 Ind. Cas. 301; (1910) M. W. N. 141; 33 M. 205, *Hossein Bhai Ahmedbhai* v. *Haji Ismail Haji Essac*, 5 Bom. L. R. 255, relied on.

Under section 53 of the Provincial Insolvency Act, every transaction which an insolvent enters into within two years previous to his insolvency is treated as *prima facie* invalid and the burden is on the insolvent or the alienee to show that the transaction impeached is a valid and *bona fide* one. [p. 451, col. 2.]

Both good faith and valuable consideration have to be proved. The circumstances under which the deed came to be executed, the covenants made therein, the conduct of the parties both at the time and subsequently have all to be taken into consideration. If the transfer was really intended to be carried out and was made *bona fide* for saving the insolvent from incurring debts and ruining himself, the transfer would not be interfered with, but if circumstances show that the transferor was actually screening his properties from the reach of his future creditors, the transfer would be a fraudulent one. [p. 451, col. 2; p. 452, col. 1.]

Ebrahimbhai Rahimbhai v. *Fulbai*, 26 B. 577, *Edward Russell William Hayward* v. *Elizabeth Hammand*, (1737) 26 E. R. 9 at p. 11; *Re Tellys Ex parte Jeffery*, (1896) 75 L. T. 166; *Denny*

Trustee v. *Denny*, (1919) 1 K. B. 583; 88 L. J. K. B. 679; 120 L. T. 608; (1918—19) B. & C. R. 139; 35 T. L. R. 238, distinguished.

Appeal against the order of the District Court of East Tanjore at Negapatam, dated the 9th August 1922, in I. A. No. 260 of 1921, in I. P. No. 29 of 1920 on the file of the District Court, Tanjore.

Mr. *S. Subrahmaniya Iyer*, for the Appellant.

Mr. *A. V. Visvanatha Iyer*, for the Respondent.

JUDGMENT.—This is an appeal by the Official Receiver of Tanjore in an insolvency matter in which the Official Receiver applied to have a release-deed or a transfer deed executed by the insolvent in favour of his father within two years of the insolvency to be declared void under section 53 of the Provincial Insolvency Act V of 1920. The learned District Judge disposed of the case, we think, somewhat summarily; he fell into the initial error of thinking that, as at the time the release-deed was executed, all the previous creditors had been paid off and there were no creditors in existence, the deed could not be said to be in fraud of creditors and the subsequent creditors could not impugn it. We cannot accept this as a correct statement of the law. It has been laid down so early as 1742 in *Stileman* v. *Ashdown* (1) that "It is not necessary that a man should actually be indebted at the time he enters into a voluntary settlement to make it fraudulent; for if a man does it with a view to his being indebted at a future time, it is equally fraudulent, and ought to be set aside." A man can commit what may be termed compendiously "anticipatory fraud" and effect a transfer of his properties with a view to get into debt and prevent his creditors getting at his property. The view that was laid down in *Steleman* v. *Ashdown* (1) has been followed in *Thomas Pillai* v. *Muthurama Chettyar* (2) and *Hossein Bhai Ahmed Bhai* v. *Haji Ismail Haji Essac* (3). It follows, therefore, that one of the chief grounds taken by the District Judge for not setting aside this alienation is not good in law.

The second point the District Judge mentions is that in the present case there was consideration for the alienation, namely, the payment of debts and the maintenance of the executant and his wife and children. This might be no doubt some consideration for the transaction, but the question that has to be considered in such cases is the *bona fides* of the transaction. If the consideration is inedaquate or is such that it shows that it was not a real consideration, it certainly may be taken as one item for deciding whether the transaction itself was *bona fide* or not. Now, under section 53 of the Act, what has to be proved is that the transfer was in good faith and for valuable consideration, if the transfer is within two years of the insolvency, the burden being on the person asserting it to prove it. Every transaction which an insolvent enters into within two years previous to his insolvency is treated by the Act as *prima facie* invalid and it lays the burden on the insolvent or the alienee to show that the transaction is a valid and *bona fide* one. Both good faith and valuable consideration have to be proved by the alienee or by the person who supports the transfer. On the side of the respondent some Indian and English cases were cited to us *viz.*, *Denny's Trustee* v. *Denny* (4), *Ebrahimbhai Rahimbhai* v. *Fulbai* (5), *Re Telby Ex parte Jeffery* (6) and *Edward Russel William Hayward* v. *Elizabeth Hammand* (7). It will be noticed that in all these cases the learned Judges were able to come to the conclusion on the facts and circumstances of those cases that the transactions or alienations were *bona fide*, made in good faith and for valuable consideration. The circumstances under which the deed came to be executed, the covenants made in the deed and the

(1) (1742) 26 E. R. 688; 2 Atk. 477.
(2) 4 Ind. Cas. 301; (1910) M. W. N. 141; 3 M. 205.
(3) 5 Bom. L. R. 255.
(4) (1919) 1 K. B. 583; 88 L. J. Q. B. 679; 120 L. T. 608; (1918—19) B. & C. R. 139; 35 T. L. R. 238.
(5) 26 B. 577.
(6) (1896) 75 L. T. 166.
(7) (1737) 26 E. R. 9 at p. 11.

conduct of the parties both at the time and subsequently have all to be taken into consideration; and if it can be held that the transfer at the time was really intended to be carried out and was made *bona fide* for saving the insolvent from incurring debts and ruining himself, it may be that the transfer would not be interfered with. But if, on the other hand, there are circumstances to show that the transferor was actually screening his properties from the reach of his future creditors, there will be good ground for holding that the transfer is a fraudulent one. As the learned Judge of the Bombay High Court in *Ebrahimbhai Rahimbhai* v. *Fulbhai* (5) points out, in determining the question whether the transfer was really *bona fide* or was intended merely for the purpose of screening the property from probable or possible creditors, the Court must take into consideration all the circumstances which surrounded the transaction and the conduct, contemporaneous and subsequent, of the parties. It is after examining the position fully that a conclusion should be come to by the Court on the question. In this case we think that we should send this case back for a fuller trial of the matter. No doubt the father of the insolvent had an opportunity of adducing all his evidence, but it is possible that he was misled as the learned District Judge was taking a strong view in his favour. We are willing to give him a further opportunity of adducing fresh evidence to show how far the transaction in question is a *bona fide* one. The Official Receiver will also have leave to adduce whatever evidence he wishes to adduce in rebuttal of the alienee's case.

We, therefore, set aside the order of the District Judge and remand the case for a fresh disposal in the light of the observations made by us above. Costs will abide and follow the result.

V. N. V. *Case remanded.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 369 OF 1923.
August 6, 1924.
Present:—Mr. Baker, J. C.
LACHIRAM—PLAINTIFF—APPELLANT
versus
BHOLU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 11, 47—Mortgage suit—Preliminary decree—Alienation before final decree—Suit for title by alienee, whether barred—Res judicata.

Section 47 of the Civil Procedure Code applies only to questions regarding the satisfaction of the decree and not to questions arising in the proceedings for the making of a preliminary mortgage decree final, as a suit on a mortgage remains pending till the final decree. [p. 453, col. 2.]

An alienee deriving his title under a surrender *pendente lite*, between the preliminary decree and the final decree, is bound by the terms of the preliminary decree and cannot be allowed to re-open the questions already decided in the suit, nor can he sue for the establishment of his title. [*ibid.*]

Appeal against the decree, dated the 16th July 1923, of the District Judge, Nimar, in Civil Appeal No. 56 of 1923.

Dr. *H. S. Gour*, for the Appellant.

Messrs. *M. Gupta* and *W. R. Puranik*, for the Respondents.

JUDGMENT.—The facts of this case are unusually complicated.

One Rewaji, a co-sharer in the village, owned a separate *sir* land, which he mortgaged to Bansidhar, who took possession under a clause in the mortgage on default of payment. In 1905 Rewaji sold his share in the village to one Chensingh, and he, therefore, under section 45 of the Tenancy Act of 1898 became an occupancy tenant in respect of the land in dispute. In 1909 Bansidhar assigned his rights under the mortgage to the present respondent No. 1 Bholu, who thus became the mortgagee with possession of one Rewaji's occupancy rights in the land.

In 1920 Rewaji brought a redemption Suit No. 130 of 1920 against the heir Bansidhar (who was a nominal defendant) and Bholu, and on 21st October 1920, a preliminary decree was passed for redemption on payment of Rs. 535. On 5th March 1921 Rewaji surrendered the land to the present plaintiff, Lachi-

ram, who was *lambardar* of the village and also Rewaji's agent at the time.

On 29th April 1921 Lachiram as agent of Rewaji deposited the decretal amount in Court and applied for a decree absolute. On 14th June 1921 Rewaji cancelled Lachiram's power-of-attorney. On 4th July, 1921, defendant Bholu objected that as Rewaji had surrendered the land he had no right to get the decree made absolute. On 11th July 1921 defendant Bholu applied that on 15th June 1921 the case had been compromised between himself and Rewaji who wish to receive Rs. 250-0-0 more while the defendant was to remain in possession of the land.

No enquiry was made about the alleged compromise and on 18th July 1921 a decree absolute for redemption was passed. There was an appeal to the District Judge, who held that O. XXI, r. 2, did not apply and that the lower Court was right in not making an enquiry. On second appeal this Court remanded the case for enquiry both into the alleged adjustment and also into the surrender as Lachiram had applied on 11th July 1921 for his name to be substituted as plaintiff on the strength of the surrender. The First Court held that the surrender was inoperative, and that the adjustment was proved. He accordingly declined to join Lachiram as plaintiff and Bholu was given possession under the terms of the compromise. This was on 16th October 1922.

We are not concerned in the present appeal with the proceedings in execution which form the subject of another appeal, but the possession given to Lachiram as agent of Rewaji was taken from him and possession given to Bholu. Before this was done the plaintiff Lachiram while still in possession brought the present suit for a declaration that he was entitled to possession and for possession if he was dispossessed. The First Court found that the surrender was valid and passed a decree for possession as plaintiff had by that time been dispossessed.

Bholu, the mortgagee, appealed on various grounds. It was urged *inter alia* that the plaintiff was not the landlord of this field, but Chensingh, to whom Rewaji had sold his share.

The District Judge held that Chensingh could not be considered the landlord, but if the contrary view was held it made no difference, as the plaintiff got by the surrender only the rights of Rewaji in the decree which he had obtained and so he can only stept into the shoes of Rewaji and claim to redeem the mortgage, the subsequent adjustment between Rewaji and Bholu having no effect, as Rewaji had parted with his rights. The District Judge, however, dismissed plaintiff's suit on the ground that the decision regarding the validity of the surrender was a decision under section 47, Civil Procedure Code, and not having been appealed against became final, and no separate suit will lie.

Plaintiff appeals against this decree and it is argued on his behalf that the District Judge is in error in supposing that the suit is barred by section 47, Civil Procedure Code.

That section applies only to questions regarding the satisfaction of the decree, and a suit on a mortgage remains pending till the final decree. Reliance is placed on *Vinajakrao Krishnarao* v. *Baijanath Saligram* (1).

The respondent's Counsel also admits that the section 47 does not apply, the plaintiff's application to be substituted as plaintiff on the strength of the surrender having been made before the passing of the final decree.

It is further contended on behalf of the appellant that under O. XXII, r. 10, Civil Procedure Code, the Court had discretion to grant or refuse the application for substitution of the plaintiff's name, and so no question of *res judicata* can arise. In my opinion the case is covered by an established principle of law. The position of the plaintiff is that of an alienee *pendente lite* the surrender having taken place between the preliminary decree and the final decree. He is, therefore, bound by the terms of the decree and cannot be allowed to

(1) 48 Ind. Cas. 934; 15 N. L. R. 36.

re-open the questions already decided in the suit, nor can he sue for the establishment of his title. Such a suit would be *res judicata* against the purchaser who being the representative in interest of the vendor would be likewise affected by the decision, although he may have been no party to it. I am quoting from paragraph 843, page 525 of Dr. Gour's Commentary on the Transfer of Property Act, Volume I, 4th Edition. The cases which lay down this proposition will be found collected there and it is not necessary for me to repeat them. The learned Counsel for respondent has further relied on *Rai Charan Mandal* v. *Biswanath Mandal* (2) to the same effect, wherein it was remarked that to hold otherwise would mean that the assignee would be able to raise in a separate suit the very facts decided against his assignor, and by further assignments *pendente lite* this process might be carried on *ad infinitum*.

The view in this case is apparently founded on the remarks of Grant, M. R., in *Bishop of Winchester* v. *Paine* (3) that "otherwise, suits would be indeterminable: or which would be the same in effect, it would be in the pleasure of one party, at what period the suit should be determined." It is thus apparent that the plaintiff is bound by the result of the litigation in which Rewaji was plaintiff and he has the same rights which Rewaji had. Supposing Rewaji not to have executed the surrender he could not claim possession and neither can plaintiff.

The final decree in the mortgage Suit No. 130 of 1922 in which Rewaji sued for redemption is dated 16th October 1922 and is to the effect that in pursuance of the terms of the adjustment between the parties plaintiff Rewaji is debarred from redeeming the mortgaged property which should remain in possession of Bholu.

The present plaintiff is bound by this decree and it has been already shown that he cannot re-open the question or bring separate suit to establish his title. The fact that plaintiff is *lambardar* does not put him in a position different to that of an ordinary transferee.

The appeal is dismissed with costs.

G. R. D. *Appeal dismissed.*

(2) 26 Ind. Cas. 410; 20 C. L. J. 107.
(3) (1805) 11 Ves. 194 at pp. 197, 198; 8 R. R. 131; 32 E. R. 1062.

MADRAS HIGH COURT.
FULL BENCH.

CIVIL REVISION PETITIONS NOS. 21 AND 147 TO 149 OF 1923.
April 7, 1924.

Present :—Mr. Victor Murray Coutts Trotter, Chief Justice, Mr. Justice Ramesam and Mr. Justice Wallace.

Syed OOMER SAHIB—PLAINTIFF—PETITIONER

versus

GOPAUL AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras City Tenants' Protection Act (III of 1922), s. 9—Tenant against whom decree has been passed but not executed, whether entitled to apply for sale.

A tenant against whom a decree has been passed but not executed is a "tenant against whom a suit in ejectment has been instituted" within the meaning of section 9 of the Madras City Tenants' Protection Act and he is, therefore, entitled to apply for sale, under the section. [p. 456, col. 2.]

Kanniappa Chettiar v. *Ramachandraiyar*, 79 Ind. Cas. 92; 46 M. L. J. 407; 19 L. W. 587; (1924) M. W. N. 386, followed.

Latifa Bi v. *Mottai Ammal*, 72 Ind. Cas. 141; 46 M. 836; 44 M. L. J. 271; 17 L. W. 341; (1923) M. W. N. 233; 32 M. L. T. 290; (1923) A. I. R. (M.) 320, overruled.

Petitions, under section 115 of Act V of 1908, praying the High Court to revise the orders of the Court of Small Causes, Madras, in M. P. No. 170 of 1922 in Ejectment Suits Nos. 125 to 128 of 1921, respectively.

Upon hearing the arguments of Mr. *K. V. Sesha Ayyangar*, for the Petitioner in all the cases, and of Mr. *T. L. Venkatarama Ayyar*, for the Respondent in C. R. P. No. 21 of 1923, and the other respondents not appearing in person or by Pleader on the 18th of March 1924,

the Court (Jackson, J.,) made the following

ORDER OF REFERENCE TO A FULL BENCH.

Defendant in Ejectment Suit No. 125 of 1921, Court of Small Causes, Madras, applied under section 9 of the Madras City Tenants' Protection Act III of 1922 for an order directing plaintiff to sell the land in the suit. The lower Court ordered accordingly and plaintiff seeks to revise its order.

The point for determination is whether at the date when the Act came into force defendant could be described in the words of section 9, as "a tenant against whom a suit in ejectment has been instituted." He was undoubtedly a tenant and plaintiff had instituted an ejectment suit against him in 1921. In November 1921 an order was made by consent by which the defendant was to vacate by January 1922, but the order remained unexecuted when the Act came into force. Plaintiff contends that this order terminated the suit so far as section 9 is concerned, and defendant maintains that it did not. I think that the plain reading of the section clearly supports the defendant. He is a tenant against whom a suit has been instituted, and whether that suit has been decreed or not, it can still be described as instituted. The second portion of the sentence in section 9 may make this still clearer: "against whom a suit has been instituted or proceeding under section 41, Presidency Small Cause Courts Act 1882 taken." If a landlord has applied under section 41, and the Court has proceeded to grant an order to a bailiff, the tenant is nonetheless one against whom the landlord has taken proceedings under section 41. He is not one against whom the landlord has not taken proceedings, because there happens to be a bailiff's order, nor is the tenant one against whom a suit has not been instituted because there happens to be a decree. A decree as defined in section 2 (2), Civil Procedure Code, conclusively determines the rights of the parties with regard to all matters in controversy in the suit. But such conclusive determination is not opposed to the ordinary sense of the word "institute." "Institute" means (Oxford Concise Dictionary) establish, found, set on foot; the original Latin meaning being "set up," and of course an institution is essentially something that has been established. No doubt in the Civil Procedure Code (O. IV, r. 1) "institute" is treated as synonymous with "commence" but it has never to my knowledge been used as entirely excluding the idea of completion. One cannot say that "instituted" essentially means "begun but not completed." Section 9 really provides that any tenant whose ejectment was contemplated, but who was not ejected at the time when the Act came into force, can enjoy its benefit. Apart from the language, there would be no sense in discriminating between suits in which decrees had and suits in which decrees had not been passed. The important point was whether the tenant had or had not been ejected.

The petitioner seeks to fortify this finding by arguments based on the other portions of section 9, but I am not sure that they have much weight. There is a provision that the tenant may apply to the Court 15 days after the service on him of summons, and this, it is argued must refer to suits pending at the time of the Act coming into force. But if the section had no retrospective effect at all, and only referred to suits filed after the Act, there would necessarily be summons, and this passage may will be confined to such summonses.

So too in regard to sub-clause (3) "any decree that may have been passed but which has not been executed, shall be vacated." This again could apply to suits filed after the passing of the Act. A tenant who is defendant in such a suit, may have applied under sub-clause (1) have made default and had his application dismissed under sub-clause (2), may then have had the suit decreed against him, may have had his default excused, may have paid the price under sub-clause (3) and the decree which was passed but held in abeyance shall then be vacated. Therefore, I do not think that the mention of "decree" in sub-clause (3) necessarily implies that suit

OOMER SAHIB v. GOPAUL.

decreed, but not executed are referred to in sub-clause (1); but since I find on other grounds that such suits are undoubtedly within the terms of sub-clause (1) probably the decrees in such suits are those which were mainly in view when sub-clause (3) was drafted.

Accordingly I should find no difficulty in supporting the judgment now sought to be revised only my attention has been called to the ruling in *Latifa Bi* v. *Mottai Ammal* (1). "The general frame of the Act including section 10 makes it clear that section 9 was not intended to enable tenants to apply for sale of the land to them under this section after the ejectment suit, to which they were parties, had been decreed."

Section 10 lays down that in cases of compensation for tenants' buildings and trees (sections 4, 5) and in cases of fixing a reasonable rent (sections 6, 8) if at the time of the Act coming into force, suits in regard to such matters are pending or, are decreed but are awaiting execution the Act may nevertheless be applied.

There is no mention of section 9, and therefore, it has been held that the Act was intended to apply retrospectively only to such cases as are described in section 10. But if section 10 were intended to be a general clause covering every case, the cases contemplated in section 9 even as interpreted in this ruling would certainly be mentioned under the first alternative in section 10 "which are pending." The section would run "Sections 4, 5, 6, 8 and 9 shall apply to suits.....which are pending, and in which decrees have not been passed, and sections 4, 5, 6 and 8 to suits which are pending and in which decrees have been passed but not executed." The more probable explanation seems to be that section 9 is a code in itself; and is not any way affected by section 10. I should have hesitated to put forward this view in face of the clear ruling in *Latifa Bi* v. *Mottai Ammal* (1) but I see that this has been held by Schwabe, C. J., in a case hitherto *Kanniappa Chettiar* v. *Ramachandraiyar* (2).

In these circumstances, I refer the case to the Hon'ble the Chief Justice for reference to a Full Bench.

The point for reference is whether a tenant against whom a decree has been passed but not executed is a tenant entitled to apply for sale under section 9, Madras City Tenants' Protection Act III of 1922.

Mr. *K. V. Sesha Ayyangar*, for the Petitioner in all the cases.

Mr. *T. L. Venkatarama Ayyar*, for the Respondent in C. R. P. No. 21 of 1923.

OPINION.

Coutts Trotter, C. J.—In this case (Civil Revision Petition No. 21 of 1923) the defendant in Ejectment Suit No. 125 of 1921 in the Small Cause Court applied under section 9 of the Madras Act III of 1922 for an order directing the plaintiff to sell the land in the suit. The sole question is whether at the time the Act came into force the defendant can be described as "a tenant against whom a suit in ejectment has been instituted." It is not contended that those words can bear the extreme meaning that any tenant against whom a suit in ejectment had ever been instituted—a suit which might have been brought to a completion by execution and ejectment—is within these words of section 9; but it is contended that it applies to a case where the suit in ejectment has resulted in judgment but has not been executed or completed by the process of ejectment. It seems to me that that contention is right and that the tenant intended by the section is a person who is threatened with ejectment as the result of legal proeeedings instituted against him but has not in pursuance of those proceedings been actually ejected. It seems to me immaterial whether or not the proceedings resulted in a decree which might lead, but has not led to an actual ejectment of the tenant. This is in accordance with the view expressed by the late Chief Justice and my brother Wallace in *Kanniappa Chettiar* v. *Ramachandraiyar* (2), and I agree with

(1) 72 Ind. Cas. 141; 46 M. 836; 44 M. L. J. 271; 17 L. W. 341; (1923) M. W. N. 233; 32 M. L. T. 290; (1923) A. I. R. (M.) 320.

(2) 79 Ind. Cas. 92; 46 M. L. J. 407; 19 L. W. 587; (1924) M. W. N. 386.

them in thinking that the case in *Latifa Bi* v. *Mottai Ammal* (1), was wrongly decided. The answer to the reference, therefore, be in the affirmative.

Ramesam, J.—I agree.

Wallace, J.—I agree.

Reference answered in the affirmative.

V. N. V.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 325-B OF 1922.
July 17, 1924.

Present:—Mr. Kinkhede, A. J. C.

GHUNAJI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

TULSI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Bombay School—Inheritance—Daughter's daughter.

A daughter's daughter cannot rank as a *sagotra sapinda* under the Bombay School of Hindu Law but she can inherit as a *bhinna gotra sapinda* under that school after all the *sagotra sapindas* are over. [p. 461, col. 1.]

Case-law reviewed.

Appeal against the decree of the District Judge, Amraoti, in Civil Appeal No. 232 of 1921 decided on the 29th April 1922.

Messrs. *D. W. Kathale* and *V. D. Kale*, for the Appellants.

Mr. *G. R. Pradhan*, for the Respondents.

JUDGMENT.—The following genealogical tree will give the exact relationship of respondent No. 1 to the last male holder, Jairam.

Natwaji
|
Gahani = Jairam = Bakai
|
Zibi
|
Tulsi (plaintiff No. 1.)

Jairam's father was Natwaji Kadoo of Ner Pinglai. He owned fields Survey No. 238/1 and Survey No. 13 of *Mouza* Burhanpur. Jairam died about the year 1902 leaving no male issue. His two widows, *Musammat* Gahani and Bakai succeeded to his estate on his death. Zibi was his daughter by his senior wife, Gahani. She predeceased her mother and stepmother Bakai. Bakai died about 1917 and Gahani in July 1919. Zibi left a daughter, Tulsi, plaintiff No. 1 in this case. Tulsi transferred a share in Survey No. 238/1 and Survey No 13 to plaintiff No. 2 on 24th February 1920 and they both have brought this suit for recovery of possession of the said survey numbers and mesne profits against the defendants, who claim to be alienees from Jairam's widow under a sale-deed dated 3rd May 1906 (Exhibit P-27). According to the plaintiffs the widows had no legal necessity to sell the property.

Survey No. 238/1 is in the possession of defendant No. 1 Ghunaji and Survey No. 13 is in the possession of defendant No. 2, Manaji, the brother of the original purchaser, Suryabhan. One Sadasheo Sitaram, a co-occupant of Survey No. 238/1 brought Suit No. 579 of 1906 for pre-emption and obtained a decree in the Court of Munsif, Morsi, for possession of the field against the purchaser and subsequently sold the same to defendant No. 1 Ghunaji. The present suit was instituted on 19th July 1920 against Ghunaji and Manaji. Manaji died during the pendency of the second appeal and in his place the name of his minor son, Daulat, has been substituted as his legal representative. The defendants raised several pleas but I am not concerned with all of them, in view of the findings of fact arrived at by the Courts below. The relationship of plaintiff No. 1 was held proved and the sale was held to be without legal necessity. It was also held that plaintiff No. 1 as the daughter of a predeceased daughter was entitled to inherit the property of her maternal grand-father, Jairam under the Bombay School of Law. The defendants' plea that one Tukaram was a *sapinda* relation of Natwaji and, therefore, a preferential heir to Jairam's estate was overruled. As a result of these findings the plaintiff's claim for possession has been decreed by the Courts below. The decree for mesne profits passed by the First Court has, on appeal by the defendants to the District Judge, Amraoti, been

upset but the rest of the findings of facts were upheld in that appeal. The plaintiff's right to succeed to her maternal grandfather's estate was thus maintained by both the Courts. The plaintiffs not having appealed against the dismissal of their claim for mesne profits it has now become final.

The only point which need be considered in this second appeal by the defendants is, whether on the death of a Hindu widow her predeceased daughter's daughter is entitled to succeed as a next reversionary heir to the estate of the last male holder. The Courts below have, on the authority of certain rulings, held in the affirmative and I am asked by the appellants to differ from that view. In view of the negative finding of the Courts below upon the plea that Tukaram was the preferential heir to Jairam's estate, I think, my task has been rendered very light, because I need not consider the question of preference between a daughter's daughter and a *sagotra sapinda*. It is sufficient for the decision of the case if the daughter's daughter is entitled under law to succeed even as a *bandhu* in the absence of any other preferential heirs and I need not decide where her exact position comes in the list of heirs.

Mr. Mayne did not mention her as a *bandhu* in the table at page 852 of his 8th Edition of Hindu Law and Usage, but his treatise at page 828 contains the following observations :—

"Nor can the daughter's daughter ever succeed except in Bombay, and by the recent decisions in Madras whether her mother has taken or not, because she confers no benefits on her maternal grandfather, and is estranged from his lineage."

The Court of first instance cited paragraph 46 of Mulla's Hindu Law, 3rd Edition in support of plaintiff No. 1's right to the inheritance. I have looked up that paragraph in the revised 3rd Edition of the learned author's Hindu Law. The relevant passage is to be found at page 73 of the new Edition. The citation given in support of the daughter's daughter's claim to succeed to her grandfather on the maternal side, is the decision in *Gangaram* v. *Ballia* (1). Trevelyan's Hindu Law, Second Edition, also cited the very same case at page 396 in support of her claim. That author is, however, very cautious in his observations because he prefaces the citation by saying that "the position of other females born in the family is by no means clear." I could find no other reported case. The authority in support of the claim of a predeceased daughter's daughter to succeed to her maternal grand-father's estate is so scanty even in Bombay that it is difficult to say that her positon is quite clear under that School. A careful study of that case makes it clear that it is no authority for the view that a predeceased daughter's daughter can succeed to her grand-father. On the contrary there are observations in it to the contrary effect that if the inheritance does not vest in her mother, she gets nothing. This will show that the very foundation of the decision is wanting.

In West and Buhler's Hindu Law, Fourth Edition, page 447, the following passage occurs :—

"*Q.* 8 :—A man of the Brahmin caste died. The surviving relatives are a daughter of a daughter, a cousin who has separated, and some second cousins. They have all applied for certificates of heirship to enable them to succeed to the *inam* property of the deceased. The question is: which of them should be recognised as heirs ?

A.—If the deceased has left no wife or son, the cousin who has separated will become his heir. The second cousins and the granddaughter are not the heirs."

One must not, however, forget that the question there was one of competition between a daughter's daughter and a male *sagotra sapinda*. She could certainly not have a preference over a male *sagotra sapinda* whether she is regarded as a *gotraj sapinda* or *bhinna gotra sapinda*.

A general impression prevails that a daughter's daughter is recognized as an heir under the Bombay School of Hindu Law and I find it reiterated by Ismay, J. C.,

(1) P. J. 1876, p. 31.

in *Rungu Bai* v.*Ganpatrao* (2). If one were to examine the principle underlying the case reported as *Lallubhai Bapubhai* v. *Mankuvarbai* (3) and scrutinise the reluctance of Courts to extend that principle to other cases it would be seen that it has been very sparingly extended. I have not been able to find any authority where in the principle recognized in the said case has been expressly extended to the case of a predeceased daughter's daughter. It is held by Stanyon, A. J C., in *Ramji* v. *Nursha* (4) that the principle has been extended to two cases only, namely, those of a sister and of the widow of a *gotraj sapinda*. He actually declined to extend it to the case of a daughter of the predeceased uncle of the propositus. This view has been confirmed by him also in *Sadasheo Kaboji* v. *Gai Krishna Vinayak* (5) where he observed that the daughters of a *gotraj sapinda* can under School of Hindu Law be included as the reversionary heirs of their father's cousin german. This means that they cannot succeed collaterally. It has been similarly pointed out by Macnair, A. J. C., in *Saroo* v. *Bani* (6) that the principle cannot be extended to the case of a daughter of the predeceased sister of the propositus.

In *Venilal* v. *Parjaram* (7) it was held that a predeceased son's daughter was not a *gotraj sapinda*. I do not think any distinction can be made between the position of a sister's daughter and a daughter's daughter and son's daughter in matters of inheritance as a *gotraj sapinda* of the last male owner. If any of them is a *gotraj sapinda* every one of them is equally so. There is no special reason, why a daughter's daughter alone should be considered a *gotraj sapinda* and the other two not. It must, however, be mentioned that in all the cases above cited there was a question of preference between the female on the one hand and a male *gotraj sapinda* on the other, and the male *sagotra sapinda* was held entitled to preference over the female. These cases are, therefore, distinguishable from the present case on this ground. But in view of the more recent decisions of the Bombay High Court which admit brother's daughter, *Balkrishno Bhimaji*, v. *Ramkrishna Gangadhar* (8), sister's daughter, *Dattatraya Bhimrao* v. *Gangabai Ganeshbhat* (9), uncle's daughter, *Girimallappa Channappa* v. *Kenehava* (10) as *bandhus*, I do not think the earlier decisions which disentitled each of them to come in as a *sagotra sapinda* need trouble us any longer.

West and Buhler's Hindu Law contains the following note:—

"Balambatta admits the rights of inheritance of sisters, sisters' daughters, and daughter's daughters. But he does not consider them to be included by the term *gotraj sapinda*, but by the words *bhratarah*', 'brothers' and '*dauhitra*' 'Daughter's son', and '*tatputrah*' his or her son in Yajnavalkya's text," (4th Edition, page 121).

The following observations at pages 557 and 558 in *Dattatraya Bhimrao* v. *Gangabai Ganeshbhat* (9) are very usefull and instructive in this connection. "As regards the Balmbatti, no doubt if the interpretation put by Balambatta upon the word "*bhratarah*" in the well-known text of Yajnavalkya were accepted the sister's daughter would come in not only before all *bandhus* but even before all the *gotraja sapinda*. A translation of the relevant passage has been given at page 306 and the list of heirs according to the scheme adopted in the Balambatti is stated at page 308 of the report in *Bhagwan* v. *Warubhai* (11). Though Westropp, C. J., laid stress upon the Balambhatti as supporting the case for the sister in *Sakharam Sadashiv Adhi Kari* v. *Sitabai* (12) Jenkins, C. J., in *Mulji*

(2) 14 C. P. L. R. 185 at p. 186.
(3) 2 B. 388; 1 Ind. Dec. (N. S.) 682 (F. B.).
(4) 11 Ind. Cas. 907; 7 N. L. R. 116.
(5) 43 Ind. Cas. 475; 14 N. L. R 6 at p. 8.
(6) 62 Ind. Cas. 257; 4 N. L. J. 7.
(7) 20 B. 173; 10 Ind. Dec. (N. S.) 674.

(8) 59 Ind. Dec. 771; 45 B. 353; 22 Bom. L. R. 1442.
(9) 77 Ind. Cas. 17; 46 B. 541; 24 Bom. L. R. 69; (1922) A. I. R. (B.) 321.
(10) 61 Ind. Cas. 294; 45 B. 768; 23 Bom. L. R. 213.
(11) 32 B. 300; 10 Bom. L. R. 389.
(12) 3 B. 353; 4 Ind. Jur. 81; 2 Ind. Dec. (N. S.) 236.

Purshotum v. *Cursandas Natha* (13) and Chandavarkar, J., in *Bhagwan* v. *Warubhai* (11), definitely rejected it as affording a basis for the sister's position in the list of specifically mentioned heirs; and that view was followed in *Hari Annaji* v. *Vasudev Janardhan* (14).

"Apart from these decisions there is another difficulty in following the scheme in the Balambhatti logically. It would not be easy to determine what place would be assigned according to the Balambhatti to the son's daughter's son. For instance, in dealing with the position of the daughter's son, as stated in the Mitakshara, the author has interpreted the word *dauhitra* (daughter's son) as including *dauhitri* (daughter's daughter) also; (see Gharpure's Edition of Balambhatti, Vyavaharadhaya, page 207) and he has given her a higher place than the sister and her issues. It may be said that the same author would logically assign a higher place to the son's daughter and probably to her son. I may state that I have not been able to find in the Balambhatti any express reference to the son's daughter, or to the son's daughter's son in connection with the relative positions of different heirs. So it is possible to argue that the sister's daughter occupies a higher position than the son's daughter's son according to the Balambhatti. The true view about this commentary on the particular point under consideration appears to me to be that the interpretation of the word *bhratarah* disturbs the settled series of heirs under the Mistakshara and it is difficult to base any inference upon that view unless we are prepared to accept the scheme in its entirety. Though this commentary is useful as aiding the interpretation of the Mitakshara the views propounded therein cannot be accepted without due caution and examination. I do not think that the position assigned to the sister's daughter in the Balambhatti can be properly accepted."

If we apply the same reasoning to the case of a daughter's daughter it will be seen that her place would have to be just after daughter's son in the list of direct heirs. This will show how utterly illogical and anomalous the position created by the special interpretation put by Balambhatta on the text of Yajnavalkya for her is. She cannot be regarded as a *gotraj sapinda* in the strict sense of the term although she is a *gotraja*, *i. e.*, born in the family, of her own parents. She cannot be regarded as the *gotraj* of her maternal grandfthebr because her mother, on marriage, is by a fiction of law, "born again in the family of her husband", and thus ceases to belong to the *gotraj* of the family of her birth. It is on this principle that the married or unmarried daughters of *gotraj sapindas* are not allowed to inherit collaterally under the Mitakshara Law, particularly those females who are not expressly named in the texts. They are *bhinna gotraj sapindas* and may be classed as *bandhus* instead of as *sagotra* or *gotraj spindas*, almost in all cases, except the specially favoured case of a sister, and those of the widows of *sagotra sapindas*.

Bose, A. J. C., has held in *Lochan* v. *Babai* (15) following *Bhagwan* v. *Warubhai* (11) that the word "*bhratarah*" in the text of Yajnavalkya does not include "sisters." It, therefore, follows that the word "*tatsunavah*" in the text under consideration also does not include "sister's daughters" and similarly the word "*dauhitra*" daughter's son ought not to and cannot include "*dauhitri*" daughter's daughter as interpreted by Balambhatta in his Balambhatti, Vyavaharadhyaya page 207. (See Gharpure's translation of Balambhatti). It would, as pointed out above, dislocate the whole system and bring the remoter heirs before the *sagotra sapindas* and *samanndakas* are exhausted.

(13) 24 B. 563; 2 Bom. L. R. 721; 12 Ind. D. (N. S.) 906.

(14) 23 Ind. Cas. 944; 38 B. 438; 16 Bom. L. R. 283.

(15) 4 Ind. Cas. 786; 5 N. L. R. 161.

SUBARAMA IYYAR *v.* SOMALINGA SUBBA IYYAR.

I am not here concerned with the conflict which prevails under the Benaras or the Madras School of Hindu Law as regards the claim of a daughter's daughter to succeed to her maternal grandfather after the death of her grandmother. While the latter recognizes her as an heir, *Ramappa Udayan* v. *Arumugath Udyan* (16), on the ground that she is a *bandhu* the former excludes her from inheritance on the ground that she is not expressly named in the Mitakshara, *Jagan Nath* v. *Champa* (17)

On the whole I hold that a daughter's daughter cannot rank as a *sagotra sapinda* under the Bombay School of Law but she can come in as a *bhinna gotra spinda* under that School after all the *sagotra sapinda* are over. As in this case there is no nearer heir than the plaintiff No. 1 and the defendant is a transferee from a widow without legal necessity I hold that the plaintiffs' claim has been correctly decreed. I, therefore, dismiss the appeal with costs.

G. R. D. *Appeal dismissed.*

(16) 17 M. 182; 4 M. L. J. 30; 6 Ind. Dec. (N. S.) 125.

(17) 28 A. 307; A. W. N. (1906) 13; 3 A. L. J. 87

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 324 of 1923.

April 4, 1924.

Present:—Mr. Justice Krishnan and Mr. Justice Odgers.

DOORVAS S. S. SUBARAMA IYYAR—DECREE-HOLDER—APPELLANT

versus

SOMALINGA SUBBA IYYAR AND ANOTHER—JUDGMENT-DEBTORS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 5—Attachment before judgment—Security bond, execution of—Dismissal of suit—Decree in appeal—Security bond, if effective.

There is no general rule in all cases that whenever a bond is given as security to a Court for any decree that may be passed by that Court, it should be construed as meaning that the security is available for the proceedings not only in that Court but also in the Courts of Appeal. [p. 463, col. 2; p. 464, col. 1.]

On an application for attachment before judgment, the judgment-debtor executed a security bond under O. XXXVIII, r. 5, Civil Procedure Code, agreeing to give certain properties as security and bound himself and his property as responsible for the decree amount "in case the aforesaid suit" was decided in favour of the plaintiff. The suit was subsequently dismissed by the First Court but was decreed in appeal. On an application to enforce the security bond :

Held, that the bond which really took the place of the attachment before judgment was intended to take effect only if the attaching Court passed a decree and since the suit was dismissed, the bond ceased to have any further effect and the decree-holder was not entitled to any charge on the property on the strength of the bond. [p. 462, col. 1.]

Abdur Rahaman v. *Amir Sharif*, 44 Ind. Cas. 229; 45 C. 780; 22 C. W. N. 927, *Sheikh Suleman* v. *Shivram Bhikaji*, 12 B. 71; 6 Ind. Dec. (N. S.) 534, *Gollamudi Venkatasubba Rao* v. *Chaparala Rosayya*, 26 Ind. Cas. 76; (1914) M. W. N. 714, *Ranee Birjobuttee* v. *Pertaub Singh*, 8 M. I. A. 160; 13 Moo. P. C. 465; 1 Suth. P. C. J. 408; 1 Sar. P. C. J. 740; 3 W. R. P. C. 36; 19 E. R. 490; 15 E. R. 174; 132 R. R. 149, *Moonshee Ameer Ali Khan Bahadur* v. *Kassim Ali Khan*, 13 W. R. 403 and *Janaki Nagasawmi Iyer* v. *Ramasawmi Iyengar*, 56 Ind. Cas. 267; (1920) M. W. N. 264; 11 L. W. 6, relied on.

Erikulappa Chetty v. *The Official Assignee of Madras*, 32 Ind. Cas. 190; 39 M. 903, not followed.

Seena Vana Ramiah Ayyar v. *Gopala Ayyar*, 49 Ind. Cas. 20; 41 M. 1053; 35 M. L. J. 355, *Raj Raghubar Singh* v. *Thakur Jai Indra Bahadur Singh*, 55 Ind. Cas. 550; 42 A. 158; 22 O. C. 212; 6 O. L. J. 682; 38 M. L. J. 302; 18 A. L. J. 263; 22 Bom. L. R. 521; 46 I. A. 228; 13 L. W. 82 (P. C.), distinguished.

Appeal against the order, dated the 13th August 1923, of the Court of the Subordinate Judge, Madura, in Execution Petition No. 92 of 1923, in Original Suit No. 19 of 1918.

Mr. *K. Bashyam Iyengar*, for the Appellant.

Messrs. *T. Narasimha Iyengar* and *P. R. Srinivasa Iyengar*, for the Respondent.

JUDGMENT.—In this case the appellant brought a suit against the first respondent in the Sub-Court of Madura and pending that suit, applied for attachment before judgment under O. XXXVIII, r. 5, of the Civil Procedure Code. The first respondent agreed to furnish security and executed the bond, the effect of which is the question now before us. His suit was subsequently dismissed by the First Court. The appellant, however, succeeded in getting a

decree in the Appellate Court. He now applies to have his decree executed against the properties mentioned in the security-bond. It should be stated that after this application had been filed, the first respondent was adjudicated an insolvent and all his properties have become vested in the Official Receiver, who has been brought on record as the second respondent. The Official Receiver raised a number of contentions against the decree of the appellant being executed against the properties in question. It is sufficient for the disposal of this appeal to refer to one of them, namely, that the bond ceased to have any effect as soon as the decree of the First Court was passed, dismissing the appellant's suit. The circumstances under which the bond was given we have already stated, namely, that it was under O. XXXVIII, r. 5. What that rule states is that the defendant should furish security in such sum as may be specified under the order of the Court, to produce and place at the disposal of the Court when required the said property (namely, the properties that are attached) or such portion thereof as may satisfy the decree which may be passed by the Court in the case. We have to construe the bond with reference to the circumstances under which it was executed as its language is not clear. The bond says; "In pursuance of the order of the Court dated 22nd March 1918, in I. A. No. 68 of 1918 in the above suit, I have hereby given as security all the rights which I have in the property described hereunder for the aforesaid suit amount. In case the aforesaid suit is decided in favour of the plaintiff, the undermentioned property, myself and my heirs hereby bind ourselves to be responsible for the said amount. This security bond is executed for Rs. 5,000". The bond was executed to the Court. We have not before us the records of I. A. No. 68 of 1918 referred to in the bond. But evidently it was some order passed by the Court under r. 5, O. XXXVIII. Though the bond is worded somewhat widely it is clear that the respondent was giving security only for the decree that might be passed against him by the Court to which he gave the security. There can be no doubt that if he had not furnished security, and his property had been attached before judgment, such an attachment would have ceased to have any effect as soon as the Court dismissed the plaintiff's suit. See *Abdur Rahaman* v. *Amir Sharif* (1). It seems, therefore, right to hold that the bond which really took the place of the attachment before judgment, was meant to give security only for the purpose of enabling the First Court to execute its decree in case it passed a decree. As that Court did not pass a decree at all but dismissed the suit, we consider that the Subordinate Judge was right in thinking that the bond ceased to have any further effect. This view is in conformity with the case reported as *Sheikh Suleman* v. *Shivram Bhikaji*, (2) followed in *Gallamudi Venkatasubba Rao* v. *Chapparalla Rosayya* (3) by a Bench of this Court. An earlier case in the Privy Council, *Ranee Birjobutee* v. *Pertab Singh* (4), raised a somewhat similar question with reference to the security given for a Privy Council appeal. That appeal was dismissed by the Privy Council for default and then was restored. The question arose whether the security of Rs. 4,000 given for the appeal would continue as security for the subsequent proceedings in the Privy Council after the Privy Council had dismissed the original appeal. Their Lordships thought that it would not, and directed that a fresh security of £600 should be furnished by the appellant. Their Lordships were of opinion that when they dismissed the appeal in the first instance, the surety ceased to be bound, and, therefore, a fresh security was necessary.

A similar case was brought to our notice in *Moonshee Ameer Ali Khan Bahadoor* v. *Kassim Ali Khan* (5). In this Court we have a case in *Erikulappa*

(1) 44 Ind. Cas. 229; 45 C. 780; 22 C. W. N. 927.
(2) 12 B. 71; 6 Ind. Dec. (N. S.) 534.
(3) 26 Ind. Cas. 76; (1914) M. W. N. 714.
(4) 8 M. I. A. 160; 13 Moo. P. C. 465; 1 Suth. P. C. J. 408; 1 Sar. P. C. J. 740; 3 W. R. P. C. 36; 19 E. R. 490; 15 E. R. 174; 132 R. R. 149.
(5) 13 W. R. 403.

Chetty v. *The Official Assignee of Madras* (6) where the money specified in the summons issued under O. XXXVIII, r. 5 was paid by the defendant into Court; their Lordships held that the decree-holder had no charge on that money, as against the Official Assignee. This view seems to be somewhat in conflict with the view expressed in *Janaki Nagasawmi Iyer* v. *Ramasawmi Iyengar*, (7) but we must follow the rulings in *Erikulappa Chetty* v. *The Official Assignee of Madras*, (6) in preference to the one in *Janaki Nagasawmi Iyer* v. *Ramasawmi Iyengar* (7).

Our attention has also been drawn to the case in *Seena Vana Ramiah Ayyar* v. *Gopala Ayyar* (8). That case is not against the view we are taking. Here the security was given only for enabling the decree to be executed, if any decree was passed by the Court. In the case cited, money had been deposited, under r. 2 of O. XXXVIII to the credit of the action and it was held that the plaintiff who obtained a decree in the suit had a lien on the money. That case is not an authority here as the plaintiff here did not get a decree in the Court to which security was given.

Finally our attention was drawn to the decision of the Privy Council in *Raj Raghubar Singh* v. *Thakur Jai Indra Bahadur Singh* (9). In that case no doubt there are some observations by their Lordships on page 164*, which appear to be in favour of the appellant. Their Lordships, construing the security bond in the case, say that the construction that the security was confined to the Judicial Commissioner giving a decree for the mesne profits in the first instance was not proper as "according to it if the Court of the Judicial Commissioner had reversed the decree of the Subordinate Judge, but wrongly reversed it and been itself corrected on final appeal, so that the widow was really entitled to possession and the mesne profits, still the Court of the Judicial Commissioner having decided against her, the sureties would have had to pay to the defendant who had no title the amount of the mesne profits from the date of the original decision to that of the intermediate Court of Appeal." This shows that the bond should not be construed too literally but reasonably with reference to its language and the surrounding circumstances. If the decree is reversed by the Appellate Court, the security goes with it; the security must, therefore, be taken to be for a subsisting decree only. The observations of their Lordships must be read with the language and the circumstances of the instrument which they were construing. That was a case where security had been given for mesne profits on behalf of a widowed Rani, who was asking for possession of properties pending the appeal in the Judicial Commissioner's Court. She was directed to give security for mesne profits of the property, and the bond in question was the security that was given. The bond stated that the hypothecated property should serve as security and be liable to the extent of a *lakh* of Rupees for carrying out the aforesaid purpose. It was argued before their Lordships that this security bond ceased to have effect as soon as the Judicial Commissioner dismissed the appeal to him. This argument was met by their Lordships by pointing out that there was really no difficulty on the language of the instrument as by it the sureties made themselves liable for any order that might be passed by the Judicial Commissioner, not the first order merely but any order. The order for which the security was sought to be enforced was an order of the Judicial Commissioner himself though passed after remand and it fell within the language of the bond.

We cannot use this case as an authority for holding generally in all cases that whenever a bond is given as securtty to a Court for any decree that may be passed by that Court, it should be

(6) 32 Ind. Cas. 190; 39 M. 903.
(7) 56 Ind. Cas. 267; (1920) M. W. N. 264; 11 L. W. 6.
(8) 49 Ind. Cas. 20; 41 M. 1053; 35 M. L. J. 355.
(9) 55 Ind. Cas. 550; 42 A. 158; 22 O. C. 212; 6 O. L. J. 682; 38 M. L. J. 302; 18 A. L. J. 263; 22 Bom. L. R. 521; 46 I. A. 228; 13 L. W. 82 (P. C.).

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construed as meaning that the security was available for the proceedings not only in the Court, but also in the Courts of Appeal. That would really depend upon the language of the bond as construed with reference to the surrounding circumstances. In the present case we think the bond was given to take effect only if the attaching Court had passed a decree and that not having taken place the appellant is not entitled to any charge upon the properties on the strength of the bond. The appeal, therefore, fails and is dismissed with costs of the second respondent.

V. N. V. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 865 OF 1922.

March 18, 1924.

Present :—Mr. Justice Jackson.

GARIMELLA VENKAYYA AND ANOTHER—DEFENDANTS—PETITIONERS

versus

MOKKARALA BANGARAYYA —PLAINTIFF—RESPONDENT.

Hindu Law—Widow—Debts for necessity—Liability of reversioners.

A debt incurred by a Hindu widow in circumstances of necessity is binding on the estate, and assets in the hands of reversioners after the widow's death are, therefore, liable for the discharge of such a debt.

Regella Jogayya v. *Nimushakani Venkataratnamma*, 5 Ind. Cas. 271; 33 M. 492; 7 M. L. T. 112; 20 M. L. J. 412, *Dhiraj Singh* v. *Manga Ram*, 19 A. 300; A. W. N. (1897) 69; 9 Ind. Dec. (N. S.) 196, *Ramcoomar Mitter* v. *Ichamoyidasi*, 6 C. 36; 6 C. L. R. 429; 5 Ind. Jur. 579; 3 Ind. Dec. (N. S.) 24, *Sakrabhai* v. *Magan Lal*, 26 B. 206; 3 Bom. L. R. 738, followed.

Ramaswami Mudaliar v. *Sellattammal*, 4 M. 375; 1 Ind. Dec. (N. S.) 1097, not followed.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise a decree, dated 6th May 1922, of the Court of the Subordinate Judge, Cocoanada, in S. C. S. No. 100 OF 1922.

Mr. *C. Rama Rao*, for the Petitioners.

Mr. *K. Ramamurthi*, for the Respondent.

JUDGMENT.—Plaintiff sued for recovery of Rs. 424-9-6, (Rupees four hundred and twenty-four, annas nine and pies six) due on a pronote executed by a widow for family necessity and obtained a decree against her reversioners who petition to have it set aside. The question is whether in circumstances of necessity, a widow can bind the estate. It was originally held in Madras that she cannot do so. See *Ramaswami Mudaliar* v. *Sellatammal* (1) but that ruling has been departed from in *Regella Jagayya* v. *Nimushakavi Venkataratnamma* (2). *Dhiraj Singh* v. *Manga Ram* (3) follows the earlier Madras view. Calcutta has always held the other way. See *Ramcoomar Mitter* v. *Ichamoyi Dasi* (4) and the whole question has been exhaustively summed up by Jenkins, C.J., in *Sakrabhai* v. *Maganlal* (5) where it is held that the assets are liable as against the reversioners.

In the circumstances I see no reason to interfere. The petition is dismissed with costs.

V. N. V. *Petition dismissed.*

(1) 4 M. 375; 1 Ind. Dec. (N. S.) 1097.
(2) 5 Ind. Cas. 271; 33 M. 492; 7 M. L. T. 112; 20 M. L. J. 412.
(3) 19 A. 300; A. W. N. (1897) 69; 9 Ind. Dec (N. S.) 196.
(4) 6 C. 36; 6 C. L. R. 429; 5 Ind. Jur. 579; 3 Ind Dec. (N. S.) 24.
(5) 26 B. 206; 3 Bom. L. R. 738.

MADRAS HIGH COURT.
FULL BENCH.

CRIMINAL APPEAL No. 1045 OF 1923.
April 24, 1924.
Present:—Mr. Justice Spencer, Mr. Justice Krishnan and Mr. Justice Ramesam.

THEETHUMALAI GOUNDER AND OTHERS—PRISONERS Nos. 1, 4, 6, 7, 12, 13, 15, 16 AND 18—APPELLANTS
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 233, 537—Penal Code (Act XLV of 1860), ss. 149, 326—Charge under ss. 326, 149, Penal Code—Conviction under s. 326—Legality—Prejudice.

When a charge has been framed under sections 326, 149, Penal Code, a conviction under section 326 is not necessarily bad but it depends on whether the accused has or has not been materially prejudiced by the form of the charge. [p. 470, col. 1.]

Obiter dicta.—Section 149, Penal Code, creates no offence, but is, like section 34, merely declaratory of a principle of the common law, and its object is to make it clear that an accused who comes within that section cannot put forward as a defence that it was not his hand which actually committed the offence. A person could not be tried and sentenced under section 149 alone, as no punishment is provided by the section. Therefore, the omission of section 149 from a charge does not create an illegality by reason of section 233, Criminal Procedure Code, which provides that for every distinct offence of which any person is accused there shall be a separate charge. [p. 470, cols. 1 & 2.]

When a person is charged with being a member of an unlawful assembly, one of the members of which caused grievous hurt in pursuance of the common object, there is no necessary implication that that particular member is not himself. [p. 470, col. 2.]

Appeal against the order of the Court of Session of the Tinnevelly Division in Case No. 55 of the Calendar for 1923.

This appeal coming on for hearing on the 18th and 19th of March, 1924, upon perusing the petition of appeal and the record of the evidence and proceedings before the Court of Session, and upon hearing the arguments of Messrs. *V. L Ethiraj* and *T. Krishnan Nambisan*, for the Appellants, and of Mr. *J. C. Adam*, Public Prosecutor, on behalf of the Crown, and the case having stood over for consideration till the 2nd of April, 1924, the Court (Phillips and Odgers, JJ.) dismissing the appeal so far as accused Nos. 4, 7, 12, 13, 15, 16 and 18 are concerned, made the following

ORDER OF REFERENCE TO A FULL BENCH.

Phillips, J.—In this case the appellants who were accused Nos. 1, 4, 6, 7, 12, 13, 15, 16 and 18 were charged under sections 148, 326 and 302, Indian Penal Code, read with section 149, Indian Penal Code. Accused Nos. 4, 7, 12, 13, 15, 16 and 18 were found guilty of rioting under section 147 and accused Nos. 1 and 6 were found guilty under sections 148 and 326, Indian Penal Code.

It appears that there was a dispute between the accused party and the party of prosecution sixth witness about some land. Prosecution sixth witness has filed suits with reference to this land and obtained an injunction restraining the persons under whom the accused claim from interfering with his enjoyment of the land. The prosecution case is that when some of prosecution 6th witness's men were watching the land, the accused came and began harvesting the crop. Prosecution sixth witness and others then went and remonstrated and apparently beyond remonstrating did nothing else before they were attacked by the accused. The first accused broke the arm of prosecution seventh witness and the sixth accused injured one Mapillaiswami Naick, who subsequently died of his injuries. These facts are not disputed in appeal but the conviction is questioned on grounds of law.

So far as the conviction of the seven accused under section 147 is concerned, it is urged that the Sessions Judge has not found, that prosecution sixth witness was in possession of the land and that, consequently, there is no finding to justify the conviction for rioting, but it appears that there had been an order enjoining the accused not to interfere with the possession of prosecution sixth witness. When, therefore, they entered upon the land and began cutting the crop, they were doing an unlawful act in contravention of the orders of the Civil Court. It is possible that, if the prosecution witnesses had then attacked them, they would have been entitled to defend themselves and that injuries

caused by them might be so justified; but the prosecution witnesses merely remonstrated with them, which they were perfectly entitled to do, and, consequently, the use of force towards these witnesses in prosecution of the common object of retaining the land which was in itself an unlawful object, undoubtedly constituted then into an unlawful assembly guilty of rioting. So far as these accused are concerned, their convictions are right and must be confirmed and the appeal dismissed.

Accused Nos. 1 and 6 have been convicted under sections 148 and 326, Indian Penal Code, and, while it is not disputed that the convictions under section 148 are correct, it is argued that the convictions under section 326 cannot stand, because the charge against them was under section 326 read with section 149, and that, therefore, the convictions under section 326 alone are bad. This is undoubtedly the view of the Calcutta High Court which has always treated the so-called offence under section 149 as distinct from the substantive offence and I may refer to *Abhi Misser* v. *Lachmi Narain* (1), *Panchu Das* v. *Emperor* (2), *Emperor* v. *Madan Mandal* (3) and *Reazuddi* v. *Emperor* (4). In all these cases it was held that, when the charge had been made under section 325 read with section 149, there could be no conviction under section 325 alone, the two being distinct offences which must be charged separately. As a matter of fact, in each of these cases it was found that no rioting took place and, consequently, no conviction could possibly be had by reason of section 149, for that necessarily implies a riot; but apart from this, those cases are certainly authority for Mr. Ethiraj's contention that the present conviction of accused Nos. 1 and 6 under section 326 is wrong. There would appear to be no reported cases of this Court, until one reported very recently in *In re Thaikkottathil Kunhaeen* (5) and apparently the Judges in that case do treat the two offences as distinct; but although Wallace, J., in his judgment says that section 233, Criminal Procedure Code, which prescribes that there should be a separate charge for each distinct offence, was not followed, yet he does not hold that that in itself vitiates the conviction, for he treats it as a defect which may or may not occasion a failure of justice and, no doubt, in the case which he was considering, the omission of section 149, which was the question under consideration then, was likely to prejudice the accused and, on that ground, the conviction was set aside. Similarly Ramesam, J., seems to consider the offence under section 149 as a separate offence, but does not definitely deal with the point and also relies on the omission of section 149 as being a serious defect prejudicial to the accused. This decision was considered by this same Bench in a very recent case, Criminal Appeal No. 1364 of 1922, in which we held that, where the charge was sufficiently clear, the mere omission of section 149 from the charge was not sufficient to vitiate the conviction for the substantive offence. With all respect to the learned Judges of the Calcutta High Court, I find it difficult to understand how an offence is created under section 149. That section reads as follows: "If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence." That is to say, it does not define any particular offence but says that, if a particular offence is committed by any member of an unlawful assembly, other members of that assembly are guilty of the same offence if certain conditions laid down in the section are complied with; for instance, if grievous hurt is

(1) 27 C. 566; 4 C. W. N. 546; 14 Ind. Dec. (N. S.) 372.

(2) 34 C. 698 at p. 703; 11 C. W. N. 666; 5 Cr. L. J. 427.

(3) 22 Ind. Cas 731; 41 C. 662; 18 C. W. N. 668; 15 Cr. L. J. 155.

(4) 15 Ind. Cas. 646; 16 C. W. N. 1077; 13 Cr. L. J. 502.

(5) 76 Ind. Cas. 644; 18 L. W. 946; 33 M. L. T. 210; (1924) M. W. N. 47; (1924) A. I. R. (M.) 338; 25 Cr. L. J. 212.

committed by one member under certain conditions, the other members of the unlawful assembly are also guilty of grievous hurt. The offence is grievous hurt and whether it is charged under section 325 or under sections 325 and 149, the offence is the same and the punishment provided is the same. Section 149 merely provides that certain circumstances short of the actual commission of grievous hurt are sufficient to prove that a person is guilty of that offence. If the charge gives notice to the accused that the provisions of section 149 will be taken into account—and it must be presumed that he knows those provisions, as every one is deemed to know the law—then the mere omission of the number of the section would not prejudice him, and, in my opinion, would not entitle him to an acquittal. This case, however, is the converse of that and it is urged that none of the accused have been charged with the offence under section 326 because they have only been charged under sections 326 and 149, but to admit this would be to admit that they are two separate offences, one under section 326 and another under sections 326 and 149; but, as I have pointed out above, this does not seem to be so. It is possible that by framing a charge under section 149, the accused persons might be prejudiced if, for instance, the actual offence under section 326 was said to have been committed by some one not under trial, in which case the attention of the accused would be directed to showing either that they were not members of the unlawful assembly, or that this person who committed the offence was not a member of that assembly; but in a case like the present where 18 persons are accused and each one is charged with the offence under section 326—and it is the prosecution case, which is known to the accused, that the offence under section 326 was committed by one or more among the accused charged—it does not seem to me to prejudice the accused in any way in their defence. Their defence must always be either that there was no unlawful assembly or that the offence of grievous hurt was not committed; and, if it is proved that it was committed by one or more accused, whether the conviction is under section 326 alone or under section 326 by reason of the provisions of section 149, seems to me immaterial; but as the view of the Calcutta High Court has some support in the case reported in *In re Thaikkottathil Kunhaeen* (5), I think it is advisable that the following questions should be referred to a Full Bench: (1) "When a charge omits section 149, Indian Penal Code, and the conviction is based upon the provisions of that section, is that conviction necessarily bad or does it depend on whether the accused has or has not been materially prejudiced by the omission? (2) When a charge has been framed under sections 326 and 149, Indian Penal Code, is a conviction under section 326, Indian Penal Code, necessarily bad, or does this also depend on whether the accused has or has not been materially prejudiced by the form of the charge?

Odgers, J.—In this case 18 accused were originally charged and accused Nos. 2, 3, 5, 8, 9, 10, 11, 14 and 17 were acquitted. Of the remaining nine all but two were convicted of rioting under section 147. Accused Nos. 1 and 6 were found guilty of rioting armed with deadly weapons and voluntarily causing grievous hurt with deadly weapons under sections 148 and 326. There has practically been no argument on the merits and this can be disposed of very shortly.

The accused were found to belong to a party which went to harvest a certain field, the title to which has been a matter of dispute, and the occurrence in question took place when the accused went on the 14th February, 1923, to harvest the *cholam* crop growing thereon. Prosecution witnesses Nos. 6 to 11 received injuries. One Mappillaiswami Naick received an injury to his arm from which he died on the 23rd February and Ramaswami Naick, P. W. No. 7, also sustained injuries necessitating amputation of his arm. It appears that in September, 1922, injunctions were obtained against the sixth accused and third accused and certain women who claimed a portion of the land in dispute. The injunction petition was posted for hearing on the 15th February

and it was the day before that the occurrence in question took place.

It is suggested that the evidence of P. Ws. Nos. 6 to 12 is all interested, but I find no reason to question the conclusion come to by the learned Sessions Judge on the facts. It may be, as the learned Judge remarks, that the issue of the injunction would not confer possession, but the accused have to justify the infliction of grievous hurt which resulted in the death in defence of their possession and this they have failed to do. The convictions under section 147 are clearly correct and need no further examination.

The interest, however, in this appeal centres round the legal point raised by Mr. Ethiraj on behalf of the accused Nos. 1 and 6 who were, as stated, convicted under sections 148 and 326. Mr. Ethiraj contends that this is illegal, because the charge was under sections 148 and 326 read with section 149, Indian Penal Code, and it is contended that a charge under section 326 made applicable by reason of section 149 will not sustain a conviction under section 326 *simpliciter*. In the first place I am not convinced that the charge is necessarily only section 326 plus section 149. It runs "...armed yourself with deadly weapons and committed rioting (that is section 148) and caused grievous hurt by dangerous weapons (that is section 326) and you did commit murder by intentionally causing the death of, etc. (that is section 302) and thereby committed offences punishable under sections 148, 326 and 302 of the Indian Penal Code read with section 149, Indian Penal Code." The question largely turns on whether or not section 149 constitutes a distinct offence or not. It has been laid down in *Queen-Empress* v. *Bisheshar* (6) that section 149 creates no offence but is merely declaratory of a principle of the common law which has for a long time prevailed in England, and that the object of the section is to make it clear that an accused who comes within that section cannot put forward as a defence that it was not his hand that caused the hurt committed in prosecution of the common object. In that case the appellants were convicted under section 147 of rioting, and under section 325 of voluntarily causing grievous hurt. It is noticeable that in this and other earlier cases, section 149 does not seem to have been specifically charged. The appellants in the Allahabad case were sentenced separately for their convictions under section 147 and section 325. It was held that these sentences were legal. In *Queen-Empress* v. *Bana Punja* (7) a Full Bench of the Bombay High Court held that it was legal to pass two sentences, one for rioting and the other for hurt, where a person is convicted of rioting and hurt and the conviction for hurt depends on the application of section 149. There again the charges were under sections 147, 148 and 326 without any reference to section 149. To turn to the Calcutta case in *Abhi Misser* v. *Lachmi Narain* (1) it was held that the accused could not be properly convicted under section 325 by the application of section 149, where it has not been found that these persons or any of them were members of an unlawful assembly. This would seem perfectly obvious in the case of persons who have been acquitted of rioting. Therefore, it seems to me to have no bearing on the present case. In *Panchu Das* v. *Emperor* (2) it was held that the conviction under section 325 was illegal on the ground that no such charge was ever framed and that the accused had not been called upon to meet such a charge. The appellants there were tried under sections 147, 304, 325 and 323 read with section 149, and they were convicted under section 325 alone, and the learned Judges add:— "If the evidence...showed that the accused or any of them inflicted hurt or grievous hurt with their own hands, ...additional counts of charge for those offences should have been added in the Sessions Court." They also held that the offence of causing grievous hurt is not minor to, or included in, a charge under section 325 read with section 149. In *Emperor* v. *Madan Mondal*(3) the accused were charged under sections 148, 304 read with section 109, and section 326 read with section 419. The Jury found them guilty under section 326 *simpliciter*. The Jury re-

(6) 9 A. 645 at p. 649; A. W. N. (1887) 149; 5 Ind. Dec. (N. S.) 867.

(7) 17 B. 260; 9 Ind. Dec. (N. S.) 170 (F. B.).

turned a verdict of acquittal under section 148 apparently owing to the admitted misdirection of the learned Judge. It was held that the verdict of the Jury convicting the accused under section 326 was practically a judgment of acquittal inasmuch as there was no charge under that section independently. In this the case in *Reazuddi* v. *Emperor* (4) was followed where the result of the Calcutta rulings is summed up as the learned Judges say: "it is now settled law that when a person is charged by implication under section 149, he cannot be convicted of the substantive offence." If this statement of the law is to be accepted as correct and if I am wrong in my suggestion that the charge here as framed does not charge section 326 *simpliciter*, it follows that the convictions under consideration are illegal. With deference I think the Calcutta decisions are wrong in that they erect section 149 into a distinct offence thus directly refusing the view set out in *Queen-Empress* v. *Bisheshar* (6).

My learned brother and myself dealt with this point, though not exhaustively in Criminal Appeal No. 1364 of 1922. There for reasons given we held that the accused could not be prejudiced by the omission to name section 149, the charge having been set out *in extenso*. We had, however, to consider the only Madras case, as far as I can discover, on the point, *viz.*, *In re, Thaikkottathil Kunhaeen* (5) decided by Ramesam and Wallace, JJ. There the petitioners were convicted under section 143, Indian Penal Code, and section 126 of the Railways Act. It was contended that the convictions were correct if considered as under section 126 of the Railways Act read with section 149, Indian Penal Code. The latter section was neither charged nor referred to in the lower Court and on that ground, following the decision of Oldfield and Devadoss, JJ., Ramesam, J., held the conviction under section 126, Railways Act, bad, as having prejudiced the accused.

Wallace, J., though holding that section 149 does not create in itself any offence, held it was essential that the accused should have had notice that what they had to meet was a charge that they were members of an unlawful assembly which in prosecution of its common object committed an offence under section 126, Railways Act. The learned Judge speaks of the "substantive offence" [as do the learned Judges of the Calcutta Court in *Reazuddi* v. *Emperor* (4)] in contradistinction to section 149—which lays down that every member of an unlawful assembly may *if an offence* is committed under certain circumstances be guilty of *that* offence.

Wallace, J., therefore, held that section 233, Criminal Procedure Code, had not been complied with and that the accused had been prejudiced thereby. He added that if section 149, Indian Penal Code, is relied on it should be stated and named in the charge.

I have had the advantage of reading the judgment just delivered by my learned brother and I share his views for doubting if in a case like the present there could be any real prejudice to the accused, assuming he has here been charged under sections 326 and 149 and not also under section 326 *simpliciter*.

For the reasons stated by him I also think an authoritative ruling on this point is very desirable. It has arisen at least three times within the last eight months and apparently twice before that, *viz.*, in Referred Trial No. 85 of 1922 and Criminal Revision Case No. 662 of 1921. There may also be other instances which have not been brought to my notice. I agree to the terms of reference proposed by my learned brother.

This appeal came on for hearing on the 22nd of April, 1924, in pursuance of the Order of Reference to a Full Bench.

Messrs. *V. L. Ethiraj*, and *T. Krishnan Nambisan*, for the Appellants.

Mr. *J. C. Adam*, Public Prosecutor, on behalf of the Crown.

OPINION.

Spencer, J.—The questions referred to us are :—(1) when a charge omits section 149, Indian Penal Code, and the conviction is based on the provisions of that section, is that conviction necessarily bad, or does it depend on whether the accused has or has not been materially prejudiced by the omission? (2) When a charge has been framed under sections 326 and 149, Indian Penal Code, is a conviction under section 326, Indian Penal Code, necessarily bad, or does this also depend on whether the accused has or has not been materially prejudiced by the form of the charge?

The charge in the present case runs as follows:—"That you on or about the 14th February, 1923, at 2 P. M. at Sekkarakudi with a view to enforce the right to the *punjai* land Suit No. 1162 of Sekkarakudi village, armed yourselves with deadly weapons and committed rioting and caused grievous hurt by dangerous weapons, and that you did commit murder by intentionally causing the death of Subramania Mappilaswami Naick and thereby committed offences punishable under sections 148, 326 and 302 of the Indian Penal Code, read with section 149, Indian Penal Code, and within the cognizance of the Court of Session of Tinnevelly Division, and I hereby direct that you be tried by the said Court on the said charge."

It is clear that the charge in this case does not omit section 149 and thus the first question referred to us does not directly arise on the facts.

We agree with the statement of Edge, C. J., in *Queen-Empress* v. *Bisheshar* (6) that section 149 creates no offence, but is, like section 34, merely declaratory of a principle of the common law, and its object is to make it clear that an accused who comes within that section cannot put forward as a defence that it was not his hand which inflicted the grievous hurt. We do not think that Schwabe, C. J., intended to lay down any contrary principle in C. R. C. No. 662 of 1921. Section 40, Indian Penal Code, defines "offence" as a thing made punishable under the Code or under any special or local law as defined in the Code. A person could not be tried and sentenced under section 149 alone, as no punishment is provided by the section. Therefore, the omission of section 149 from a charge does not create an illegality by reason of section 233, Criminal Procedure Code, which provides that for every distinct offence of which any person is accused there shall be a separate charge.

To answer the first parts of both the questions referred to us in the affirmative would be to overlook section 537, Criminal Procedure Code, which deals with omissions from charges.

The learned Judges who decided *Reazaddi* v. *Emperor* (4) and *Emperor* v. *Madan Mandal* (3) do not appear to have considered the effect of section 537 upon omissions from the charge. In *Sita Ahir* v. *Emperor* (8) it was considered illegal when a charge for a substantive offence under section 323 was omitted. We do not agree with the general statement in the first of these decisions that it is "now settled law that when a person is charged by implication under section 149, he cannot be convicted of the substantive offence." We think that when a person is charged with being a member of an unlawful assembly, one of the members of which caused grievous hurt in pursuance of the common object, there is no necessary implication that that particular member is not himself. *Emperor* v. *Madan Mandal* (3) was a clear case of misdirection to a Jury which came before the High Court in consequence of a reference under section 307, Criminal Procedure Code. *Panchu Das* v. *Emperor* (2) was another case of misdirection. *Queen-Empress* v. *Bana Punja* (7) and *Abhi Misser* v. *Lachmi Narain* (1) deal with the legality of punishments for combined offences rather than with failures of justice caused by the omission to frame the necessary charges. The legality of the sentences passed in the present case is not before us.

(8) 16 Ind. Cas. 161; 40 C. 168; 13 Cr. L. J. 593.

ON PE *v.* EMPEROR.

In the present instance the name of the person to whom grievous hurt was caused (Raghurama Naidu *alias* Ramaswami Naicker, prosecution witness No. 7) is not mentioned in the charge.

Whether this omission, or the omission to charge accused Nos. 1 and 6 separately with the offence under section 326, if in the present case there was such an omission (which Odgers, J., doubts) prejudiced those accused in their defence is a matter which the Bench which hears the appeal must deal with. It is not a part of the reference to the Full Bench. We answer the first part of second question in the negative and the second part in the affirmative.

Krishnan, J.—I agree.

Ramesam, J.—I agree.

Order accordingly.

V. N. V.
S. D.

RANGOON HIGH COURT.

CRIMINAL REVISION No. 26-B OF 1924.
January 22, 1924.
Present:—Mr. Justice Carr.
ON PE—PETITIONER
versus
EMPEROR—RESPONDENT.

Criminal proceedings—Res judicata.

An order passed by a Criminal Court unless set aside in due course of law, remains in force and its validity cannot be questioned in a subsequent prosecution based on the disobedience of that order. [p. 472, col. 2.]

Criminal reference by the Sessions Judge, Insein, under section 438, Criminal Procedure Code.

REFERENCE.—The following reference was forwarded by the Sessions Judge, Insein, to the Registrar of the High Court:—

I have the honour to submit for the perusal of the Hon'ble Judges the proceedings of the Sub-Divisional Magistrate of Insein, Maung So Min, in his Criminal Miscellaneous No. 39 of 1923. The proceedings came to my notice in connection with an appeal by the same respondent. On Pe in my Criminal Appeal No. 4 of 1924 against the order of the Sub-Divisional Magistrate (Maung Ba U 2) Insein in his Criminal Regular No. 68 of 1923 wherein On Pe was sentenced to six months' rigorous imprisonment under section 18, Habitual Offenders Restriction Act, for failure to betake himself to the area to which his movements were restricted in the former case. Assuming the correctness of the order in the first case there can be no doubt as to the correctness of the order of the latter case. On Pe did not appeal against the first order but I consider that the case in which he was ordered to restrict his movements was most inadequately tried, and that if he had appealed the order must have been set aside, and a fresh inquiry directed. If that order now be set aside, I suppose that the appeal against the conviction under section 18, Habitual Offenders Restriction Act, would succeed, but it might be argued that the order was valid until set aside and the appellant ought not to have taken it upon himself to disobey it. I would be grateful to learn the opinion of the Hon'ble Judges on this point, if they agree that the former order should be set aside. With regard to that order it will be seen that the respondent was alleged to have three previous convictions but no attempt was made to prove them. Two witnesses were examined. One was a Head Constable in charge of an outpost who stated that On Pe was a surveillance criminal, associated with the registered criminals and was suspected of participation in certain cases.

The other witness describes himself as a cultivator, and states that On Pe is reputed to be a thief or robber by habit was suspected of participation in thefts of cattle and other property and in particular, theft of buffaloes from the witness and associated with certain bad characters. This witness is a headman, but the Magistrate did not trouble to inquire.

The respondent stated he had nothing to say and no witness to offer, also that he had no cause to show against the passing of restriction order. This is a peculiarity of most of the respondents who appeared before this Magistrate under

Habitual Offenders Restriction Act. The Police sent up other witnesses but the Magistrate dispensed with them.

I do not consider that there has been an adequate inquiry and I would recommend that the order be set aside and a fresh inquiry directed.

ORDER.—This reference under section 438, Criminal Procedure Code, is made in the form of a letter to the Registrar of this Court. This form is not appropriate. Such reference should be made by a judicial order.

As regards the substance of the reference the facts are as follows. On the 25th May, 1923, in his Criminal Miscellaneous No. 39 of 1923 the Sub-Divisional Magistrate of Insein passed an order under section 7 of the Burma Habitual Offenders Restriction Act restricting Nga On Pe to the village of Tawlate for three years. On Pe did not appeal against the order but chose rather to disobey it. He never went to Tawlate at all but instead went and lived in the Thongwa Township of the Hanthawaddy District. He was arrested towards the end of November and was prosecuted under section 18 of the Act for disobeying the restriction order. He pleaded guilty to the charge and was sentenced to six months' rigorous imprisonment. He then appealed to the Sessions Court. The Sessions Judge has gone back to the original proceedings and considers that they were inadequately tried and that had On Pe appealed the order must have been set aside and a further enquiry have been ordered. He recommends that this should be done now in revision.

He further remarks that if this were done he supposes that On Pe's present appeal against his conviction would succeed, though he admits that it is arguable that the order was valid until set aside and that the appellant ought not to have taken it upon himself to disobey it.

He has overlooked the fact that under section 412, Criminal Procedure Code, On Pe has no right of appeal against his conviction, but can appeal only as to the extent or legality of the sentence. Even on the supposition that On Pe had not pleaded guilty I am of opinion that his appeal against the conviction could not succeed. The order was undoubtedly in force at the time of his disobedience, which, therefore, constituted the offence of which he has been convicted. To hold otherwise would be entirely subversive of the principle of the finality of judicial orders. It would make it possible in proceedings under section 514 or 563, Criminal Procedure Code, to question the correctness of the original order or conviction. It would enable a convict charged with escaping from Jail to question his conviction, and a person charged under section 75, Indian Penal Code, could contend that his former conviction should not have been bad. These are only a few instances of the deplorable results of such a decision.

In view of these considerations I am not prepared to interfere. The proceedings may be returned.

N. H. *Proceedings returned.*

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 891 OF 1923.
CRIMINAL REVISION PETITION No. 712 OF 1923.
March 28, 1924.

Present :—Mr. Justice Spencer.

KUPPU ODAYAR—PETITIONER

versus

POOMALAI GOUNDAN—COUNTER-PETITIONER—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 144—Time-expired order—Revision.

The High Court will not in revision interfere with an order under section 144, Criminal Procedure Code, which has expired by lapse of time, and adjudicate upon matters which have no practical effect. [p. 473, col. 2.]

Swaminatha Mudaliar v. *Gopalakrishna Naidu*, 28 Ind. Cas. 160; 16 Cr. L. J. 272, followed.

Muthukumaraswami Nadar v. *Muhammad Rowther*, 67 Ind. Cas. 500; 42 M. L. J. 352; 30 M. L. T. 148; 15 L. W. 423; (1922) M. W. N. 177; (1922) A. I. R. (M.) 76; 23 Cr. L. J. 404, not followed.

Govinda Chetti v. *Perumal Chetti*, 30 Ind. Cas. 453; 38 M. 489; 16 Cr. L. J. 629, *Ramanadhan Chetti* v. *Murugappa Chetti*, 24 M. 45; 2 Weir 92, distinguished.

Swaminatha Mudaliar v. *Gopalakrishna Naidu*, 30 Ind. Cas. 144; 16 Cr. L. J. 592, referred to.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, praying the High Court to revise the order, dated the 1st November 1923, of the District Magistrate, South Arcot, in C. M. P. No. 29 of 1923.

Messrs. *E. L. Thornton* and *T. R. Govindaswami Mudaliar*, for the Petitioner.

The Public Prosecutor on behalf of the Crown.

Mr. *R. Gopalaswami Ayyangar*, for the Counter-Petitioner.

ORDER.—The order passed by the District Magistrate under section 144, Criminal Procedure Code, on 23rd Septamber, 1923, has expired.

It is, therefore, unnecessary to adjudicate upon the merits of the order, and it would be superfluous to annul an order which has long ceased to be in force, *vide*, *Swaminatha Mudaliar* v. *Gopalakrishna Naidu* (1).

Nevertheless it has been strongly urged that the District Magistrate should not have issued an order under section 144 and should not have discharged the Sub-Divisional Magistrate's order under section 107, Criminal Procedure Code, without finding that there was a danger of a breach of the peace even if the Goundans continued to be bound over to keep the peace. In *Muthukumaraswami Nadar* v. *Muhammad Rowther* (2) a learned Judge of this Court whose attention does not seem to have been drawn to *Swaminadha Mudaliar* v. *Gopala Krishna Naidu* (1) thought it incumbent on him to interfere in revision with an expired order. The cases quoted by him do not in my opinion support his view.

In *Ramanadhan Chetti* v. *Murugappa Chetti* (3) the fact that the order had ceased to be in force does not appear to have been brought to notice when the High Court heard the criminal revision case; and in *Govinda Chetty* v. *Perumal Chetty* (4) there was in fact one day more for the order to remain in force.

It seems to me a waste of time to adjudicate upon matters which have no practical effect. I, therefore, dismiss the criminal revision petition.

It will be sufficient to communicate to the District Magistrate for his future guidance a copy of the judgment of Ayling, J., in *Swaminatha Mudaliar* v. *Gopalakrishna Naidu* (5) as representing the proper course to be adopted by a Magistrate in dealing with cases in which his powers under section 144 are repeatedly invoked.

V. N. V. *Petition dismissed.*

(1) 28 Ind. Cas. 160; 16 Cr. L. J. 272.
(2) 67 Ind. Cas. 500; 42 M. L. J. 352; 30 M. L. T. 148; 15 L. W. 423; (1922) M. W. N. 177; (1922) A. I. R. (M.) 76; 23 Cr. L. J. 404.
(3) 24 M. 45; 2 Weir 92.
(4) 30 Ind. Cas. 453; 38 M. 489; 16 Cr. L. J. 629.
(5) 30 Ind. Cas. 144; 16 Cr. L. J. 592.

RANGOON HIGH COURT.

CRIMINAL APPEAL No. 622 OF 1923.
November 6, 1923.
Present:—Mr. Justice May Oung.
NGA SAN MIN AND OTHERS—
—APPELLANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 149, 325—Riot—Grievous hurt—Accused, liability of.

In a case of rioting resulting in grievous hurt convictions and separate sentences under section 325 read with section 149 of the Penal Code are legal against all those accused who actually joined in the assaults, though some assaults resulted in simple hurt and others in grievous hurt. [p. 475, col. 2.]

Criminal appeal from the order of the Sessions Judge, Pyapon, in Sessions Trial No. 9 of 1923.

Mr. *Brown*, for the Appellants.

The Government Advocate, for the Respondent.

JUDGMENT.—This is a case which presents many extraordinary features not the least of which was the extreme laxity of the Police Officers concerned. On the morning of the 16th October, 1922, a gang of about 30 villagers, armed with sticks, spears and *dahs* went across the river in two big sampans to the little town of Bogale in the Pyapon District. It was about 7 o'clock, when most people would be up and about, and many either

joining to or returning from the bazaar. U Shwe Lon (P. W. No. 2) a Karen Christian, aged 62 years and the local opium licensee, was on his way to his shop near the bazaar, when he saw the gang, for whom indeed he had to make way as they marched past. Every member of the gang had a piece of white cloth tied round his head and all or nearly all wore white undervests, their *longyis* being of different colours. Prominent amongst them was the first appellant, San Min, who apparently was a well-known man in the Township.

The gang came up from the river *bund*, marched south along the strand *bund* and then turned east into a side road which separates the bazaar from a row of houses, in some of which were Chinese shops. Their main object was the eating house of one Pauk Si.

Two days previously, San Min's younger brother, Po Hnin second appellant, had visited the same shop and therein had an altercation and fight with Amine, one of the shop assistants. When it was over, Po Hnin complained to the Police that he had been robbed of a watch chain with a dollar pendant, and some official enquiry was made, resulting in nothing.

San Min and his men were, therefore, out for revenge, their resentment being directed towards the inmates of Pauk Si's shop in particular and all Chinamen in general. It should be mentioned that there were some Burman shop servants in Pauk Si's shop.

The gang began operation as soon as they turned into the side road. At least three Chinamen, who were not near the street corner and who had no connection with Pauk Si, were struck down by some. Others, including the ring-leaders, entered Pauk Si's shop, and started to assault every one therein. The victims included one Shwe Sin, an innocent customer, who soon afterwards died of his injuries. It has been urged before us that this man was probably struck by inmates of the shop itself, while they were resisting the attack. This, however, is pure conjecture. There is no evidence of any resistence and, in the circumstances it is extremely improbable that resistence was even thought of. The attacking force was a large one and they took the people in the shop by surprise.

There was, necessarily, big commotion and it can well be understood that the news of most unusual incident such as this taking place near the bazaar, would spread with great rapidity all over the little town. The Police Station is only half a mile away from the shop. Yet, the gang, when they had completed their work, marched back along the public road to their sampans and rowed away across the river without let or hindrance.

It was not till the 27th that the Inspector acting under orders from the D. S. P. took over the case from Maung Po Se.

As a result of the investigation 29 persons were committed to the Sessions. Of these, nine were acquitted, one a boy of 16 was sentenced to imprisonment till the rising of the Court, 14 were convicted of rioting under section 147, and sentenced to suffer one year's rigorous imprisonment each, and 5 were convicted of causing grievous hurt and rioting and sentenced to 5 years and one year the sentences to run concurrently. These 19 have appealed.

The learned Counsel for both parties dealt with the evidence against each appellant in detail and I have taken time to study the depositions for the prosecution and the defence.

The two most reliable witnesses for the prosecution (besides U Shwe Lon already mentioned) were Kan Ye (P. W. No. 18) and Po Tha (P. W. No. 19). There the evidence of these two support that of witnesses who saw the riot in and near Pauk Si's shop. I consider that the identity of the two rioters was well established. Kan Ye made one mistake, as regards Hla Saung, who was acquitted.

Adopting this view, I find that two of the appellants were not satisfactorily identified, namely, Po Hnit and Pan Bu. A third man, Po Thi was also unnoticed by Kan Ye and Po Tha, but there is otherwise a strong array of witnesses against him and as he appears to have taken a prominent part in the attack I

see no reason to disbelieve the evidence against him.

Po Hnit and Pan Bu (4th and 5th appellants) were, as stated above, not satisfactorily identified. Sit Phaung said that he was struck by the former, but he had never seen his assailant before and, as there was no identification parade (another serious omission by the Police), his statement must be received with caution; Maung Thin and Lu Bu who said that Po Hnit was a member of the gang were disbelieved by the Trial Court. So far Pan Bu, the evidence was conflicting, and the prosecution witnesses who named him tried to place him at several spots at the same time. I, therefore, set aside the convictions of the 4th and 5th appellants and direct that they be acquitted.

The convictions of the 17 remaining appellants for the offence of rioting are confirmed.

Charges under sections 325 and 452 read with section 149 had also been framed against each of them, but the learned Sessions Judge, on a consideration of certain decisions of Indian High Courts, came to the conclusion that they could not be convicted under these sections in addition to the conviction under section 147. The authorities on this point are conflicting and there does not seem to have been a case on all fours with the present one. The question, however, is largely one of the sentence to be passed, and as I am unable in the circumstances to hold that a case for enhancing any of the sentences in revision has been made out, it is unnecssary to discuss the legal point in connection with those who have been convicted only of rioting. The appeals of the 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 16th, 17th, 18th and 19th appellants are dismissed.

There remain the cases of the 1st, 2nd, 3rd, 6th and 15th appellants. These men were also charged under sections 302 and 325 in the alternative with respect to the deceased Mg Shwe Sin; in addition San Min was charged under sections 326 and 325 (in the alternative) with respect to Chit Tha, the charges under sections 302 and 326 were not substantiated.

As regards the assailants of Shwe Sin, the evidence is very clear against San Min and Kyaw Hla. These two were named both by Amine and by Shwe Sin himself to his wife before he became speechless. The latter also mentioned Po Hnin but this appellant was attacking Amine and there is much force in the contention that he could not have joined in the assault on Shwe Sin, especially when it is borne in mind that the deceased had really only two injuries.

Hence, as regards Po Hnin, Po Thi and San Win, I am not satisfied with the evidence that they joined in the attack on Shwe Sin. I accept the evidence that they were active participators in the riot and that they actually struck one or more of the injured persons other than Shew Sin. In this view, it becomes necessary to consider whether they are not liable under section 149. That they may be convicted of voluntarily causing hurt in addition to the conviction for rioting is undisputed, but where it is sought also to convict him under section 325 read with section 149, the decisions of the High Courts are in conflict. A Full Bench of the Bombay High Court in *Queen-Empress* v. *Bana Punja* (1) favoured the view which I propose to adopt, namely, that such convictions and separate sentences are legal where it is shown that the accused actually joined in the assaults; some of these assaults may have resulted in simple hurt others in grievous hurt but all the actual assailants are, under section 149, liable for all the results. I, therefore, alter the convictions in these three cases to convictions under section 325 read with section 149 and reduce the sentence on each to 3 years' rigorous imprisonment. The convictions and sentences under section 147 will stand, but the sentences passed on each appellant will run concurrently.

As regards San Min and Kyaw Hla, I confirm the convictions and sentences under sections 325 and 147, the sentences to run concurrently. The additional charge against San Min under section 325 with respect to Chit Tha de-

(1) 17 B. 260 (F. B.); 9 Ind. Cas. (N. S.) 170.

pended on the statement of Chit Tha alone and there was little or no corroboration. I give San Min the benefit of the doubt and the conviction and sentence under this charge are set aside.

In the result, San Min and Kyaw Hla will suffer 5 years' rigorous imprisonment each; Po Hnin, Po Thi and San Win 3 years' rigorous imprisonment each; and the remaining appellants (except the two whom I have acquitted) 1 year's rigorous imprisonment each.

N. H. *Order accordingly.*

ALLAHABAD HIGH COURT.

CRIMINAL REVISION NO. 210 OF 1924.

May 19, 1924.

Present:—Mr. Justice Boys.

TULSHI DAS—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Public Gambling Act (III of 1867), s. 13—Legislature, intention of—"Public place," meaning of—Question, how determined.

In enacting the Public Gambling Act the Legislature had in view the prevention of public injury to moral standards and cannot be conceived of as having been even remotely concerned with the protection of public title to any particular property. [p. 477, col. 1.]

For the purpose of determining whether a place is a public place within the meaning of section 13 of the Public Gambling Act, what has to be taken into consideration is not the question of title to the place nor the nature of its metes and bounds but the use to which the place is put. [p. 478, col. 1.]

Sukhnandan Singh v. *Emperor*, 65 Ind. Cas. 419; 20 A. L. J. 80; 23 Cr. L. J. 67; 44 A. 265; (1922) A. I. R. (A.) 542, followed.

Reg v. *Wellard*, (1885) 14 Q. B. D. 63; 54 L. J. M. C. 14; 51 L. T. 604; 33 W. R. 156; 15 Cox. C. C. 559; 49 J. P. 296, *Hari Singh* v. *Jadu Nandan Singh*, 31 C. 542; 8 C. W. N. 458, *Emperor* v. *Govindarajulu*, 30 Ind. Cas. 752; 39 M. 886; 2 L. W. 937; 16 Cr. L. J. 704; (1915) M. W. N. 941, *In re Musa*, 36 Ind. Cas. 839; 31 M. L. J. 285; (1916) M. W. N. 196; 4 L. W. 503; 40 M. 556; 18 Cr. L. J. 7, referred to.

Criminal revision from an order of the Additional Sessions Judge, Agra at Muttra, dated the 9th April 1924.

Mr. *C. Ross Alston*, for the Applicant.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—This Criminal Revision No. 210, and the other Criminal Revisions Nos. 205, 206, 209 and 211, deal with two incidents of *satta* gambling. The cases Nos. 206, 209, 210 and 211 are the cases of Tulshi Das, Lachmi Narain, Budha, Thakar Das and Nahal Chand. The case No. 205 is that of Ghisa, Pershadi, Manohar and Kallu.

To deal now with the Case No. 210, this man, Tulshi Das, was charged with a number of others with gambling in the *satta* form, *i. e.*, with betting or taking bets on opium price figures in a public place—an offence under section 13 of the Gambling Act III of 1867, as amended by the U. P. Act I of 1917. The section, as amended, reads:—"Any person found gambling in any public street, place or thoroughfare" and by the same Acts "gaming" includes "wagering". The nine men, whose cases are before me, were in their respective two groups, charged in effect with being book makers, *i.e.*, with keeping premises for the purposes of betting and themselves taking bets therein. They have been sentenced to a month's imprisonment each. A number of those who went there merely for the purpose of making bets were sentenced to various fines. Those others have not applied to this Court in revision.

The principal accused avowedly (*vide* the terms of their lease) took a lease of the premises concerned for the express purpose of carrying on the business which forms the subject of the charge. The "place" in question consists of an enclosure within a larger enclosure, and the public street runs along one side of the larger enclosure, and the "place", if used in the ordinary way as a place of residence, would undoubtedly be a "private" place. I mention these facts, because reliance has been placed on them by the defence, but in the view that I take the construction of the place is wholly immaterial. The only question here is "Did the accused by their action convert this place into 'a public place' within the meaning of the Gambling Act?"

The term "public place" or a cognate, expression is used in many Acts of the Legislature, but I am not aware of any statutory definition which can have bearing on the present case. It may

well have different meaning for the purpose of different Acts. Where it is not specifically defined, its value must be reasonably determined by the context and the circumstances in which it has been used. It is not defined in the Gambling Act. I have, therefore, to fall back on the consideration of what is the reasonable and proper scope to be given to the term for the purpose of Act III of 1867.

Two considerations present themselves. Is the Act, which is forbidden, so forbidden because it violates a public title or because it violates moral standards publicly.

Now it is clear that the Legislature in such Acts as forbid encroachment on public property, has in view the protection of public title. It is equally clear that in enacting the Gambling Act the Legislature had in view the prevention of public injury to moral standards and cannot be conceived of as having been even remotely concerned with the protection of public title to any particular property.

In what ways then can the standard of morality be publicly injured by gaming? It is possible to gamble:

(*a*) in a private house, entry to which is not permitted to any but friends, a select few coming by special invitation or special permission, and where the gaming can be neither seen nor heard by the public. This, whether gaming be or be not morally desirable, can clearly constitute in no sense a public injury to moral standards;

(*b*) under similar conditions but where the gaming can be seen by the public without the public infringing the private rights of the owner of the place. Here there is a public injury to moral standards; whether the circumstances of the gaming in a house, which is private in every sense of the term, being visible to the public or members thereof, will suffice to constitute it gaming "in a public place" is a point which I have not got to decide in this case. I content myself with noting that in view of the case *Reg* v. *Thallman* (1) any body who so acts will at least run a risk of meeting with an adverse decision;

(*c*) in a place the title to which is vested in the public. Here there can be no suggestion that an offence is not committed;

(*d*) in a place the title to which is vested in a private individual but into which that individual, either avowedly or by implication, invites the public to come whether to gamble or as spectators.

Here again is that public injury to moral standards in an equally virulent form, as in the case (*c*) above, where the gambling is on land of which the title is vested in the public. The Legislature has used words "in a public place" capable equally of including in their ordinary reasonable and proper meaning "a place the title to which is vested in the public" and "a place to which, however owned, the public is allowed in effect unrestricted access". The public injury to moral standards to be prevented is equally great in the two cases and is equally obvious in the two cases, and the language used reasonably covers the two cases. It would be unreasonable to hold that both cases are not covered.

In the case before me, it is not disputed that the accused invited to enter all and sundry who might wish to bet, but the case would in my opinion have been no different if the invitation had been to a class of "the public" or if there had been a merely colourable restriction on the right of entry.

My attention has been invited to a number of rulings and Statutes, English and Indian. But holding, as I have, that the matter must be decided on the language and purpose of Act III of 1867 and on that alone, I do not think it necessary further to refer to them, beyond saying that the view I have taken in effect accords with that of Mr. Justice Stuart in *Sukhanandan Singh* v. *Emperor* (2), in which he relied on *Reg* v. *Wellard* (3). The latter case

(1) (1864) 33 L. J. M. C. 58; L. & C. 326; 9 L. T. 425; 12 W. R. 88; 9 Cox C. C. 388.

(2) 65 Ind. Cas. 419; 20 A. L. J. 80; 23 Cr. L. J. 67; 44 A. 265; (1922) A. I. R. (A.) 542.

(3) (1885) 14 Q. B. D. 63; 54 L. J. M. C. 14; 51 L. T. 604; 33 W. R. 156; 15 Cox. C. C. 559; 49 J. P. 296.

has, I find, been followed also in *Hari Singh* v. *Jadu Nandan Singh* (4), *Emperor* v. *Govindarajulu* (5) and *In re Musa* (6).

I am of opinion that it is not the question of title to the place nor the nature of its metes and bounds, which are the decisive factors, but the use to which the place is put.

I hold that the accused were gaming in a public place.

There remains only the question of sentence. The accused plead that they did not know that they were breaking the law. I have held that they were breaking the law, and it appears to me that it had really been quite clear ever since the ruling of Mr. Justice Stuart in *Sukhnandan Singh* v. *Emperor* (2) decided on December 16th 1921, which, though it referred to gambling of a different type, specifically dealt with the phrase "in a public place." Apart from what may have been the law, it is clear that the accused at least knew that they were doing some thing, which the law had intended to forbid; and, being badly advised that there was a loop hole, deliberately tried to take advantage of it. It is clear that they have done a very great deal of mischief; and, if the case rested there, I would maintain the sentence as it stands; but it also seems that some, at least, of that mischief would have been prevented if the Police had taken action sooner. While, therefore, I think that a fine of Rs. 50 is adequate in the case of the men who merely took advantage of the facilities provided by these accused and went to bet, I think it would be wholly inadequate in the case of the men who, for their own profit, deliberately provided those facilities. I reduce the sentence in the case of each of these nine men to a period of two weeks' simple imprisonment. Some, if not all, of the applicants have already served several days. They will surrender to their bail and serve the remainder.

K. S. D. *Sentences reduced.*

(4) 31 C. 542; 8 C. W. N. 458.
(5) 30 Ind. Cas. 752; 39 M. 886; 2 L. W. 937; 16 Cr. L. J. 704; (1915) M. W. N. 841.
(6) 36 Ind. Cas. 839; 31 M. L. J. 285; (1916) M. W. N. 196; 4 L. W. 503; 40 M. 556; 18 Cr. L. J. 7

RANGOON HIGH COURT.

CRIMINAL REVISION No. 675 OF 1923.
December 20, 1923.
Present:—Mr. Justice Carr.
EMPEROR—PETITIONER
versus
NGA PO THAUNG—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 397—Sentence, when begins to run—"Already undergoing sentence of imprisonment", meaning of—Separate sentences on same day.

An accused under custody begins to undergo a sentence of imprisonment passed on him from the moment the sentence is pronounced and if a second sentence of imprisonment is passed on him on the same day subsequently in a separate trial, he is "already undergoing sentence of imprisonment" within the meaning of section 397, Criminal Procedure Code. [p. 479, col. 1.]

Criminal revision of the High Court being review of an order of the Township Magistrate, Kyaiklat, in Cr. Reg. Nos. 145 and 146 of 1923.

Reference made by the District Magistrate, Pyapon, in his Criminal Revision Nos. 321 and 322 of 1923.

REFERENCE.—In this case the accused was sentenced to suffer one year's rigorous imprisonment by Maung Po Ywet, First Class, Township Magistrate, Kyaiklat, under section 379, Indian Penal Code, on the 11th September 1923 and to run concurrently with the sentence passed in Criminal Trial No. 145 of 1923 which is also submitted for reference.

Under section 397 of the amended Criminal Procedure Code, the concurrent sentence can only be passed in a case where the accused is undergoing sentence passed in another case.

The sentences in both cases were passed on the same date, *i. e.*, 11th September 1923, and I do not think that the sentence passed in both cases can run concurrently as accused was not undergoing any sentence when the sentence was passed in both cases and the sentence passed at separate trials must run consecutively under paragraph 325, Lower Burma Courts Manual.

Accused does not appeal in both cases which are now submitted to the High

Court with a recommendation that the sentence in Criminal Regular Trial No. 146 of 1923 may be altered to run consecutively with the sentence passed in Criminal Regular Trial No. 145 of 1923 under section 379, Indian Penal Code.

ORDER.—The respondent was convicted in two separate trials on the same day by the same Magistrate. In each case he was sentenced to rigorous imprisonment for one year. In Case No. 146 the Magistrate ordered that the sentence should run concurrently with that passed in No. 145. I think it is a reasonable presumption that sentence was passed first in No. 145.

The District Magistrate has referred the case with a recommendation that the sentence should be ordered to run consecutively. He does not go into the merits or suggest that the effective sentence of one year for the two offences was inadequate. I have read the judgments and in my opinion the sentences are sufficient as they stand.

The District Magistrate's ground for this recommendation is that as the two sentences were passed on the same day the respondent, at the time when sentence was passed in No. 146, was not "already undergoing a sentence of imprisonment" within the meaning of section 397, Criminal Procedure Code.

I am unable to agree. The respondent was in custody and in my view in such circumstances he began to undergo the sentence in No. 145 from the moment at which that sentence was pronounced. I hold, therefore, that the Magistrate's order was a proper one under section 397, Criminal Procedure Code.

No action is called for. The proceedings may be returned.

N. H. *Proceeding returned.*

LAHORE HIGH COURT.

CRIMINAL REVISION PETITION No. 195 OF 1923.

March 10, 1923.

Present:—Mr. Justice Zafar Ali.

RAM SARAN—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 420—Cheating—Creditor receiving payment of debt—Subsequent denial—Offence.

Accused received from the complainant, his debtor, cash and cattle in payment of the debt due by the latter. Subsequently he gave the complainant notice calling upon him to pay the debt and denied the receipt of the cash and cattle :

Held, that, in the absence of proof that the accused received payment of the debt with the pre-conceived intention of denying it later on, he could not be held to have committed an offence under section 420 of the Penal Code.

Petition, under section 439 of the Criminal Procedure Code, for revision of an order of the Sessions Judge, Karnal, dated the 13th January 1923, confirming that of the Magistrate, First Class, Sonepat, District Rohtak, dated the 21st December 1921.

Mr. *Shamair Chand*, for the Petitioner.

JUDGMENT.—The case against Ram Saran, petitioner, who has been convicted of cheating under section 420, Indian Penal Code, was, that in spite of receiving from his debtor, the complainant, cash and cattle in payment of what he owed him, he gave him notice later on for payment of the debt originally due, and denied what he had already received. Counsel for the petitioner contends that even if he did this, he could not be said to have committed cheating. This point was raised in the grounds of appeal to the learned Sessions Judge, but there is no reference to it in his judgment. It is clear that there was no dishonesty or fraud in the creditor's act of receiving the cash and cattle from the debtor, nor was it alleged that he made the payment under deception. Further, there was nothing to show that the petitioner received payment with the pre-conceived intention of denying it later on. If he subsequently denied it he cannot be said to have cheated the debtor though this conduct of his was highly reprehensible. Therefore, I accept this petition in revision and acquit him and discharge him from his bail bond.

Z. K. *Petition accepted.*

PATNA HIGH COURT.

CRIMINAL REVISION No. 744 OF 1922.
January 9, 1923.
Present :—Mr. Justice Ross.
JAGARNATH CHAUBEY—
PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 439—Reformatory Schools Act (VIII of 1897), s. 16—Penal Code (Act XLV of 1860), s. 411—Dishonestly receiving stolen property—Youthful first offender—Sentence of six months' rigorous imprisonment or detention in Reformatory School—High Court, whether can interfere.

A sentence of six months' rigorous imprisonment on a youthful first offender aged 14½ years for an offence of dishonestly receiving stolen property under section 411, Penal Code, is improper, and where in lieu of this sentence the offender has been ordered to be detained in a Reformatory School, the High Court has jurisdiction to interfere with the order for detention.

Sheikh Reasut v. *Courteney*, 5 C. W. N. 211, relied on.

Revision from the order of the Additional Sessions Judge, Patna, dated the 4th December 1922, affirming that of the Additional District Magistrate, Patna, dated the 15th November 1922.

Mr. *P. C. Roy*, for the Petitioner.

JUDGMENT.—This is an application on behalf of one Jagarnath Chaubey a boy of 14½ years who was sentenced to six months' rigorous imprisoment on conviction of an offence under section 411 of the Indian Penal Code and whom the Additional District Magistrate ordered to be detained in a Reformatory School for 3½ years instead of being imprisoned. It is contended that in view of the youth of the accused he ought to have been dealt with under section 31 of the Reformatory Schools Act. The sentence of six months' rigorous imprisonment on a youthful first offender in a case of this kind appears to me to have been improper and, therefore, this Court has jurisdiction to alter the order for detention in a Reformatory School [*Sheikh Reasut* v. *Courteney* (1)]. I do not think that the case is one in which it would be proper that the boy should be discharged after admonition. But if the parent or the guardian or the nearest adult relative of the boy is willing to

(2) 5 C. W. N. 211.

enter into a bond in Rs. 100 to be responsible for the good behaviour of the youthful offender for a period of twelve months then such a bond will be accepted and the order of detention in the Reformatory School will be set aside. If no bond is given the sentence will stand. The bond should be given to the Additional District Magistrate.

N. H. *Order accordingly.*

LAHORE HIGH COURT.

CRIMINAL REVISION No. 1523 OF 1922.
February 27, 1923.
Present:—Mr. Justice Abdul Raoof.
MUGHLA—ACCUSED—PETITIONER
versus
MUHAMMAD AND OTHERS—
COMPLAINANTS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), s. 250—Discharge of accused—Compensation, order for—Notice to complainant.

An order directing a complainant to pay compensation to an accused person who has been discharged, without giving him an opportunity of showing cause why such order should not be made is bad in law and should be set aside.

Case reported by the District Magistrate, Jhang, with his No. *nil* of 1922.

Mr. *Jiwan Lal*, for the Petitioner.

Mr. *Sagar Chand*, for the Respondents.

ORDER.—In this case, a number of accused persons were charged; some of them were discharged, as there was no evidence against them. The Magistrate ordered the complainant to pay compensation to the persons who had been discharged without giving the complainant an opportunity to show cause why such an order may not be made against him. The proviso (A) attached to section 250 of the Criminal Procedure Code lays down that before making any direction as to the payment of compensation the Magistrate shall consider any objections which the complainant on information may urge against the making of the direction. This was not done in this case. The order is consequently bad in law. I accept the recommendation made by the District Magistrate of Jhang and set aside the order of the Magistrate.

W. C. A. *Order set aside.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 279 OF 1922.
July 16, 1924.
Present:—Mr. Justice Devadoss.
AUTHINARAYANA IYER AND OTHERS—DEFENDANTS—APPELLANTS
versus
KRISHNASWAMY IYER—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 132—Unpaid purchase-money, suit for—Date of payment postponed—Limitation, operation of.

A claim for unpaid purchase-money is governed by Art. 132 of Schedule I to the Limitation Act and the starting point of the period of imitation is the date of sale and not the date to which the payment of the purchase-money is postponed.

A lien for unpaid purchase-money is a statutory charge and parties cannot extend the time given by law for the enforcement of such a charge by simply putting off the date of payment.

It is however open to them to create a charge by a proper document and fix a period for the payment of the amount due.

Second appeal against the decree of the Court of the Subordinate Judge, Mayavaram, in Appeal Suit 56 of 1920 (Appeal Suit No. 183 of 1920 on the file of the District Court of Tanjore) preferred against the decree of the Court of the District Munsif of Mayavaram, in Original Suit No. 111 of 1918.

Messrs. *K. Bhashyam Iyengar* and *P. J. Kuppanna Rao*, for the Appellants.

Mr. *N. Muthusami Iyer*, for the Respondents.

JUDGMENT.—The first question argued in this second appeal was that Exhibit B was the consideration for Exhibit A and the plaintiff was not entitled to claim a statutory charge for the unpaid purchase-money. From a perusal of Exhibits A and B it is clear that the vendor did not accept Exhibit B as consideration for the sale. According to Exhibits A and B the arrangement was that the vendee should execute a bond for the unpaid purchase-money, undertaking to pay the amount on the happening of a certain event, namely, the attaining of majority of Dharmaraja Iyer. It cannot be said that the vendor accepted the bond as consideration for the price of the property sold. The vendee undertook to pay the price of the land sold to him on the happening of a certain event. I find against the appellant so far as this contention is concerned.

The next contention is that the suit is barred by limitation as more than 12 years have elapsed from the date of the sale. The plaintiff's case is that he had a statutory charge and by Exhibit B the date of payment was fixed as 17th July 1905 and that he, therefore, has 12 years from that date. The plaint was filed no doubt within 12 years from that date. But the real question is whether in the case of statutory charge for unpaid purchase-money, the vendor can claim the purchase-money more than 12 years after the date of the sale. It is settled law that in the case of a claim for unpaid purchase-money, Art. 132 of the Limitation Act applies, *vide Ramakrishna Ayyar* v. *Subramania Ayyen*, (1). The further question is when does the money become payable? The third column of the First Schedule against Art. 132 contains the words "when the money sued for becomes due". The price of the land sold is payable on the date of the sale. So the money becomes payable to the vendor on the date of the sale. The suit, therefore, has to be brought within 12 years from the date of the sale.

On behalf of the plaintiff it is urged that Exhibits A and B should be considered as parts of one transaction and by Exhibit B time for payment was postponed and that, therefore, the plaintiff's suit is within the period of limitation. No doubt in the case of contract between two persons it is open to the obligor to extend the period of limitation by a subsequent document. But in this case the charge was not created by the act of the parties. The charge was a statutory charge and unless the parties clearly expressed their intention to extend the period of limitation by a proper instrument, a document like Exhibit B cannot extend the period of limitation given by law. The respondent relies upon a judgment of this Court in *Kavoonoor Velayuda Reddi* v. *Reddiyvari Narasimha*

(1) 29 M. 305.

Reddi (2). I do not see how that case can help the plaintiff. There the charge or mortgage was created by the act of the parties; it was open to the parties to vary the terms of a prior document by a proper subsequent instrument. Here as I have said the charge is given by law and the parties cannot extend the time given by law for the enforcement of such a charge by simply putting off the date of payment. As I said it was open to them to create a charge by a proper document and fix a period for the payment of the amount due. Exhibit B is not such a document and, therefore, the contention of the appellent ought to prevail.

In the result I allow the appeal and dismiss the plaintiff's suit with costs throughout.

The memorandum of objections is dismissed but without costs.

V. N. V. *Appeal dismissed.*

(2) 38 Ind. Cas. 240; 21 M. L. T. 105; 5 L. W. 111; 32 M. L. J. 263.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 558 OF 1922.
June 16, 1924.

Present:—Mr. Hallifax, A. J. C.

SONA PATIL—PLAINTIFF—APPELLANT
versus
LAXMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 23, Sch. I, Arts. 36, 37, 39—Tank closed—Crops damaged—Suit for compensation—Continued obstruction—Limitation, operation of.

A suit for compensation for injury caused to crops by the closing of the main sluice of a tank is governed by Art. 39 and not Art. 36 of the Limitation Act, and if it is alleged by the plaintiff that the obstruction caused continued and he was prevented from removing it by threats of violence, it is a continuing wrong and under Art. 37 read with section 23 of the Limitation Act, the suit would be within time if brought within three years of the last day to which the wrong continued. [p. 482, col. 2.]

Appeal against the decree of the District Judge, Bhandara, in Civil Appeal No. 17 of 1922 dated the 24th August 1922.

Messrs. *D. T. Mangalmurti* and *K. K. Gandhe*, for the Appellants.

Mr. *Wazalwar*, for the Respondents.

JUDGMENT.—The plaintiff, who is appellant here, sued for compensation for the injury done to his *dhan* crop by the closing of the main sluice of a tank. In his plaint, which was filed on the 16th of November 1921, he alleged that on the 5th of October 1918 when he was taking water from the sluice, the defendants obstructed him and prevented him from taking any more, so that he got a very small out-turn; he harvested the *dhan* in the second half of November, so that his cause of action arose on or about the 1st of December 1918.

The written statement of the defendants dealt fully with the merits of the case but did not raise any plea of limitation an omission which is somewhat unusual. The question was, however, raised in some way, apparently by the learned Judge himself, and the plaintiff's Pleader made a further statement in which he said the defendants had threatend him with violence if he opened the sluice after they had closed it, and in fear of that violence he had not opened it again till July 1919. The suit has been dismissed in both Courts as barred by time without any trial on the merits.

In the First Court it was held that the Article of the Schedule of the Limitation Act governing the case was Art. 36, which refers to suits for compensation for malfeasance and the like not otherwise specially provided for in the Article. As there are several provisions of the Act that very clearly cover the facts alleged by the plaintiff, that Article could certainly not apply. In appeal it was contended that the provisions applicable were Art. 37 (compensation for obstructing a water channel) and section 23 (continuing wrong), but the learned District Judge held that the suit was one for compensation for trespass on immoveable property, governed by Art. 39, and that time began to run from the 5th of October 1918, as neither section 23 nor section 24 of the Act could be called in aid.

In original alleged wrongful act of the defendants out of which the claim

arose was certainly a trespass on immoveable property, rendered actionable by being accompanied by obstruction of a water course, and as the trespass was not repeated section 23 of the Act does not extend the accrual of the cause of action in respect of the trespass to any date after the 5th of October 1918. But there was also a separate cause of action in respect of the obstruction of the water course by itself, and the plaintiff alleged that the obstruction was continued by the defendants till the following July, in that he was prevented by threats of violence from removing it. That is undoubtedly a continuing wrong, and under section 23 and Art. 37 of the Limitation Act the suit is within time if it is brought within three years of the last day to which the wrong continued. None of the plaintiff's allegations of fact that make out that the obstruction of the water course extended at least up to the 16th of November 1918, the first day of the second half of that month, has been denied, and they must be regarded as admitted.

The suit filed on the 16th of November 1921 was, therefore, within time. The decree of the lower Appellate Court will accordingly be set aside and the case will be remanded to the First Court to be tried out on its merits. A certificate for the refund of Court fees paid on this appeal will issue. All other costs heretofore incurred will be costs in the suit.

G. R. D. *Case remanded.*

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 6 OF 1923.
April 10, 1924.

Present:—Sir Victor Murray Coutts Trotter, KT., Chief Justice, Mr. Justice Ramesam and Mr. Justice Wallace.

BOLLA GROUVAYYA AND OTHERS—DEFENDANTS—APPELLANTS

versus

CHERUKURI VENKATARATHNAM—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s. 77—Refusal of Registrar to register document—Suit for registration—Court, duty of.

In a suit under section 77 of the Registration Act, against the refusal of the Registrar to register a document, the same considerations should guide the Court which should guide the Registrar in considering his duty to register or refuse registration. [p. 484, col. 1.]

The question for consideration would be whether the document tendered for registration was actually in the state in which it was executed by the parties to it. [*ibid.*]

Where it is found that the document tendered bears the most apparent traces of having been tampered with, after the execution of the document in its original state, the Court should refuse to direct registration. [*ibid.*]

Letters Patent Appeal against the judgment of Mr. Justice Phillips, dated the 19th February 1923 and passed in Appeal No. 300 of 1921, preferred against a decree of the District Court of Kistna at Masulipatam, in Original Suit No. 17 of 1920.

Mr. *K. Krishnamachariar*, for the Appellant.

Mr. *N. Rama Rao*, for the Respondent.

JUDGMENT.

Coutts Trotter, C. J.—This was a suit brought under section 77 of the Indian Registration Act which enables a person who has tendered a document for registration to bring a suit in a Civil Court against the refusal of the Registrar to register it.

In this case the plaintiff tendered a document, which is before us for registration. The document bears the most apparent traces of having been tampered with. In one sheet all the glaze of the paper has been destroyed and there is a very deep discolouration. Others bear obvious signs of the surface of the paper having been chemically dealt with but throughout although the discolouration is marked, in the operative sheets of the document, the signature, which is admitted, and the stamp paper at the top are practically intact. Expert evidence has shown that the discolouration and the distruction of the glaze on the surface of the paper is due to chemical action. The inference that those alterations were made after the execution of the document in its original state by the defendants is almost irresistible. Naturally enough the plaintiff was asked what explanation he proposed

to offer. The one he gave was so childish that hardly any of the learned Judges who considered this matter have treated it seriously. That being so, what is the position? Is this Court to enter into a roving enquiry into the probabilities and the surrounding circumstances and put itself the question—Does this document, whatever its history, represent the substance of the agreement between the parties? In my opinion, that is a wholly officious and irrelevant enquiry. The Registrar has got to ask himself merely this: Is this document now tendered to me to be registered actually in the state in which it was executed by the parties to it? In my opinion, he would be exceeding his functions if, he went into a roving enquiry to guess at the probabilities of its provisions; and it appears that, in a suit under section 77, the same considerations should guide the Court which should guide the Registrar in considering his duty to register or to refuse registration. Indeed, were it otherwise, the Court would be called upon to say, in effect that the Registrar was perfectly justified in refusing registration, but that the Court will nevertheless order it to be registered; and the result might be that the Court would order registration of the document which had been altered behind the back of a person who executed it and after its execution and signature on the ground not that he had ever executed it in its present state, but that it represented what had actually been agreed between the parties. In my opinion, such a conclusion is so absurd as to refute itself.

This appeal must be allowed and the suit dismissed with costs throughout.

I may add that, if the facts were as the plaintiff contends, namely, that, although he has tampered with the document, the agreement was that which he contended to be, he has a remedy other than by proceeding under this Act, or at any rate he had, though perhaps by now he may have lost it by limitation.

If the impugned document has been registered in pursuance of the order of the District Judge—and we are given to understand that it has—the registration stands cancelled. This order will be communicated to the Registrar of Kistna District.

Ramesam, J.—I agree.

Wallace, J.—I agree and have nothing to add.

V. N. V. *Appeal allowed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 374 OF 1924.

September 24, 1924.

Present:—Mr. Dalal, J. C.

GANESH DAT—DEFENDANT—APPELLANT

versus

HIRDE BIHARI—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 5—Appeal filed beyond time—Delay due to Pleader's clerk—Sufficient cause—Extension of time.

A mistake of the clerk of the Counsel engaged in a case resulting in the filing of an appeal after the expiry of the period of limitation does not stand on a higher plane than a mistake of a party and is not sufficient for extension of time under section 5 of the Limitation Act.

Second appeal against the decree of the First Additional Sub-Judge, Gonda, dated the 9th May 1924, in an appeal preferred against a decree of the Munsif, Gonda, dated the 20th December 1923.

Mr. *S. N. Roy*, for the Appellant.

Mr. *H. N. Das*, for the Respondent.

ORDER.—This appeal is beyond time. It is said that the mistake was not due to the party filing the appeal but due to a clerk of the learned Counsel engaged in the case. The learned Counsel read out to me abstracts of certain rulings from Mr. Rustomji's book on Limitation, some of which were against himself. The mistake of a clerk does not stand on a higher plane than the mistake of a party and I see no reason to extend the time under section 5 of the Limitation Act.

The petition of appeal is dismissed.

G. H. *Appeal dismissed.*

MADRAS HIGH COURT.

(APPEAL AGAINST ORDER No. 378 OF 1923.

April 17, 1924.

Present:—Mr. Justice Krishnan and Mr. Justice Odgers.

BATHULA PETCHIREDDI AND OTHERS —DEFENDANTS—APPELLANTS

versus

YELLAPEDDI BHARATASASTRI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—"Heard and finally decided," meaning of—Finding recorded to avoid remand, whether res judicata.

For a finding to become *res judicata*, it is necessary that the point should have been "heard and finally determined". [p. 486, col. 1.]

When a Court merely for the purpose of preventing a remand records a conclusion on an issue not necessary for the decision and the decree is not based upon it, the Court cannot be held to have "*heard and finally determined the question.*" [*ibid.*]

Devarakonda Narasamma v. *Devarakonda Kannaya*, 4 M. 134; 5 Ind. Jur. 634; 1 Ind. Dec. (N. S.) 928, followed.

Appeal against an order of remand, dated the 14th December 1922, of the Court of the Subordinate Judge, Bapatla, in A. S. No. 131 of 1922, preferred against the decree of the Court of the District Munsif, Bapatla, in O. S. No. 125 of 1920.

Mr. *C. H. Raghva Rao*, for the Appellants.

Mr. *B. Somayya*, for the Respondent.

JUDGMENT.—The question raised in this case is one of *res judicata*. The appellant represents the interests of one Pitchi Reddi. The respondent represents the interests of one Rami Reddi II. Rami Reddi and Bapi Reddi brought a suit, O. S. No. 372 of 1904, and got it declared that certain alienations by the widow in possession to Pitchi Reddi and to some others respectively were not binding upon the reversioners. In that suit Pitchi Reddi and the other defendants raised the question that the property did not belong to the widow's husband, and, therefore, the reversioners had no right to the properties. They also raised the question that the suit was barred by limitation. These were the two main questions raised in that case. The District Munsif came to the conclusion that the suit was barred by limitation and dismissed the suit expressly on the ground of limitation. He also gave a finding on the issue as to title against the plaintiffs' reversioners, holding that the properties did not belong to the estate of the deceased last male holder as alleged by them. But after coming to that finding he stated in his judgment that he recorded that finding for the purpose of preventing a remand, but that he really based his judgment upon the finding on limitation. It is the finding of the District Munsif in that suit on the question of title that is now claimed to make that question *res judicata* between the present parties. There was an appeal from the judgment of the District Munsif by one of the reversioners Bapi Reddi; the other reversioner Rami Reddi was joined as the 5th respondent. So far as the second set of alienees were concerned the District Munsif's decree was confirmed, on the finding that the suit was barred by limitation by the Appellate Court. But the Appellate Court expressed no opinion on the matter regarding Pitchi Reddi's claim as the matter ended in a compromise by which the decree of the First Court was set aside and the suit was decreed in appeal as per terms of the compromise under which Pitchi Reddi agreed that Bapi Reddi should take the properties on the death of the widow, on the footing that the alienation to him did not cover more than the life estate of the widow. There was a second appeal in the matter by Pitchi Reddi in the High Court in which this compromise decree seems to have been set aside and so far as Bapi Reddi was concerned the decree of the First Court was restored, Rami Reddi not being a party to the second appeal. This is how the matter stands. Now the lower Court has held that the finding in the previous litigation as to title is not *res judicata* in the present litigation on the ground that the finding of the First Court as to title had been by implication set aside by the Appellate Court and the High Court's decree restoring the First Court's decree was not binding upon Rami Reddi, because he was not a party to the second appeal. Assuming for a moment that this view is not correct, and the First Court's

findings are still subsisting, we must still hold that the question of title has not been made *res judicata* by those findings. The findings of the First Court on the question of title was only a tentative decision; a sort of opinion expressed by the Court that the title was not in the person whom the reversioners put forward. The District Munsif says, after finding on the question of title in favour of the alienee, in paragraph 17 of his judgment that: "the finding on the first issue was beside the point, and that he ought not to have recorded the finding but for saving the suit from being remanded in case the Appellate Court disagreed with him in his finding of the other issue." He then considered the question of limitation and found that the plaintiffs' suit was barred by limitation and dismissed the suit. It is clear after this statement of the Munsif that he did not intended to base his judgment at all upon the question of title; his finding, therefore, can only be treated as an *obiter dictum* and not as *res judicata* at all. For a finding to become *res judicata* it is necessary that the point should have been heard and finally determined. When a Court merely for the purpose of preventing a remand records a conclusion on an issue, not necessary for the decision, we cannot hold that it has finally determined the question. This point was decided by the Madras High Court in *Devarakonda Narasamma* v. *Devarakonda Kannaya* (1). Their Lordships held: "The words in section 13 of the Civil Procedure Code 'has been heard and finally decided by such Court' do not apply to an opinion expressed in the judgment on other issues not material for the purpose of the decree, though properly determined under section 204 of the Code of Civil Procedure by the Court of the first instance." That is, if the decree is not based upon a particular finding, that finding cannot be treated as *res judicata*. We, therefore, agree with the Subordinate Judge in thinking that there is no *res judicata* in this case, and dismiss the appeal with costs.

V. N. V. *Appeal dismissed.*

(1) 4 M. 134; 5 Ind. Jur. 634; 1 Ind. Dec. (N. S.) 928.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 2719 OF 1923.

June 25, 1924

Present :—Sir Scott-Smith, KT., Offg. Chief Justice.

Muhammad BARKAT ULLAH—PLAINTIFF—APPELLANT

versus

FASIH ULLAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Pensions Act (XXIII of 1871), s. 6—Suit relating to share of jagir*—Collector's certificate whether necessary—Certificate not obtained—Procedure.*

A suit for a declaration that plaintiff is the sole owner of a certain share in a *jagir* cannot proceed without a certificate from the Collector under section 6 of the Pensions Act.

But the absence of a certificate is not a sufficient ground for the summary rejection of the plaintiff's appeal and the hearing may be adjourned to enable the plaintiff-appellant to obtain the certificate.

Ihtisham Ali v. *Sham Sundar*, 25 A. 73; A. W. N. (1902) 187, *Antaji Vasudev Kelkar* v. *Vinayak Keshav*, 27 Ind. Cas. 927; 17 Bom. L. R. 153, followed.

Second appeal from the decree of District Judge, Delhi, dated the 31st July 1923, affirming that of the Sub-Judge, Third Class, Delhi, dated the 23rd January 1923.

Mr. *Sagar Chand*, for the Appellant.

Mr. *Mohammed Monier*, for the Respondents.

ORDER.—In this case out of which the present second appeal arises plaintiff-appellant asked for a declaration that he was the sole owner of a certain share in a *jagir*. A preliminary objection is taken on behalf of the respondents to the effect that the suit could not proceed in the absence of a certificate granted by the Collector under section 6 of the Pensions Act XXIII of 1871. The matter was before the Collector who directed that the plaintiff should bring a civil suit but gave no certificate in proper form. Having regard to section 4 of the Act, I am satisfied that the certificate was essential, but I do not think that the absence of one is a sufficient ground for the summary rejection of the appeal. In the case reported as *Ihtisham Ali* v. *Sham Sunder* (1) the Judges adjourned the hear-

(1) 25 A. 73; A. W. N. (1902) 187.

ing of the appeal and allowed the appellant three months to take such steps as he might be advised for the purpose of obtaining a certificate under section 6 of the Pensions Act. The same course was adopted in the case reported as *Antaji Vasudev Kelkar* v. *Vinayak Keshav* (2). I therefore, allow the appellant three months' to obtain a certificate from the Collector under section 6 of the Act. A fresh date will be fixed after the coming vacation.

K. S. D. *Order accordingly.*

(2) 27 Ind. Cas. 927; 17 Bom. L. R. 153.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1446 OF 1921.
April 22, 1924
Present :—Mr. Justice Phillips.

GOSULA KONDA REDDI AND ANOTHER —DEFENDANTS Nos. 1 AND 2—APPELLANTS
versus
PULCHERLA PICHIREDDI AND OTHERS—PLAINTIFFS Nos. 1 TO 4, DEFENDANT No. 4 AND LEGAL REPRESENTATIVE OF DEFENDANT No. 3—RESPONDENTS.

Evidence Act (I of 1872), s. 90—Presumption of genuineness of document—Period of 30 years, computation of.

In applying the presumption allowed by section 90 of the Evidence Act, the period of 30 years is to be reckoned not from the date upon which the document is filed in Court, but from the date on which it having been tendered in evidence, its genuineness or otherwise became the subject of proof. [p. 417. col. 1.]

Hari Ram v. *Mutsaddi*, 42 Ind. Cas. 80, *Minu Sirkar* v. *Rhedoy Nath Roy*, 5 C. L. R. 135, *Ladha Singh* v. *Hukam Devi*, 75 Ind. Cas. 57; 4 L. 233; 6 L. L. J. 97; (1924) A. I. R. (L.) 145, followed.

Chirannji Lal v. *Kallo*, 25 Ind. Cas. 412; 12 A. L. J. 507, not followed.

Second appeal against the decree of the District Court, Nellore, in Appeal Suit No. 45 of 1919, preferred against the decree of the Court of the District Munsif, Kanigiri, in Original Suit No. 417 of 1915.

Mr. *K. Krishnaswami Iyengar*, for the Appellants.

Mr. *T. V. Ramanatha Iyer*, for the Respondents.

JUDGMENT.—The appellants raise an objection that Exhibit A, which is a registration copy of a sale-deed executed in 1888, has not been properly proved, because the presumption under section 90 of the Evidence Act cannot be drawn, as the document was less than 30 years old when it was first produced in Court. When the case was first tried, the Munsif naturally did not consider whether section 90 was applicable because the document was obviously not 30 years old at that time. But after finding that the loss of the original was not satisfactorily proved, he refused to allow the sale to be proved by secondary evidence, whether oral or documentary in the shape of Exhibit A. Therefore, although this document was marked as Exhibit A, it was not treated as evidence in the suit.

On appeal the suit was remanded for re-trial and when it came on for re-trial the sale-deed, of which Exhibit A is a copy, was more than 30 years old; and it has been laid down so long ago as *Minu Sirkar* v. *Rhedoy Nath Roy* (1) that in applying the presumption allowed by section 90 of the Evidence Act, a period of 30 years is to be reckoned not from the date upon which the document is filed in Court, but from the date on which it having been tendered in evidence, its genuineness or otherwise becomes the subject of proof. I have been referred to a decision of a Single Judge reported as *Chirannji Lal* v. *Kallo* (2) which seems to take a different view, but the same view is taken in *Hari Ram* v. *Matsaddi* (3) and in a recent case of the Lahore High Court, *Ladha Singh* v. *Hukam Devi* (4). The lower Court was, therefore, quite justified in applying section 90 of the Evidence Act to this document which was 30 years old at the time when its genuineness came up for consideration, namely, at the time of the re-trial in the District Munsif's Court. Apart from this, it might be noticed that the appellants in their written statement did not deny the genuineness of this document. They

(1) 5 C. L. R. 135.
(2) 25 Ind. Cas. 412; 12 A. L. J. 507.
(3) 42 Ind. Cas. 80.
(4) 75 Ind. Cas. 57; 4 L. 233; 6 L. L. J. 97; (1924) A. I. R. (L.) 145.

did not, directly admit its execution, but paragraphs 3 and 4 of their written statement show clearly that they did impliedly admit execution, but denied the *bona fides* and the validity of the document. In that view also it seems rather strange that they should now question the genuineness of the document, namely, the fact of its execution. For both these reasons the second appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 876 OF 1922.

April 24, 1924.

Present:—Mr. Justice Odgers.

KUPPAMMAL—PETITIONER

versus

MUNIAPPA CHETTY AND OTHERS—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 43 (1)—Persons not guardians, proceedings against—Power of Court to pass orders.

Under section 43 of the Guardians and Wards Act, it is only the conduct or proceedings of any guardian appointed or declared by the Court which can be called in question. The District Court has, therefore, no power to pass orders against persons not guardians except in certain specified instances.

Komma Somakka v. *Kovidala Pedda Ramiah*, 13 Ind. Cas. 251; 10 M. L. T. 483; (1911) 2 M. W. N. 519; 22 M. L. J. 193; 36 M. 39, relied on.

Wallace Sitha Boi v. *Wallace Radha Boi*, 51 Ind. Cas. 236; 36 M. L. J. 189, distinguished.

Therefore, a mother who has been appointed by Court as guardian of her minor daughter is not entitled to apply under the section for return of the child's jewels from a relation, with whom the child was living before her appointment by Court as guardian.

Petition, under sections 115 of Act V of 1908 and 107 of Government of India Act, praying the High Court to revise an order of the District Court, Coimbatore, in I. A. No. 341 of 1922, in I. A. No. 189 of 1922, in O. P. No. 91 of 1919.

Mr. *A. Vasudeva Menon*, for the Petitioner.

Mr. *V. Narasimha Iyengar*, for the Respondents.

JUDGMENT.—In this case the minor's guardian was the mother, the present petitioner, appointed on 29th November 1919. Sometime before that the minor lived with the second respondent her uncle presumably against the wishes of the mother. The girl was returned to the mother on 18th December 1919 and the present application is by the mother for the return of two jewels said to have been on the person of the minor, when she went to second respondent. The mother's attitude is a peculiar one. She denies having put in any such application and now says the District Judge has acted without jurisdiction. I think he has. The mother is no doubt a person interested in the minor under section 43 (1) of the Guardians and Wards Act but it it is only the conduct or proceedings of any guardian appointed or declared by Court which can be called in question. The second respondent had ceased at the end of 1919 to be even a *de facto* guardian and was not such at the date of the application by the mother in 1922.

The case, therefore, in *Wallace Sitha Boi* v. *Wallace Radha Boi* (1) has no application.

The learned District Judge has proceeded on the powers conferred by section 43 of the Act. But as pointed out in *Komma Somakka* v. *Kovidala Pedda Ramiah* (2) the Act does not profess to give the District Court any power or authority over persons other than the guardian or the minor except in certain instances which do not apply here. I, therefore, think in the circumstances of this case the District Judge acted without jurisdiction and he had no right to call upon the second repondent to deliver up the jewels under section 43 of the Guardians and Wards Act. I think interference is called for and I allow the civil revision petition and set aside the order of the District Judge with costs.

V. N. V. *Petition allowed.*

(1) 51 Ind. Cas. 236; 36 M. L. J. 189.

(2) 13 Ind. Cas. 251; 10 M. L. T. 483; (1911) 2 M. W. N. 519; 22 M. L. J. 193; 36 M. 39.

RAMPRASAD *v.* JASKARAN.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 267 OF 1923.
June 16, 1924.

Present :—Mr. Hallifax, A. J. C.

RAMPRASAD—APPELLANT

versus

Seth JASKARAN AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 53—Sale by insolvent—Vendee paying off mortgage—Sale held fraudulent—Vendee whether entitled to redemption amount.

If a person, in whose favour a sale is executed by an insolvent, pays off a mortgage on the transferred property, he is entitled to be entered as a scheduled creditor to the extent of the amount paid by him, even though the sale is set aside by the Insolvency Court under section 53 of the Provincial Insolvency Court as fraudulent and void as against the Receiver. [p. 489, cols. 1 & 2.]

The principle that where both parties to a void agreement are equally to blame in the matter the law will restore to neither of them any advantage that he may have allowed the other to get from him has no application to a case where the object of the fraud has been wholly frustrated. [p. 489, col. 2.]

Jadu Nath Poddar v. *Rup Lal Poddar*, 33 C. 967; 4 C. L. J. 22; 10 C. W. N. 650, and *Munisami Mudaliar* v. *Subbarayar*, 31 M. 97; 3 M. L. T. 244; 18 M. L. J. 151, referred to.

Appeal against the order of the District Judge, Raipur, in Civil Appeal No. 10 of 1922, dated on 22nd February 1923.

Mr. *W. R. Puranik*, for the Appellant.

Dr. *H. S. Gour* and Mr. *M. R. Bobde*, for the Respondents.

JUDGMENT.—Gend Prasad, who was adjudged insolvent as from the 22nd of February 1919, executed a sale-deed in favour of the appellant Ramprasad on the 10th of December 1918 for Rs. 5,000. The property which the sale-deed purported to transfer was subject to a mortgage in favour of one Gajadhar, and the amount payable on it on that date was Rs. 4,700. This sum was paid to him in redemption of the mortgage by Ramprasad. It may be mentioned that the sale did in fact also practically extinguish another mortgage for Rs. 3,105 of the same property held by Ramprasad himself, but this was not metioned in the sale-deed.

In the proceedings in the Insolvency Court this sale-deed was eventually held to be fraudulent and void as against the Receiver and was annulled under section 53 of the Provincial Insolvency Act, 1920. Later the Court ordered that the mortgage property should be sold free of both mortgages, but that Ramprasad should be entered in the schedule of creditors for Rs. 4,700, the amount he had paid in redemption of Gajadhar's mortgage. In appeal the first part of this order was maintained and the latter part set saide, it being held that Ramprasad was not entitled to share in the assets even as an ordinary creditor.

The appeal to this Court is only in respect of Gajadhar's mortgage and we are no longer concerned with the other, for which it has been held that no consideration ever passed. It is contended that the property ought to be sold subject to Gajadhar's mortgage now in the hands of Ramprasad or at the least that Ramprasad ought to be made a scheduled creditor for Rs. 4,700. It has to be remembered that what has been found to be fraudulent and void is the transfer of the property to Ramprasad by sale, so as to make it not available for the satisfaction of the claims of his creditors. The payment of the Rs. 4,700 may have been and indeed was made in the prosecution of this object, but the object was wholly frustrated and was not attained even in part.

To such a case the principle that where both parties to a void agreement are equally to blame in the matter the law will restore to neither of them any advantage that he may have allowed the other to get from him has no application: *Jadu Nath Poddar* v. *Rup Lal Poddar* (1) and *Munisami Mudaliar* v. *Subbarayar* (2). Ramprasad could, therefore, still recover his Rs. 4,700 from Gend Prasad under section 64 of the Contract Act and is certainly entitled at least to rank as a scheduled creditor for Rs. 4,700.

Further there was nothing fraudulent in the payment of Gajadhar's mortgage. That certainly took none of the available assets of Gend Prasad out of the reach of his creditors; it merely transferred from Gajadhar to Ramprasad

(1) 33 C. 967; 4 C. L. J. 22; 10 C. W. N. 650.
(2) 31 M. 97; 3 M. L. T. 244; 18 M. L. J. 151.

rights in the property which Gend Prasad had lost in 1915, and it is beyond all doubt that Ramprasad paid the Rs. 4,700 with the full intention of keeping the mortgage alive for his own benefit. Ramprasad is, therefore, entitled to stand in the shoes of Gajadhar in respect of the mortgage: *Chama Swami* v. *Padala Anandu* (3).

For all these reasons the order of the lower Appellate Court in respect of Gajadhar's mortgage is set aside and it is declared instead that Ramprasad is entitled to rank as a secured creditor on that mortgage which he now holds. All the costs of the proceedings in all three Courts will be paid by the respondents in this Court.

G. R. D.

(3) 31 M. 439; 3 M. L. T. 395; 18 M. L. J. 306.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 311 OF 1922.

February 12, 1924.

Present:—Mr. Justice Phillips and Mr. Justice Odgers.

YELLAPPA—DEFENDANT No. 3—APPELLANT

versus

GOHA SWAMI AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 1, 2, 4 AND 5—RESPONDENTS.

Construction of document—Will by Hindu in favour of son's daughter—Absolute or limited estate.

The words "You shall enjoy after my death all the properties moveable and immoveable.....you can enjoy all the said properties attending to my obsequies after my death and settling the matters of the debts, etc., incurred by me" in a Will by a Hindu testator in favour of his son's daughter are of sufficient amplitude to convey the fullest rights of ownership and an absolute estate passes to the legatee.

Guruswami Pillai v. *Sivakami Ammal*, 18 M. 347; 22 I. A. 119; 5 M. L. J. 106; 6 Sar. P. C. J. 610; 6 Ind. Dec. (N. S.) 591 (P. C.), *Kamarazu* v. *Venkataratnam* 20 M. 293; 7 Ind. Dec. (N. S.) 208, *Ramachandra Rao* v. *Ramachandra Rao*, 67 Ind. Cas. 408; 43 M. L. J. 78; 45 M. 320; 30 M. L. T. 154; 26 C. W. N. 713; 35 C. L. J. 545; 16 L. W. 1; (1922) M. W. N. 359; (1922) A. I. R. (P. C.) 80; 20 A. L. J. 684; 24 Bom. L. R. 963; 49 I. A. 129 (P. C.), *Surajmani* v. *Rabi Nath Ojha*, 35 I. A. 17; 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 30 A. 84 (P. C.), *Ramachandra Rao* v. *Ramachandra Rao*, 52 Ind. Cas. 94; 36 M. L. J. 306; 42 M. 283, *Sambasiva Ayyar* v. *Venkataswara Ayyar*, 31 M. 179; 3 M. L. T. 369, *Moulvie Mohamed Shamsool Hooda* v. *Shewakram*, 2 I. A. 7; 22 W. R. 409; 14 B. L. R. 226; 3 Sar. P. C. J. 405 (P. C.), *Namasivayam Pillai* v. *Kuthalalingam Pillai*, 38 Ind. Cas. 840; (1917) M. W. N. 78; 21 M. L. T. 30; 5 L. W. 211, *Ramasami* v. *Papayya*, 16 M. 466; 3 M. L. J. 205; 5 Ind. Dec. (N. S.) 1031, *Atul Krishna Sircar* v. *Sanyasi Churn Sircar*, 32 C. 1051; 2 C. L. J. 50; 9 C. W. N. 784, considered.

Appeal against the order of remand, dated the 30th March 1922, of the Court of the Subordinate Judge, Kurnool, in A. S. No. 14 of 1922, (O. S. No. 626 of 1919, on the file of the Court of the Principal District Munsif, Kurnool.)

Mr. *B. Sitaram Rao*, for the Appellant.

Messrs. *Krishna Aiyar* and *Veera Raghavalu*, for the Respondents.

JUDGMENT.—In this case I have to determine the *quantum* of interest taken by the son's daughter of the testator by his Will, Exhibit A. The operative words are "You shall enjoy after my death all the properties moveable and immoveable ..... You can enjoy all the said properties attending to my obsequies after my death and settling the matters of the debts, etc., incurred by me."

The testator further recites that the properties left by him are his divided properties. The District Munsif has held that the legatee took an absolute estate and the Subordinate Judge that only a life-estate was taken. The reasons for the latter decision are, first, that the word "enjoy" could not confer an absolute estate, and secondly that as the legatee is a female, there is no presumption that she takes an absolute estate. As to the word "enjoy," in the case in *Guruswami Pillai* v. *Sivakami Ammal* (1) the words were "shall enjoy for their lives"—as opposed to "shall enjoy the whole property." The expressions were applied to females and the Privy Council laid down that where the language of a Will is clear and consistent, it should receive its literal construction unless there is something in the Will itself to suggest departure from

(1) 18 M. 347; 22 I. A. 119; 5 M. L. J. 106; 6 Sar. P. C. J. 610; 6 Ind. Dec. (N. S.) 591 (P. C.)

it. In *Kamarazu* v. *Venkataratnam* (2) the Will applied to daughters who were directed to take possession of certain immoveable properties and "enjoy the same happily as they please." It was held the daughters took an absolute estate, there being nothing in the instrument or surrounding circumstances to point to an intention to limit the gift to a life estate. The question is really whether the words used are in the language of the Privy Council, *Ramachandra Rao* v. *Ramachandra Rao* (3), explaining *Surajmani* v. *Rabi Nath Ojha* (4) "of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, etc."

In my opinion the words are not cut down in any way and there is no disposal of the residue as would be usual if only a life estate were intended. The testator says he has no male issue and apparently there was nobody at all nearly connected with him save the legatee. The surrounding circumstances do not, therefore, point to any such limitation or restriction. Further there is the direction to pay the debts, etc. These would probably have to be paid by selling the immoveable property or some portion of it which the holder of a mere life estate could not do. I think there is no doubt that the words used are capable of passing an absolute estate.

The question remains whether there is anything against such a construction of the words from the fact that the legatee is a woman. It is contended that it must be presumed that the testator intended to confer a life estate as that would be consonant with his notions as to the *quantum* of interest a woman would ordinarily take. In *Ramachandra Rao* v. *Ramachandra Rao* (5), which was on a different point reversed by the Privy Council, Wallis, C. J., stated that the trend of latter decisions here, *i. e.*, since *Sambasiva Aiyar* v. *Venkataswara Ayyar* (6) is against making any assumption that only a widow's estate should pass in the absence of any indication to give a larger estate and that the rule in *Moulvie Mohamed Shumsool Hooda* v. *Shewakram* (7) which construed the intention of the testator to have been against the gift of an absolute estate is a rule of construction only to be applied where there is some uncertainty or ambiguity in the language of the instrument. As Seshagiri Aiyar, J., pointed out in the same case, the decision of the Privy Council in *Surajmani* v. *Rabi Nath Ojha* (4) shows that their Lordships thought that no difference should be made between a male and female provided the words of gift are sufficiently clear to convey the property. The same learned Judge in *Namasivayam Pillai* v. *Kuthalalingam Pillai* (8) held that if apt words are used no matter who the transferee is, whether male or female, the estate conveyed would be an absolute one. Further it is to be noted that the legatee in this case is not an heir in the ordinary sense. In *Ramaswami* v. *Papayya* (9) the presumption relied on in argument that a gift to a female is only a life estate was rejected, it not being shown that the female legatee was a widow when her father gave his property to her. In *Atul Krishna Sircar* v. *Sanyasi Churn Sircar* (10) a single learned Judge of the Calcutta High Court held that such a presumption did not exist in the case of a mother, but only in the case of a widow. With this I am disposed to agree, subject, however, to this, the presumption may even in the case of widows be rebutted by the employment of words of "sufficient amplitude" to create an absolute estate. It is I think clear that no such pre-

(2) 20 M. 293; 7 Ind. Dec. (N. S.) 208.

(3) 67 Ind. Cas. 408; 43 M. L. J. 78; 45 M. 320; 30 M. L. T. 154; 26 C. W. N. 713; 35 C. L. J. 545; 16 L. W. 1; (1922) M. W. N. 359; (1922) A. I. R. (P. C.) 80; 20 A. L. J. 684; 24 Bom. L. R. 963; 49 I. A. 129 (P. C.)

(4) 35 I. A. 17; 5 A. L. J. 67; 12 C. W. N. 231; 18 M. L. J. 7; 10 Bom. L. R. 59; 7 C. L. J. 131; 3 M. L. T. 144; 30 A 84 (P. C.)

(5) 52 Ind. Cas. 94; 36 M. L. J. 306; 42 M. 283.

(6) 31 M. 179; 3 M. L. T. 369.

(7) 2 I. A. 7; 22 W. R. 409; 14 B. L. R. 226; 3 Sar P. C. J. 405 (P. C.)

(8) 38 Ind. Cas. 840; (1917) M. W. N. 78; 21 M. L. T. 30; 5 L. W. 211.

(9) 16 M. 466; 3 M. L. J 205; 5 Ind. Dec. (N. S.) 1031.

(10) 32 C. 1051; 2 C. L. J. 50; 9 C. W. N. 784.

sumption exist with regard to a distant female connexion as in the present case and if, as I hold, the words are sufficient to create an absolute estate, there is no reason from the point of view of Hindu sentiment or intention why it should be cut down to a life estate.

In my opinion the Subordinate Judge was wrong on both grounds and the appeal must be allowed with costs here and in the lower Appellate Court.

Phillips, J.—I agree.

V. N. V. *Appeal allowed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS Nos. 253, 580 AND 579 OF 1923.

March 19, 1924.

Present:—Mr. Justice Venkatasubba Rao.

V. KRISHNA IYER—PETITIONER

versus

PACHAIPPA CHETTY AND OTHERS—RESPONDENTS.

*Civil Procedure Code (Act V of 1908), O. I, rr. 8, 10, O. VI, r. 17—Representative suit—Plaintiff not possessing common interest with other members—Other members whether constructively parties—Parties, addition of—*Bona fide *mistake—Suit by wrong person—Amendment of plaint—Fresh allegations of fraud, whether permissible.*

Under O. I, r. 8, Civil Procedure Code, it is not any person that may sue on behalf of a class, but it is that person who has an interest which is the same as that possessed by the whole body of persons. Given a common interest and a common grievance, a representative suit is in order, if the relief sought is in its nature beneficial to all whom the plaintiff proposes to represent. If this condition is found wanting, and if the plaintiff turns out not to be a member of the class on whose behalf he professed to institute the suit, the suit is wrongly constituted, and is not a representative suit and no member of the class is constructively a party to it. [p. 493, col. 1.]

Bedford Duke v. *Ellist*, (1901) A. C. 1 at p. 8; 70 L. J. Ch. 102; 83 L. T. 686, *Burt* v. *British Nation Life Assurance Association*, (1859) 4 De. G. & J. 159; 28 L. J. Ch. 731; 5 Jur. (N. S.) 612; 7 W. R. 517; 45 E. R. 62; 124 R. R. 201, relied on.

On an application under O. I, r. 10, Civil Procedure Code, to add a person as party plaintiff to a suit under O. I, r. 8, it must be alleged and proved that the suit was instituted originally in the name of the wrong person through a *bona fide* mistake. [p. 494, col. 1.]

If either party to a suit seeks to amend his pleadings by introducing for the first time allegations of fraud, etc., the Court must ask why this new case was not presented originally and may require to be satisfied as to the truth and substantiality of the proposed amendment. [p. 494, col. 2.]

Annual Practice, page 451, followed.

Petitions, under section 115 of Act V of 1908, praying the High Court to revise the orders of the Court of the Subordinate Judge, Sivaganga, dated the 25th January 1923 in I. A. Nos. 95, 93 and 94 of 1923 respectively in Original Suit No 15 of 1920 now transferred to the Court of the Additional Subordinate Judge, Sivaganga, and numbered as Original Suit No. 12 of 1923 on his file.

Mr. *G. Krishnaswami Iyar*, for the Petitioner.

Messrs. *C. S. Venkatachariar, R. Swaminatha Iyar* and *D. Ramasami Iyangar*, for the Respondents.

JUDGMENT.—The plaintiff instituted the suit for a declaration that the sale-deed dated the 16th September 1919 executed by the Official Assignee of Rangoon in favour of the defendant is null and void. He described himself in the plaint as a creditor of T. A. R. A. R. M. Ramanathan Chetty who was adjudicated an insolvent and whose estate was represented by the Official Assignee above mentioned. This suit was filed on the 15th of January 1920. Among other pleas, the defendant stated that he did not admit that the plaintiff was a creditor of the insolvent firm. Issues were framed on the 30th of March 1920, and the third issue runs thus:—

"Whether the plaintiff was one of the creditors of the insolvent Ramanathan Chetty, and if so, whether he has no cause of action to maintain this suit?

The trial was about to commence in January 1923 and on the 24th of January one Krishnier made an application to the Court for the purpose of being added as a plaintiff to the action. I may state that the plaintiff is a Nattukottai Chetty and was represented throughout by this Krishnier. The reason why he desired to be added as a party is set forth in paragraph 4 of his affidavit dated the 24th of January 1923. "The defendant has taken the objection that the plaintiff is

not a creditor of the insolvent firm and has no *locus standi* to maintain the suit. In order to obviate any technical objection on that ground it is necessary in the interests of justice that the Hon'ble Court should be pleased to join me as a plaintiff and I am willing to continue the suit from the stage which it has now reached".

Mr. G. Krishnaswami Iyer, the learned Vakil for the petitioner, has contended that the suit having been instituted under O. I, r. 8, Civil Procedure Code, was a representative suit filed in the interests of the creditors of the insolvent, that, therefore, Krishnier, was throughout constructively a party to the proceedings, that the application in effect was to place Krishnier on the record *eo nomine* as a party and that in making the application he was merely taking advantage of the provision contained in clause (2) of r. 8. If this argument is correct, in my opinion, there will be very little difficulty in acceding to the request. But the question is, is Krishnier a party to the proceeding at all; is he a party although on the record his name does not appear? The answer to the question will depend upon the construction of O. I, r. 8. The object of this provision is that in certain cases one person or a few persons should be allowed to represent all persons interested in a suit. The rule is in fact an exception to the general rule that all persons interested should be made parties to a suit. It pre-supposes the existence of a right in the plaintiff. It assumes that under the substantive law, the plaintiff has a right of suit and the rule enables him to represent the whole body of persons whom he seeks to represent. The rule says "Where there are numerous persons having the same interest in one suit, one person may sue on behalf of all persons so interested". The "one person" indicated in the rule is the person who has an interest common to himself and the body whom he professes to represent. The community of interests between him and the others of the class as the pre-requisite is necessary to the end proposed. It is not any person that may sue on behalf of a class, but it is that person who has an interest which is the same as that possessed by the whole body of persons. "Given a common interest and a common grievance, a representative suit is in order, if the relief sought is in its nature beneficial to all whom the plaintiff proposes to represent". (Judgment of Lord Macnaghten in *Bedford Duke* v. *Ellist* (1). If this condition is found wanting, if the plaintiff turns out not to be a member of the class on whose behalf he professed to institute the suit, I am of opinion that the suit is wrongly constituted. The permission to sue is given by the Court on the assumption that the plaintiff is a member of the class and if the assumption is shown to be wrong the suit is not a representative suit and no member of the class is constructively a party to it. On the assumption, therefore, that the plaintiff in the present suit is not a creditor of the insolvent, O. I. r. 8, has no application.

The following observations of Knight Bruce, L. J., in *Burt* v. *British Nation Life Assurance Association* (2) are very relevant in this connection: "He has sued on behalf of himself and others, and notwithstanding what has been contended on the part of the defendants, I assume that there still exist persons who have a right to complain of these transactions. But that will not give the plaintiff a title to sue for them. As on one hand a plaintiff, who has a right to complain of an act done to a numerous society of which he is a member, is entitled effectually to sue on behalf of himself and all others similarly interested, though no other may wish to sue, so, although there are a hundred who wish to institute a suit and are entitled to sue, still if they sue by a plaintiff only, who has personally precluded himself from suing, that suit cannot proceed. The present case, in my opinion, stands upon the same footing as if the dissatisfied share-holders (supposing them to be dissatisfied) had sued by a plaintiff who had released the defendants". Lord Justice Turner concurs and the law is

(1) (1901) A. C. 1 at p. 8; 70 L. J. Ch. 102; 83 L. T. 686.

(2) 4 De. G. & J. 158; 23 L. J. Ch. 731; 5 Jur. (N. S.) 612; 7 W. R. 517; 45 E. R. 62; 124 R. R. 201.

stated in the same terms in Daniel's Chancery Practice, page 179.

If the plaintiff is a creditor, the assumed necessity for this application does not exist and it eqully fails.

It is next contended that Krishnier may be made a party under O. I, r. 10. I do not propose to discuss the applicability of this rule to cases falling within O. I, r. 8. It is sufficient to say that it must be alleged and proved, that the suit was instituted originally in the name of wrong person through a *bona fide* mistake and that element is utterly wanting in the present case. No allegation is made that the mistake was *bona fide*. As a matter of fact, no materials—absolutely none—are placed before the Court from which an inference can be drawn in favour of the plaintiff. This application cannot, therefore, be allowed under O. I, r. 10. I may in passing mention that in the lower Court only this provision was relied on and that reference to O. I, r. 8 was made only in the course of the arguments before me. Civil Revision Petition No. 253 of 1923, therefore, fails and is dismissed.

Another application was made on the same date, namely, 24th of January 1923 by the orginal plaintiff himself for permission to amend the plaint. Paragraph 5 of the plaint runs thus :—

"The plaintiff states that the Official Assignee of Rangoon has, through private negotiations conducted by the Official Receiver of Ramnad, conveyed the undermentioned properties for a grossly inadequate value of Rs. 12,000 and has executed a sale-deed in favour of the defendant though several creditors of the insolvent including the plaintiff, protested against such a sale and offered much higher price". He proposes to amend the plaint by saying that the defendant was a *benamidar* for the insolvent and that T. S. Ramasamy Iyengar who conducted the sale as agent of the Official Assignee of Rangoon made a pretence of selling the property by public auction but really sold the property by private contract to the insolvent, the defendant being merely a *benamidar* for him. Thus allegations of fraud are proposed to be added. The law is stated thus in Annual Practice, page 451. "Thus, if either party seeks to amend his pleading, by introducing for the first time allegations of fraud, etc., the Court will ask why this new case was not presented originally and may require to be satisfied as to the truth and substantiality of the proposed amendment." The materials, if any, which substantiate the allegations of fraud have not been referred to in the affidavits. In the circumstances and having regard to the great delay in making this application from which want of *bona fide* may be inferred I am not disposed to interfere with the order of the lower Court. C. R. P. No. 580 of 1923 accordingly fails and is dismissed.

Then there is a third application made by the plaintiff on the same date for adding the Official Assignee of Rangoon as a party—defendant. The defendant contends that the plaintiff's object in making this application is to delay the trial. As a matter of fact the learned Vakil for the petitioner says that he wants no relief against the Official Assignee but that for enabling the Court to do complete justice between the parties his presence is necessary. He says, if the plaintiff obtains a decree setting aside the sale and if the Court directs the refund of the purchase-money to the defendant, it may then become necessary to have the Official Assignee on the record. The answer is that if the plaintiff obtains the decree, it will be open to him to move the Insolvency Court for directions to the Official Assignee to pay the money. I do not think at this late stage this application ought to be granted. C. R. P. No. 579 of 1923, therefore, fails and is dismissed.

The petitioner will pay the defendant's costs in all the civil revision petitions. (Three set of costs.)

V. N. V. *Petitions dismissed.*

VITHAL *v.* WAMAN.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 122 OF 1923.

July 26, 1924.

Present :—Mr. Prideaux, A. J. C.

VITHAL—DEFENDANT—APPELLANT

versus

WAMAN—PLAINTIFF—RESPONDENT.

C. P. Land Revenue Act (II of 1917), s. 182 —Occupancy holding, transfer of—Lambardar, *consent of, whether necessary.*

A *lambardar* is entitled to maintain a suit for ejectment against a transferee of absolute occupancy holding without his consent, even though the transfer was consented to by the other co-sharers.

Ramakrishna Puri v. *Tanba*, 71 Ind. Cas. 777; 19 N. L. R. 59; 6 N. L. J. 85; (1923) A. I. R. (N.) 153, followed.

Nilmoni Guntia v. *Jogendra Guntia*, 6 Ind. Cas. 389; 37 C. 694; 12 C L. J. 104, not followed.

Appeal against the decree of the District Judge, Wardha, dated the 20th December 1922, in Civil Appeal No. 109 of 1922.

Messrs. *W. R. Puranik* and *D. W. Kathaley*, for the Appellant.

Mr. *D. N. Khare*, R. B., and Mr. *G. N. Kawaley*, for the Respondent.

JUDGMENT.—The plaintiff is the *lambardar* of *Mouza* Mandogarh in Wardha *Tahsil*, and he sues for possession of fields Nos. 27 and 30 of that village under the following circumstances. One Gajanan Balkrishna was the absolute occupancy tenant of these fields and he sold them to the defendant by a sale-deed dated 21st January 1920. Plaintiff states that this sale-deed was invalid for want of his consent and asks that defendant be ordered to deliver possession to him.

The defence is that the sale-deed was consented to by several of the co-sharer *malguzars* of the village and also by the plaintiff's mother and natural guardian and that the plaintiff's agent had recognized the defendant as a tenant of the holding by taking from the latter rent for it on 15th July 1921. It was further contended that plaintiff being merely a fractional co-sharer could not sue on behalf of the whole proprietary body ; and that his co-sharers have consented to the sale and also have shared in the consent money.

Plaintiff denied the alleged giving of consent by other co-sharers, and the case was tried on the following issues :—

"1. Have the other co-sharers given their consent for the transfer in defendant's favour ? Have the four co-sharers named by the defendant passed receipts evidencing their consent as alleged ? If so, how will this affect the plaintiff's claim ?

2. Did the plaintiff's mother give her consent to the sale and she agreed not to demand more than one year's rent as consent money as alleged by defendant ?

3. Was the amount of Rs. 22 deposited with the co-sharer Sadasheo at the instance of the plaintiff's mother as alleged ?

4. Can the plaintiff alone maintain this suit under the circumstances of this case ?

5. In what right does the defendant hold the field ?

6. Can plaintiff avoid the transfer in face of the ratification of the same by the other co-sharers ? Can the plaintiff claim to eject the defendant ?

7. (*a*) Has the plaintiff accepted rent for the field as alleged by defendant ?

(*b*) Is he estopped from claiming possession as alleged ?"

The Trial Court found that the four co-sharers, *viz.*, Krishna, D. W. No. 1, Sadasheo, D. W. No. 3, Badri Prasad, D. W. No. 4, and Chintaman, D. W. No. 6 had consented to the transfer after it had been effected. The plaintiff is a minor and the Judge of the Trial Court finds that his guardian, his mother, had not consented to the transfer. Rupees 22 were found not to have been deposited with the co-sharers Sadasheo at the instance of plaintiff's mother, and plaintiff's agent was found to have been tricked into receiving the rent of this field, and the Judge finds that it has not been established that defendant is recognised as the tenant of the holding in suit. With regard to the question whether the minor *lambardar's* suit should fail because some of his co-sharers had, after the sale had taken place, consented to it, the Judge writes :—

"The lot of the *lambardar* is indeed miserable if the tricks such as have been

played by the co-sharer *malguzars* and the *patwaris* in this case should succeed on technicalities of law leading to differences of opinion. Under the Land Revenue Act of 1917 the law laid down by section 188 (2) is that the *lawbardar* shall be deemed to be the landlord within the meaning of the C. P. Tenancy Act of 1898. It is admitted before me the above two Acts govern this case. The decisions in *Ramji Patel Kunbi* v. *Syed Nur* (1) and in *Murlidhar* v. *Jagannath* (2) were given before the passing of the new Land Revenue Act. I think it is wrong to say that the section 188 simply affirms the old pronouncements. In paragraph 13 of the Preface to the Land Revenue Act it is stated : 'Many important changes have been introduced into the law. Under section 188 sub-section 2 the *lambardar* will be the agent of all the co-sharers, and his actions in connection with the management of the village will be binding on them. If they are dissatisfied with him they may apply for his removal....' Ordinarily the *lambardars* represent their co-sharers in the matter of avoiding unauthorised transfers of tenancy lands : this position is admitted before me. It is, however, contended that in this case the *lambardar* ceased to represent the proprietary body because some of the co-sharers consented to the transfer...I have only to see if the new Land Revenue Act has changed the law."

The Judge came to the conclusion that the *lambardar* under the section of the Land Revenue Act quoted represented in these matters the whole of the proprietary body. He further writes :—

"The matter suould be dealt with in a very simple way. The section 41 (7) lays down that any transfer in contravention of this section shall be void at the instance of the landlord. Under section 188, sub-section 2 (*a*) the *lambardar* shall be deemed to be the landlord within the meaning of the Tenancy Act of 1898. Under the law laid down by these two sections the plaintiff *lambardar* in this case is the only landlord entitled to avoid the transfer in contravention of the section 41. His co-sharers have got no power to revoke or restrict the authority of the *lambardar*. It is, therefore, immaterial whether co-sharers do or do not consent to the transfer."

The Judge held that the plaintiff *lambardar* was entitled to maintain the suit as the landlord and decreed his claim for possession with costs.

On appeal the District Judge confirmed the findings of fact come to by the Trial Court, and dealing with the question of law involved, the learned Judge writes :—

"But since that date the statutory law had been altered by the Land Revenue Act of 1917. In section 188 it is provided that 'landlord' under section 41 of the Tenancy Act should be deemed to mean the *lambardar* of the *mahal*. Section 41, therefore, is not to be interpreted as meaning that a *lambardar* of a *mahal* can avoid a transfer. No other interpretation of the statutory law is possible and the decision of the lower Court is correct."

I am not prepared in second appeal to interfer with the findings of fact come to by the two lower Courts and they will stand. As regards the question of law as to whether plaintiff cannot maintain the suit because co-sharers holding 10-annas share in the village have agreed to the transfer, I am of opinion that the interpretation put by the lower Courts on the relevant sections of the Land Revenue Act is correct.

It is argued here that there has been a mis-apprehension as to the interpretation of section 188 (2) of the C. P. Land Revenue Act and *Murlidhar* v. *Jagannath* (2), *Baijnath* v. *Raghunath* (3) and *Ganpatrao* v. *Pandurang* (4) are quoted in support of the argument. It is to be noted that these cases were decided prior to the introduction of the present C. P. Land Revenue Act. I am also referred to *Nilmani Guntia* v. *Jogendra Guntia* (5) a case from the Sambhalpur District, in which that Court decided that a *lambardar* is only a representative of the proprietary body of a

(1) 4 N. L. R. 45.
(2) 23 Ind. Cas. 20; 10 N. L. R. 5.
(3) 26 Ind. Cas. 608; 10 N. L. R. 93.
(4) 33 Ind. Cas. 758; 12 N. L. R. 24.
(5) 6 Ind. Cas. 389; 37 C. 694; 12 C. L. J. 104.

mahal in its relations with Government and is not entitled alone to bring a suit for ejectment. This has never been the view prevailing in these Provinces.

It is further contended that it would be absurd to allow a *lambardar* who holds only a fractional share in that village to go against the express wishes of the majority of the co-sharers, for, if allowed to sue in these cases, the real result would be that as soon as he obtains his decree and under the decree possession of the land not validly transferred, the other co-sharers would return their shares to the person to whom the tenant had sold and to which sale the other co-sharers had consented. This may be so ; but the fact that this is the possible result of allowing a *lambardar* to sue in these cases does not affect the interpretation to be placed on the Revenue Act. The decision in *Ramji Patel Kunbi* v. *Syed Nur* (1) was under the old Act. The language of the present Act is precise and unambiguous and capable of reasonable meaning. I agree with Hallifax, A. J. C., in *Ramakrishna Puri* v. *Tamba* (6) in which he holds that "section 188 (2) of the Land Revenue Act 1917, concentrates in the *lambardar* certain powers appertaining to the whole proprietary body, which before 1917 were in almost all cases given to him by that body, sometimes expressly but more often tacitly, but need not have been so given and could be withdrawn or modified at any time. Now the *lambardar* has those powers of law, and his co-proprietors can neither refuse or limit them at the beginning by law, and his co-proprietors can neither refuse or limit them at the beginning nor withdraw or modify them subsequently."

The result is that this appeal fails and is dismissed with costs. Appellant will pay respondent's costs.

G. R. D. *Appeal dismissed.*

(6) 71 Ind. Cas. 777; 19 N. L. R. 59; 6 N. L. J. 85; (1923) A. I. R. (N.) 153.

MADRAS HIGH COURT.

CIVIL REVISION PETITIONS No. 117 TO 123 AND 156 OF 1921.

July 24, 1924.

Present:—Mr. Justice Wallace.

A. L. A. R. ARUNACHALAM CHETTIAR THROUGH HIS AUTHORIZED AGENT PICHAPA CHETTIAR—PLAINTIFF No. 1—PETITIONER

versus

LATCHMANAN CHETTIAR AND OTHERS—PLAINTIFFS NOS. 2 AND 3 AND DECEASED DEFENDANT AND HIS LEGAL REPRESENTATIVE—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5) —Payment of process fee for arrest warrant without application therefor—Step-in-aid of execution.

The mere payment of process fee for issue of a warrant of arrest in execution of a decree without a formal application, oral or written, for the issue of such warrant is not a step-in-aid of execution so as to save limitation. [p. 498, col. 1.]

Kuppuswami Chettiar v. *Rajagopala Iyer*, 70 Ind. Cas. 324; 42 M. L. J. 303; (1922) M. W. N. 113; 15 L. W. 348; 45 M. 466; (1922) A. I. R. (M.) 79; 32 M. L. T. 27, referred to.

Vijayaraghavalu Naidu v. *Srinivasulu Naidu*, 28 M. 399, relied on.

Malukchand Ratanchand v. *Bechar Natha*, 25 B. 639; 3 Bom. L. R. 275, distinguished.

Bhupendra Narayan Dutt v. *Rajendra Nath Dutt*, 18 Ind. Cas. 455, *Radha Prosad Singh* v. *Sundar Lall*, 9 C. 644; 4 Ind. Dec. (N. S.) 1078, *Norendra Nath Pahari* v. *Bhupendra Narain Roy*, 23 C. 374; 12 Ind. Dec. (N. S.) 250, not followed.

Petitions, under section 25 of Act IX of 1887, praying the High Court to revise the orders of the Court of the District Munsif, Satur, in E. P. No. 93 of 1920 and E. P. Nos. 90 to 92 and 94 to 96 and E. A. No. 80 of 1920 respectively in S. C S. Nos. 1110, 1030 to 1032, 1026, 1092 1029, and 1025 of 1913.

Mr. *K. Balasubrahmanya Iyer*, for the Petitioner.

JUDGMENT.—The short question for decision in all but two (Civil Revision Petitions Nos. 117 and 156 of 1921) of these Civil Revision Petitions is whether the payment of process fees for issue of a warrant of arrest in execution of a decree is a step-in-aid of execution so as to save limitation.

The execution petitions under consideration were presented on 12th February 1920 and the previous execution petitions were presented on 9th January 1917, more than three years before. In

the course of the latter petitions, *batta* memos for warrant of arrest were put in on 21st February 1917 and 23rd March 1917. The question is whether the filing of these *batta* memos is a step-in-aid of execution. The District Munsif held that it was not. The decree-holders have put in these civil revision petitions. The respondents, the judgment-debtors, do not appear.

A step-in-aid of execution has been defined in *Kuppuswami Chettiar* v. *Rajagopala Iyer* (1) as an application which is not an initial application for execution, but an application to take some step to advance an execution petition already pending. Whether a formal application is in all cases necessary is a matter of some doubt. There is no direct authority whether a mere payment of process-fees for an arrest warrant without a formal application for the issue of warrant is a step-in-aid; but there are cases analogous to this, in which different Hight Courts take different views. This High Court in *Vijayaraghavalu Naidu* v. *Srinivasulu Naidu* (2) has held that a *batta* memo which applies for the issue of a sale proclamation and on which a sale proclamation is issued is a step-in-aid. From the report in that case it appears that the *batta* memo itself asked that process may issue and the learned Judges in that case in consequence distingnish it from the Full Bench case in *Mulukchand Ratanchand* v. *Bechar Natha* (3) in which there was nothing more than the payment of *batta* there being no application either written or oral. *Vijayaraghavalu Naidu* v. *Srinivasulu Naidu* (2) followed the case in *Ambica Pershad Singh* v. *Surdhari Lal* (4) in which also there was an application for the issue of a sale proclamation. The previous case in Madars, *Vellaya* v. *Jaganatha* (5) is inconclusive; but seems to have held that the payment of stamps for the transmission of records for the purposes of execution to another Court would not amount to a step-in-aid unless there was an application. Two Calcutta cases seem to adopt rather a different view. In *Radha Prosad Singh* v. *Sundar Lall* (6) it was held that the deposit of costs for bringing property to sale is a step-in-aid without a formal application, and in *Norendra Nath Pahari* v. *Bhupendra Narain Roy* (7) it was held that the deposit of process-fees for service of a sale proclamation is in itself a step-in-aid. Another Calcutta case reported in *Bhupendra Narayan Dutt* v. *Rajindra Nath Dutt* (8) follows these two rulings and holds that a payment of process-fees paid at the instance of the Court after notice had been served and a sale proclamation issued, imported a request to the Court to proceed with the execution and, therefore, was a step-in-aid. It is a little curious that the *Radha Prosed Singh* v. *Sundar Lall* (6) and *Norendra Nath Pahari* v. *Bhupendra Narain Roy* (7) cases were not cited before the Full Bench in *Malukchand Ratanchand* v. *Bechar Nath* (3) when other cases from the same volumes were cited. In *Sheo Prasad* v. *Indar Bahadur Singh* (9) it was held that the payment of process-fees for attachment without an application is not a step-in-aid. I think the case in *Vijayaraghavalu Naidu* v. *Srinivasulu Naidu* (2) indicates the then view of this Court that a mere payment of *batta* for process, where the *batta* memo itself does not apply for the issue of process will not be a step-in-aid, and I think that it is more essential in such matters that there should be uniformity of practice in each Presidency than that there should be unanimity in the views of different High Courts.

In the present memo I find no prayer for the issue of process. I am asked to infer that there must have been one because the Court has under O. XXI, r. 37, Civil Procedure Code, discretion not to issue a warrant at once. But there is noth-

(1) 70 Ind. Cas. 324; 62 M. L. J. 303; (1922) M. W. N. 113; 15 L. W. 348; 45 M. 466; (1922) A. I. R. (M.) 79; 32 M. L. T. 27.
(2) 28 M. 399.
(3) 25 B. 639; 3 Bom. L. R. 275.
(4) 10 C. 851; 5 Ind. Dec. (N. S.) 569 (F. B.).
(5) 7 M. 307; 2 Ind. Dec. (N. S.) 798.
(6) 9 C. 644; 4 Ind. Dec. (N. S.) 1078.
(7) 23 C. 374; 12 Ind. Dec. (N. S.) 250.
(8) 18 Ind Cas. 455.
(9) 30 A. 179; A. W. N. (1908) 74; 5 A. L. J. 258.

ing to show that if it did after deliberation or on application order the issue of a warrant, that application was within three years of the Execution Petition of 1920. I am, therefore, not prepared to interfere in these cases and dismiss the petition.

In two cases which I excepted at the beginning—Civil Revision Petitions Nos. 117 and 156 of 1921—the case for the petitioner is much weaker. The process memos there were merely for the issue of a notice to the second plaintiff and not to the judgment-debtors at all. Clearly this was not a step-in-aid of execution and these petitions are also dismissed.

V. N. V. *Petitions dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 203 AND 204 OF 1923.

April 23, 1924.

Present:—Mr. Justice Phillips.

IN S. A. No. 203 OF 1923.

GOOLAPUDI SESHAYYA—DEFENDANT—APPELLANT

versus

NADENDLA SUBBIAH AND ANOTHER—PLAINTIFFS—RESPONDENTS

IN S. A. No. 204 OF 1924.

GOLLAPUDI SESHAYYA—PLAINTIFF—APPELLANT

versus

NADENDLA SUBBIAH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXIII, rr. 1, 2—Withdrawal of suit—Permission for fresh suit on payment of costs—Second suit without payment of costs, whether maintainable—Champertous agreements—Public policy in India.

Order XXIII, r. 2 (*b*), Civil Procedure Code, must be read as referring not to permission to withdraw a suit as well as permission to institute a fresh suit, but merely as allowing the Court to give permission to institute a fresh suit in place of the one which has been withdrawn. Inasmuch as the withdrawal of the suit does not require the permission of the Court, it must be taken that the first suit is withdrawn when the order is passed and is no longer pending and the permission granted refers only to the filing of the subsequent suit on certain conditions. Therefore, where an order has been made under O. XXIII, r. 1 of the Civil Procedure Code, giving to a plaintiff, who withdraws a suit, permission to institute a fresh suit on condition of paying the costs, a subsequent suit instituted without paying such costs is barred. [p. 501, col. 1.]

Robert Fischer v. *Nagappa Mudaly*, 6 Ind. Das. 288; 33 M 258; 7 M. L. T. 226, *Hare Nath Das* v. *Syed Hossain Ali*, 2 C. L. J. 480; 10 C. W. N. 8, *Subal Chandra* v. *Mosaraf Ali*, 38 Ind. Dec. 176, relied on.

Shital Prosad Mondal v. *Gaya Prasad Dingal*, 23 Ind. Cas. 210; 19 C. L. J. 529, *Kuldip Singh* v. *Kuldip Chowdhury*, 44 Ind. Das. 79; 3 P. L. J. 63; 4 P. L. W. 134 and *Deb Kumar Roy* v. *Deb Nath Barna*, 64 Ind. Cas. 738, dissented from.

In India champerty is not necessarily opposed to public policy; and in deciding whether a champertous agreement should be set aside, it has to be considered whether such an agreement is extortionate, unconscionable, or one made for the purpose of gambling in litigation or of injuring or oppressing others by encouraging unrighteous suits, in which case it would be contrary to public policy and unenforceable. [p. 502, col. 1.]

Loke Indar Singh v. *Rup Singh*, 11 A 118; A. W. N. (1889) 72; 6 Ind. Dec. (N. S.) 504, *Chunni Kuar* v. *Rup Singh* 11 A 57; A. W. N. (1888) 296; 6 Ind. Dec. (N. S.) 465 and *Husain Bakhsh* v. *Rahmat Husain*, 11 A. 128; A. W. N. (1888) 273; 6 Ind. Dec. (N. S.) 510, distinguished.

Second appeals against the decrees of the Court of the Subordinate Judge, Baptla, in Appeal Suits Nos. 105 and 99 of 1922 respectively, preferred against the decrees of the Court of the District Munsif, Ongole, in Original Suits Nos. 195 and 505 respectively.

Mr. *A. Krishnaswami Iyer*, for the Appellant.

Messrs. *N. Rama Rao* and *K. Rameswara Rao*, for the Respondents.

JUDGMENT.—The respondent in both these appeals is one Subbiah, the adopted son of Ramachandrudu. He was dissatisfied with his father's misconduct and spendthrift ways and consequently wanted to file a suit for partition of the family property. As he had not sufficient funds to finance this litigation, he entered into relations with the appellant Seshayya who is a private Vakil. On the 1st of November 1916, Subbiah executed a sale-deed in favour of Seshayya for Rs. 1,000 under which he sold one half of his share in the family properties. Admittedly the consideration was fixed at a low figure on the ground that Sub-

biah's father was wasting the family property and alienating the same and that consequently the properties that would be recovered for Subbiah's share might be considerably less than what he really ought to have. It is found that Seshayya paid a sum of Rs. 600 towards the consideration for the sale-deed, and a suit was filed by Subbiah and Seshayya jointly in 1918. A decree was obtained under which Subbiah was to get as his half share of the property all the properties which had not been alienated by his father, leaving the validity of the alienations undetermined. Before the decree was passed, Subbiah agreed to certain items being decreed in favour of Seshayya and the remainder was to fall to his share. Subsequently Subbiah appears to have thought that he had been defrauded and he filed a suit, Original Suit No. 641 of 1919, to set aside the sale-deed in favour of Seshayya. The suit was withdrawn with leave to bring a fresh suit on condition of Subbiah paying the costs of the suit. Subbiah then filed his present suit, Original Suit No. 195 of 1921, in which he again seeks to set aside the sale-deed. Seshayya also filed a suit, Original Suit No. 505 of 1921, in which he seeks to recover the property decreed to him in the prior litigation alleging that he obtained delivery through Court of the property decreed to him but that subsequently the plaintiff has obstructed his enjoyment. Subbiah's suit has been decreed and at the same time Seshayya has been given a charge upon the properties for Rs. 600 with interest. Seshayya's suit for possession has been dismissed. Hence these two appeals.

The first point for consideration is whether Subbiah's suit is not barred by reason of O. XXIII, Civil Procedure Code for, it is admitted, that he did not pay the costs of his first suit until after the close of the trial in the present suit; and it is contended that he is precluded from filing a fresh suit until he has complied with the condition imposed. In *Robert Fischer* v. *Nagappa Mudaly* (1) it was held that, when an order had been made giving permission to bring a fresh suit on condition of paying the costs before a specfied date, a subsequent suit was barred if the costs had not been paid by that date. That case differs from the present in that the date was specified for payment of costs, whereas the order in the case under consideration does not specify any date. Without expressing any opinion as to the correctness of the decision in *Abdul Aziz Molla* v. *Ebrahim Molla* (2) that case was distinguished. In that case it was held that subsequent payment of costs was sufficent to warrant the reception and trial of a fresh suit which had been allowed to be brought on condition of those costs being paid. In that case the costs were paid before the suit was tried. This has been followed in a later case reported as *Shital Prosad Mondal* v. *Gaya Prasad Dingal* (3) where the question is discussed somewhat fully and the reasoning adopted for the conclusion is as follows:—It is said that inasmuch as permission to withdraw and bring a fresh suit is made conditional on a certain payment, the original suit cannot be deemed to be withdrawn until those costs have been paid and it must, therefore, be deemed to be a pending suit which becomes disposed of as soon as payment is made. This case was followed in *Kuldip Singh* v. *Kuldip Chowdhury* (4) and also in *Deb Kumar Roy* v. *Deb Nath Barna* (5) but I can find no authority in this Court for holding this view, which with all respect, appears to me to be incorrect. These cases all assume that the permission granted by the Court is not only permission to bring a fresh suit but also permission to withdraw the first suit and that consequently until the condition is fulfilled the first suit is pending. This seems to me to overlook the provisions of O. XXIII, r. 1 (1) which gives a plaintiff power to withdraw his suit at any time without the permission of the Court. Consequently, I

(1) 6 Ind. Cas. 288; 33 M. 258; 7 M. L. T. 326.

(2) 31 C. 965.

(3) 23 Ind. Cas. 210; 19 C. L. J. 529.

(4) 44 Ind. Cas. 79; 3 P. L. J. 63; 4 P. L. W. 134.

(5) 64 Ind. Cas. 738.

think that we must read the latter part of clause 2 (*b*) as referring not to permission to withdraw a suit as well as permission to institute a fresh suit, but merely as allowing the Court to give permission to institute a fresh suit in place of the one which has been withdrawn. Inasmuch as the withdrawal of the suit does not require the permission of the Court, it must be taken that the first suit is withdrawn when the order is passed and that the permission granted refers only to the filing of the subsequent suit on certain conditions. If the first suit is still pending as held in the above cases, it would be open to the plaintiff to obtain permission under O. XXIII, and instead of complying with the conditions of that permission, to go to the Court and demand that the trial on his first suit should be proceeded with and this could be done, however long the interval might be. For these reasons, I am unable to accept the view that the first suit is still pending, for it has been withdrawn, and that withdrawal, in my opinion, takes effect from the date of the Court's order. If the Calcutta view were to be applied in the present case, it would appear, as observed in those judgments, that the trial of a second suit is barred under section 10, Civil Procedure Code, until the first suit is disposed of by performance of the conditions imposed by the order granting leave. In the present case, therefore, the whole of the trial of the suit which took place before the costs were paid would be bad under section 10, Civil Procedure Code for want of jurisdiction and the whole suit would have to be tried again. There is another case of the Calcutta High Court reported as *Sajjad Hossain* v. *Ram Lal Saha* (6) where it was held that payment might be made after the institution of the suit but that the suit would not be deemed to be validly instituted until the date of such payment. In the view that I take, I would follow *Robert Fischer* v. *Nagappa Mudaly* (1) and hold that it extends, as was held in *Hare Nath Das* v. *Syed Hossain Ali* (7) and *Subal Chandra* v. *Mosaraf Ali* (8) to cases where no time is fixed for fulfilling the condition.

In support of the view held by the Calcutta High Court, reference has been made to other cases in which similar conditions were held not to be mandatory, *Ramayyangar* v. *Krishnayyanger* (9) with reference to the provisions of section 539, Civil Procedure Code, *Karooth Parakote Ammu Kutty* v. *Manavikraman* (10) with reference to the permission necessary to bring a suit against a receiver, and *Mahammad Azmat Ali Khan* v. *Lalli Begam* (11) with reference to the certificate requisite for bringing a suit under the Pensions Act. I do not attach much importance to these cases, for in all of them the Court *prima facie* has jurisdiction to try such suits; and, beyond imposing a condition precedent, none of the provisions referred to take away the jursidiction of the Courts; whereas under O. XXIII, r. 2 (3) a Court is definitely precluded from entertaining a second suit when no permission has been granted. Unless, therefore, permission has been given, a Court is specifically forbidden to entertain a second suit.

In this view, Subiah's suit is barred under O. XXIII and must be dismissed. Second Appeal No. 203 must, therefore, be allowed and the suit dismissed with costs throughout to be paid by the first respondent.

As regards Second Appeal No. 204 the Subordinate Judge has found that the sale-deed in favour of Seshayya is "vitiated by undue influence and fraud and cannot be enforced" and, consequently, has dismissed the suit which is based upon it. I may observe here that the suit is not based upon the sale-deed but upon the decree obtained in pursuance of that sale-deed, namely, the decree in Original Suit No. 12 of 1918. In giving his findings the Subordinate Judge does not definitely specify the facts which he finds to be sufficient to prove undue influence and fraud. In the plaint the

(6) 15 Ind. Cas. 159.
(7) 2 C. L. J. 480; 10 C. W. N. 8.
(8) 38 Ind. Cas. 476.
(9) 10 M. 185; 3 Ind. Dec. (N. S.) 881.
(10) 59 Ind. Cas. 568; 43 M. 793; 12 L. W. 331.
(11) 8 C. 422; 9 I. A. 8; 4 Sar. P. C. J. 310; 6 Ind. Jur. 201; 17 P. R. 1882; 4 Ind. Dec. (N. S.) 269 (P. C.).

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plaintiff stated that the sale-deed was brought about owing to several misrepresentations specified in paragraph 4, but there is no finding by the Subordinate Judge that these misrepresentations were made, and apparently the statements set out in the plaint are substantially correct. The cases relied upon by the Subordinate Judge for holding that the sale-deed is invalid are merely cases in which the transactions were set aside as being hard, unconscionable and opposed to public policy: *Chunni Kuar* v. *Rup Singh* (12), *Loke Indar Singh* v. *Rup Singh* (13) and *Husain Bakhsh* v. *Rahmat Husain* (14). It has been held that in this country champerty is not necessarily opposed to public policy; and, in considering whether champertous agreements should be set aside, it has to be considered whether such an agreement is extortionate and unconscoinable, or one made for the purpose of gambling in litigation or of injurious or oppressing others by encouraging unrighteous suits in which case it would be contrary to public policy and unenforceable. These facts do not seem to have been considered by the Subordinate Judge. He has not found what the facts were which made the bargain unconscionable or otherwise opposed to public policy. He finds that property worth Rs. 2,000 was sold for Rs. 1,000 and that Rs. 600 cash was actually paid as consideration. The properties which have passed under the sale-deed are no doubt worth Rs. 2,000 but it was by no means certain that the plaintiff's suit would be successful, or, at any rate, successful to a large extent. Half of the family property had been alienated and, if those alienations had been found to be valid, Subbiah's share would have come to Rs. 1,000 or less, the consideration agreed to be paid, to which must be added additional compensation for Seshayya's trouble and knowledge of litigation. Here again I must note that the Subordinate Judge has not discussed the question whether the decree in pursuance of the sale-deed was obtained by fraud. There is no such allegation in the plaint, but the Subordinate Judge seems to hold in paragraph 7 of his judgment that the undue influence exercised in the suit was that of the plaintiff's Vakil, who is not a party to this litigation, and not the influence of Seshayya; and he has also omitted to notice that Subbiah did not pray to have the decree set aside although the amendment was asked for but refused by the District Munsif. There are other points to be considered also in this appeal which have not been dealt with by the Subordinate Judge, one of these being whether Seshayya's remedy was by suit or by execution proceedings. It was on the latter ground that the District Munsif dismissed his suit without giving him an opportunity of treating the suit as an exception petition. It would also be necessary to consider what effect the dismissal of Subbiah's suit will have upon Seshayya's suit, for in execution proceedings a claim by Seshayya to these properties was allowed, *vide* Exhibit VI, and it has to be considered whether that was not a final adjudication of the right of the parties. Appeal No. 99 of 1922 will accordingly be remanded for disposal in the light of the above remarks. Costs in this Court will abide the result.

Court fee in Second Appeal No. 204 of 1923 will be refunded.

V. N. V. *Appeal allowed.*

(12) 11 A. 57; A. W. N. (1888) 296; 6 Ind. Dec. (N. S.) 465.

(13) 11 A. 118; A. W. N. (1889) 72; 6 Ind. Dec. (N. S.) 504.

(14) 11 A. 128; A. W. N. (1888) 273; 6 Ind. c (N. S.) 510.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL ORDER NO. 134. OF 1922.

May 29, 1923.

Present :—Sir Dawson Miller, KT., Chief Justice, and Mr. Jutice Kulwant Sahay.

RAGHU SINGH—PLAINTIFF—APPELLANT

versus

Mahant KRISHNA DEYAL GIR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII,

RAGHU SINGH *v.* KRISHNA DEYAL.

r. 1—Review, grounds for—"Other sufficient reason," meanjng of—Failure to refer to particular piece of evidence.

The only ground upon which a review can be obtained according to O. XLVII, of the Civil Procedure Code is the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made, or some mistake or error apparent on the face of the record or for any other sufficient reason. [p. 503. col. 2.]

The words "any other sufficient reason" in r. 1 of O. XLVII of the Civil Procedure Code mean a reason sufficient on grounds analogous to those specified immediately previously. [*ibid*]

Chhajju Ram v. *Neki*, 72 Ind. Cas. 566; 3 L. 127; 49 I. A. 144; 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. 1922; 3 P. L. T. 435; (1922) A. I. R. (P. C.) 112; 16 L. W. 37; 17 P. W. R. (1922); 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L. J. 459 (P. C.), followed.

The mere fact that a Judge has not in terms referred to certain of the evidence in favour of one party or the other is not a sufficient reason entitling that party to come before the Court subsequently and seek to have a review of that judgment. [p. 503, col. 2; p. 504, col. 1.]

Appeal from an order of the Subordinate Judge, Gaya, dated the 20th May 1922.

Mr. *Sambhu Saran*, for the Appellant.

Messrs. *Sailendranath Palit* and *Kailaspati*, for the Respondents.

JUDGMENT.

Miller, C. J.—This is an appeal from an order of the Subordinate Judge of Gaya dated the 20th May 1922 granting a review of a judgment of his predecessor. It appears that one of the important points to be determined in the first judgment was the date upon which the plaintiff separated from the rest of his family. The Trial Court found in favour of the defendant. The learned Subordinate Judge on appeal decided that question in favour of the plaintiff and allowed the appeal. Subsequently one of the defendants applied to the successor of the learned Subordinate Judge to grant a review of judgment on the ground that the learned Subordinate Judge had not mentioned in his judgment two documents one of which was a plaint in a suit which the plaintiff and his brothers had brought on a mortgage and in which there was apparently an admission that the family had separated at a later date than the plaintiff alleged in the present case, and the other document was a document connected therewith, it was the decree passed in that case. It is quite true that the learned Subordinate Judge who gave the decision complained of did not in terms refer to those two documents in his judgment; but he did, as far as can be gathered from reading the judgment, give what appear to have been convincing reasons for arriving at his conclusions of fact. The learned Subordinate Judge whose order is now under appeal considered that the mere fact that no mention is made in the previous judgment of these two documents was in itself a sufficient ground for granting the review and he made the order accordingly. From that decision the present appeal is brought.

It seems to me that the ground alleged is not one which comes within the purview of O. XLVII, r. 1, Civil Procedure Code. The only ground upon which a review can be obtained according to O. XLVII is the discovery of new and important matter or evidence which, after the exercise of due diligence, is not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made, or some mistake or error apparent on the face of the record or for any other sufficient reason. It has been decided by the Judicial Committee in the case of *Chhajju Ram* v. *Neki* (1) that the words "any other sufficient reason" in that Order mean a reason sufficient on grounds at least analogous to those specified immediately previously. It follows from that that these words "any other sufficient reason" are not of a wide and general application so as to give the Court a discretion in such cases whether to allow a review or not. The reason there indicated must be some reason analogous to the two grounds of review mentioned immediately before. It seems to me that the mere fact that a Judge has not in terms referred to certain of the evidence in favour of one party or the other is not a sufficient

(1) 72 Ind. Cas. 566; 3 L. 127; 49 I. A. 144; 30 M. L. T. 295; 26 C. W. N. 697; 41 P. L. R. 1922; 3 P. L. T. 435; (1922) A. I. R. (P. C.) 112; 16 L. W. 37; 17 P. W. R. 1922; 43 M. L. J. 332; 24 Bom. L. R. 1238; 4 U. P. L. R. (P. C.) 99; 36 C. L J. 459

reason entitling that party to come before the Court subsequently and seeks to have a review of that judgment. It is undoubtedly a matter which might be urged in appeal, if any appeal were permissible on questions of fact; but I think it would be stretching the language of the order too far to say that the mere fact that certain evidence has not been specifically mentioned in the judgment is a good reason within O. XLVII, r. 1, for granting a review.

In my opinion this appeal must succeed, the order of the learned Subordinate Judge of the 20th of May 1922 will be set aside and the decree which it reversed will be restored.

The appellant is entitled to his costs from the respondent Mahant Krishna Deyal Gir, who has appeared.

Kulwant Sahay, J.—I agree.

Z. K. *Appeal allowed.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 114 OF 1922.

July 28, 1924.

Present:—Mr. Justice Jackson.

N. C. LAKSHMIKUTTI AMMA—PETITIONER—APPELLANT

versus

V. MARIATHAMMA *alias* THITHUMMA AND OTHERS—PETITIONERS Nos. 2 TO 7—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 14—Mortgage and lease back—Decree on lease—Property whether can be sold—Omission to object, effect of.

Where a mortgage with possession and lease back form part of the same transaction, though the mortgagee may obtain a decree for rent on the lease document alone, his claim is one arising under the mortgage and within the mischief of O. XXXIV, r. 14, Civil Procedure Code, and the mortgagee is not entitled to bring the property to sale in execution of such a decree. [p. 505, col. 1.]

Ibrahim Goolam Husenbux v. *Nihalchand Waghmal*, 55 Ind. Cas. 536; 44 B. 366; 22 Bom. L. R. 113, *Bhaichand Kirparam* v. *Ranchhoddas Manchharam*, 58 Ind. Cas. 231; 45 B. 174; 22 Bom. L. R. 670, *Govindachandra Pal* v. *Konles Chandra Pal*, 41 Ind. Cas. 73; 45, C. 530; at p. 536 *Kadma Pasin* v. *Muhammad Ali*, 50 Ind. Cas. 134; 41 A. 399; 17 A. L. J. 484, relied on.

Uttam Chandra Daw v. *Raj Krishna Dalal*, 55 Ind. Cas. 157; 47. C. 377; 24 C. W. N. 229; 31 C. L. J. 98, not followed.

The fact that the judgment-debtor submitted to execution proceedings prior to the order for sale does not estop him from raising the plea at the time of sale. [p. 505, col. 1.]

A decree-holder cannot demand that the Court shall infringe a statutory provision merely because the judgment-debtor has omitted to demand that it shall not infringe it. As soon as a Court is aware of an irregularity, it must avoid it *suo moto* irrespective of the intervention of the parties or their right to intervene. [p. 505, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, Palghat, in A. S. No. 61 of 1921, preferred against an order, dated the 24th January 1921, of the Court of the District Munsif, Chowghat, in E. P. No. 174 of 1919, (in O. S. No. 525 of 1916).

Mr. *K. P M. Menon*, for the Appellant.

Mr. *T. A. Ananta Iyer*, for the Respondent.

JUDGMENT.—Appeal from the Appellate Order of the Court of the Subordinate Judge of Palghat in E. P. No. 1742 of 1919 on the file of the Court of the District Munsif of Chowghat.

There was a mortgage with possession and lease back on the same day. The appellant sued on the lease and obtained a decree, and is attempting to bring the property to sale. The respondent resists, contending that such a sale is contrary to the provisions of O. XXXIV, r. 14 of the Civil Procedure Code. The lower Courts have upheld this contention, hence the appeal.

I agree that the two documents in question Exhibits A and B must be treated as one. In Exhibit B it is agreed that arrears shall be paid by the sale of the equity of redemption which appellant points to as marking a difference between the two transactions, but I do not consider that this is sufficient to justify their being treated *as separate* documents. Once the two documents are treated as one it must, I think, be taken as settled law (as observed below the Calcutta rulings seem to be contradictory) that although the mortgagee may obtain a decree for

rent on the lease document alone, nevertheless his claim is one arising under the mortgage and within the mischief of O. XXXIV, r. 14. This has been ruled in terms in *Ibrahim Goolam Husenbux* v. *Nihal Chand Waghmal* (1) which is followed in *Bhaichand Kirparam* v. *Ranchhoddas Mancchharam* (2), *Govindachandra Pal* v. *Konlas Chandra Pal* (3) to the same effect as also the case cited by the lower Appellate Court, *Kadma Pasin* v. *Muhammad Ali* (4). Appellant would distinguish this latter case on the ground that the mortgagor had merely contracted to collect the usufruct for the mortgagee but I doubt if this affects the question which turns on the actual contract effected between the parties and on the motive which induced them to make such a contract.

The appellant relies strongly upon the ruling *Uttam Chandra Daw* v. *Raj Krishna Dalal* (5) the language of which on page 405* undoubtedly helps him. But *Ashutosh Sikdar* v. *Behari Lal* (6) it is found that a sale in contravention of section 99 of the Transfer of Property Act is irregular and voidable, and the mortgagee is prevented from bringing the mortgaged property to sale in execution of a decree for the satisfaction of any claim, related or extraneous to the mortgage page 67.

It is next urged that the above plea is not open to the respondents, because without raising this plea they submitted to prior execution proceedings which terminated in attachment and permission to the decree-holder to proclaim and sell by fresh petition.

No doubt the parties to execution proceedings are governed by the general law of estoppel, else there would be no end to the matter. They cannot continue to raise the same plea over and over again. But if the plea has never been raised before I should hesitate to apply to execution proceedings the principle of constructive estoppel.

Careful consideration would have to be given to the circumstances of each particular case. However, there is no need to consider this aspect of the matter in the present case, because the decree-holder cannot demand that the Court shall infringe a statutory provision merely because the judgment-debtor has omitted to demand that it shall not. *Cf. Govinda-Chandra Pal* v. *Konles Chandra Pal* (3). "I do not think the decree-holder can raise a plea of estoppel when he must have known that he had himself induced the Court *ex parte* to pass an order to which he was not entitled." As soon as a Court is aware of an irregularity, it must avoid such irregularity *suo moto* irrespective of the intervention of the parties or their right to intervene.

The appeal fails on all grounds and is dismissed with costs.

V. N. V. *Appeal dismissed.*

(1) 55 Ind. Cas. 536; 44 B. 366; 22 Bom. L. R. 113.
(2) 58 Ind. Cas. 231; 45 B. 174; 22 Bom. L. R. 670.
(3) 41 Ind. Cas. 73; 45 C. 530 at p. 536.
(4) 50 Ind. Cas. 134; 41 A. 399; 17 A. L. J. 484.
(5) 55 Ind. Cas. 157; 47 C. 377; 24 C. W. N. 229; 31 C. L J. 98.
(6) 35 C. 61; 6 C. L. J. 320; 11 C. W. N. 1011.

*Page of 47 C.—[*Ed.*]

PATNA HIGH COURT.

CIVIL REVISION No. 248 OF 1923.
July 3, 1923.
Present :—Justice Sir B. K. Mullick, KT., and Justice Sir John Bucknill, KT.
Musammat NAND RANI KUER—PLAINTIFF—PETITIONER
versus
Babu DURGA DASS NARAIN AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Compromise decree—Time fixed for payment of money—Forfeiture on default—Extension of time—Power of Court—Revision—Civil Procedure Code (Act V of 1908), s. 115.

Where an agreement of compromise is for the payment of money on a prescribed date and upon default of payment on that date money or land is to be forfeited, time is not of the essence of the contract and the Court has power, even after the compromise has been embodied in a decree, to extend the time for payment on the application of one party without the consent of the other. [p. 506, col. 2.]

NAND RANI KUER *v.* DURGA DASS NARAIN.

In every case the Court must determine upon the facts of that case whether relief against forfeiture is to be given or not.

Australasian Automatic Weighing Machine Company v. *Walter*, (1891) W. N. (Eng.) 170, referred to.

Kandarpa Nag v. *Banwari Lal Nag*, 60 Ind. Cas. 864; 33 C. L. J. 244, relied on.

Where the Court decides that time is not of the essence of the contract in any particular case and extends the time for payment, the High Court will not interfere with the decision under section 115 of the Civil Procedure Code.

Revision from an order of the Subordinate Judge, First Court, Patna, dated the 4th June 1923.

Mr. *Banwari Lal*, for the Petitioner.

Mr. *Kailaspati*, for the Opposite Party.

JUDGMENT.

Mullick, J.—A compromise decree was passed against the opposite party ordering that upon payment of a sum of Rs. 1,000 in cash to the plaintiff immediately and the sum of Rs. 12,600 on or before the 31st March 1923 the claim of the plaintiff would be discharged in full, but that on failure to pay the above instalments the plaintiff would be entitled to realize her full claim for Rs. 20,989-9-0 with costs and future interest. Accordingly the sum of Rs. 1,000 was duly paid on the date of the compromise. But on the 31st May 1923 the defendants brought into Court a sum of Rs. 6,000 only which the plaintiff received under protest, and as regards the balance of Rs. 6,600 the defendants asked for an extension of time for one month ; on the 4th June 1923 time was allowed by the Subordinate Judge and it was ordered that payment would be accepted on or before the 30th June 1923 on condition that the defendants paid a sum of Rs. 164 on account of intermediate interest to the plaintiff.

Against this order the plaintiff moved this Court on the 13th June 1923 for the exercise of the Court's revisional powers under section 115, Civil Procedure Code.

Now the only question is whether the Court had power to extend the time allowed by an agreement which has resulted in a decree of Court.

It is contended by the petitioner that no extension of time can be given without the consent of the parties and reliance is placed upon *Australasian Automatic Weighing Machine Company* v. *Walter* (1) but the matter has been exhustively considered in *Kandarpa Nag* v. *Banwari Lal Nag* (2) and it seems now settled that no general rule can be laid down and that although a contract may have ripened into a decree the Court will not be precluded from giving relief which it would have been competent to give if it had been called upon to adjudicate upon the contract in the first instance and without its having been embodied in a decree. There are cases which have held that when a compromise takes place between an auction-purchaser, a judgment-debtor and a decree-holder stipulating that the sale would be set aside on the payment of the judgment-debt on a certain date time was of the essence of the contract. On the other hand it seems to be now settled that where the agreement is for the payment of money on a prescribed date and that upon default of payment on that date money or land is to be forfeited, time is not of the essence of the contract. Indeed the rule is clear that in every case the Court must determine upon the facts of that case whether relief against forfeiture is to be given or not. I have no doubt that in the present case the Subordinate Judge had jurisdiction to determine whether time was of the essence of the contract. He has decided that it was not and, therefore, it does not seem to me that section 115, Civil Procedure Code, can be invoked for the purpose of setting aside the learned Subordinate Judge's order. The learned Subordinate Jugde in one part of his judgment expresses the view that section 148, Civil Procedure Code, is applicable to the case, but I would prefer to base his jurisdiction on the general rules of equity.

The only question that remains is whether we should further extend the time. Having regard to the fact that the application to this Court was made without much delay and that the defendants were uncertain whether the learned Judge's order would be affirmed by the High Court I think this is a fit case for

(1) (1891) W. N. (Eng.) 170.
(2) 60 Ind. Cas. 864; 33 C. L. J. 244.

granting further extension; and we give seven days further time from this date for complying with the order of the Subordinate Judge.

We direct that if the defendants deposit in the Court of the Subordinate Judge the sum of Rs. 6,600 on account of the decretal sum together with the sum of Rs. 200 on account of intermediate interest, that is to say, a total sum of Rs. 6,800 on or before the 10th July, full satisfaction will be entered in respect of the claim as provided by the compromise decree and that on default the terms of the said decree will be duly enforced according to law.

There will be no order as to costs.

Bucknill, J.—I agree.

Z. K. *Order accordingly.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 2248 TO 2252 AND 2280 OF 1920.

July 17, 1922.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Chotzner.

RAJANI KANTA GHOSE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Sheikh RAHAMAN GAZI AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 158B (2), object of—Co-sharer landlord, whether can waive benefit—Omission to serve notice of sale, effect of—Sale held in contravention of Statute, whether null and void—Question, how determined—Irregularity and nullity, distinction between—Test.

The object of section 158B sub-section (2) of the Bengal Tenancy Act is to protect the co-sharer landlord. [p. 510, col. 1.]

It is open, however, to the co-sharer landlord to waive the benefit of sub-section (2) of section 158B of the Bengal Tenancy Act. [*ibid.*]

The omission to serve upon the co-sharer landlord the notice contemplated by sub-section 2 of section 158B of the Bengal Tenancy Act does not nullify the sale or alter its character to that of a sale held in execution of a money decree where the co-sharer concerned consents to the sale. [p. 510, cols. 1 & 2.]

It cannot be maintained on principle that because a sale has been held in contravention of a statutory provision, it must, irrespective of the nature and purposes of the provisions, be deemed to be null and void. [p. 509, col. 1.]

Ashutosh Sikdar v. *Behari Lal Kirtania*, 35 C. 61; 11 C. W. N. 1011; 6 C. L. J. 320 (F. B.), *Tasadduk Rasul Khan* v. *Ahmad Husain*, 21 C. 66; 20 I. A. 176; 17 Ind. Jur. 534; 6 Sar. P. C. J. 324; Rafique and Jackson's P. C. No. 131; 10 Ind. Dec. (N. S.) 676 (P. C.), *Gobind Lal Roy* v. *Ramajanam Misser*, 21 C. 70; 20 I. A. 165; 17 Ind. Jur. 536; 6 Sar. P. C. J. 356; 10 Ind. Dec. (N. S.) 679 (P. C.), *Malkarjun* v. *Narhari*, 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.), *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan*, 6 M. I. A. 134; 19 E. R. 50, referred to.

When the provisions of a Statute have been contravened, if a question arises as to how far the proceedings are affected by such contravention the matter must be determined with regard to the nature, scope and object of the particular provision which has been violated. [p. 509, col. 2.]

An irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated. [p. 509, col. 2; p. 510, col. 1.]

The safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity. [p. 510, col. 1.]

Holmes v. *Russell*, 9 Dow. 28 (?), followed.

Appeals against the decision of the District Judge, Howrah, dated the 8th June 1920, affirming that of the Munsif, Howrah, dated the 28th November 1919.

Babus *Mahendra Nath Ray* and *Bhupendra Kumar Ghose*, for the Appellants.

Babus *Surendra Chandra Sen*, *Biraj Mohan Mojumdar* and *Gour Mohun Dutt*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiffs in a suit for recovery of arrears of rent. The defendants denied the relationship of landlord and tenant during the years in claim. They urged in substance that the title of the plaintiffs had been extinguished as the result of a sale held in execution of a decree passed in a suit instituted under section 148A of the Bengal Tenancy Act.

The Court of first instance gave effect to this contention and dismissed the suit. Upon appeal the decree of the primary Court has been affirmed by the District Judge. On second appeal it has been argued that the question of title of the plaintiffs in *res judicata* in

view of a decree made on the 29th April 1915 in a previous suit between the parties. This view has been rejected by both the Courts below. It is not necessary to examine in detail the scope of the earlier suit because we have arrived at the conclusion that the question now in controversy was not directly and substantially in issue in the previous litigation and was not finally decided therein. Consequently we have to consider the effect of the sale held on the 11th September 1913 in execution of a decree for arrears of rent in a suit instituted under section 148A of the Bengal Tenancy Act.

It is not disputed that the interest claimed by the plaintiffs was originally held under two landlords, Dighapatia and Tagore. On the 13th July 1897 one Amarendra Nath Ghose purchased the tenancy at a sale held in execution of a decree obtained by Dighapatia against Panch Couri Ghose who was the recorded tenant. The right, title and interest of Panch Couri Ghose was subsequently purchased by Asutosh Ghose, the *pro forma* defendant in the present suit, and Arunadoy Ghose, the pre-decessor in interest of the plaintiffs at a sale held in execution of a money decree. The names of Asutosh Ghose and Arunadoy Ghose do not appear, however, to have been recorded in the office of the landlord. The cosequence was that Dighapatia brought a suit-against one Behary Lal Roy who had purchased the tenancy at a sale in execution of a decree for arrears of rent on the 9th September 1902. This suit was instituted under section 148A of the Bengal Tenancy Act. A decree was obtained in due course in the presence of Tagore who was made a party defendant. No notice, however, was served upon Tagore under section 158B of the Bengal Tenancy Act and yet the decree was executed. At the sale which followed Kishori Mohan Srimany under whom the contesting defendants claim, became the purchaser on the 11th September 1913. We are invited to hold that the effect of this purchase by Kishori Mohan Srimany was to extinguish the interest acquired by Asutosh Ghose and Arunadoy Ghose on the 10th March 1902. The plaintiffs contended in the Courts below that the decree obtained by Dighapatia in the suit instituted under section 148A could not operate as a decree for the entire rent according to the provisions of the Bengal Tenancy Act, inasmuch as the notice comtemplated by section 158B was not served on Tagore. This contention has been negatived by the Courts below. The point consequently reduces to this what is the effect of the omission of the co-sharer landlord who has instituted a suit under section 148A of the Bengal Tenancy Act to serve the notice contemplated by sub-section 2 of section 158B. The appellants contend that the result is to destroy the character of the decree as a decree for arrears of rent and to make it operative only as a decree for money so that at the sale which follows the right, title and interest of the person named as the judgment-debtor alone passes. In support of this view reliance has been placed upon the cases of *Nunda Lal Choudhury* v. *Kala Chand Chowdhury* (1), *Sarip Hochan* v. *Tilattama Debi* (2) and *Ahamad Biswas* v. *Benoy Bhusan Gupta*. (3).

To determine the question raised before us it is necessary to investigate the scope and object of sub-section 2 of section 158B. That sub-section is in these terms. When one or more co-sharer landlords having obtained a decree in a suit framed under sub-section (1) or under section 148A applies or apply for the execution of the decree by the sale of the tenure or holding, the Court shall, before proceeding to sell the tenure or holding, give notice of the application for execution to the other co-sharers. It will be observed that the section does not in express terms state the result of the failure to comply with this direction. The cases of *Sarip Hochan* v. *Tilattama Debi* (2) and *Ahamad Biswas* v. *Benoy Bhusan Gupta* (3) laid down that the provisions contained in sub-section 2 of section 158B is mandatory and not

(1) 8 Ind. Cas. 50; 15 C. W. N. 820.
(2) 43 Ind. Cas. 3.
(3) 53 Ind. Cas. 515; 23 C W. N. 931; 30 C. L. J. 135.

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directory and the failure of the Court to serve the notice rendered the sale invalid. In support of this view, reliance was placed upon the decision of the Judicial Committee in *Raghunath Das* v. *Sundar Das Khetri* (4) which turned on the true construction of section 248, Civil Procedure Code of 1882, now replaced by O. XXI, r. 22 of the Code of 1908. It must be remembered in this connection that the validity of the sale in the two cases mentioned was challenged by the co-sharer concerned and it may be conceded that the co-sharer who has not received the notice required to be served under sub-section 2 of section 158B is entitled to contest the legality of the sale on that ground. In the case before us the legality of the sale has not been questioned by the co-sharer. On the other hand, as pointed out by the District Judge, that co-sharer has adopted the sale, withdrawn his share of the purchase-money and granted mutation of name to the purchaser. It may consequently be inferred that he knew of the sale and acquiesced therein. Can it be maintained, then, in such circumstances, that the sale was either a nullity or a sale inoperative as a sale under the Bengal Tenancy Act. The answer depends upon the scope and purpose of section 158B.

It was pointed out in the case of *Ashutosh Sikdar* v. *Behari Lal Kirtania* (5), that a sale held contrary to legislative enactment is not necessarily a sale absolutely without jurisdiction. It cannot be maintained on principle that because a sale has been held in contravention of a statutory provision, it must, irrespective of the nature and purposes of the provisions, be deemed to be null and void. Reference may be made to five decisions of the Judicial Committee in illustration of this principle. The cases of *Tasadduk Rasul Khan* v. *Ahmad Husain* (6) (where a sale was held in violation of the provisions of section 290, Civil Procedure Code), *Gobind Lal Roy* v. *Ramjanam Misser* (7) (where a sale for arrears of revenue was held in contravention of the provisions of sections 5 and 17 of Act XI of 1859) and *Malkarjun* v. *Narhari* (8), (where a sale was held contrary to the provisions of section 248 of the Code) amply show that there may be cases where the violation of an express provision of a Statute may not nullify the proceedings. On the other hand, the cases of *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khan* (9), (where an arbitration proceeding was carried on contrary to the provisions of the Bombay Regulation VII of 1827) and *Subrahmania Ayyar* v. *Emperor* (10) (where a trial was held in contravention of the rule of joinder of charges embodied in section 234 of the Criminal Procedure Code) are instances where failure to comply with the provisions of a Statute completely vitiated the proceedings. The only rule that may be adopted is that when the provisions of a Statute have been contravened, if a question arises as to how far the proceedings are affected by such contravention the matter must be determined with regard to the nature, scope and object of the particular provision which has been violated. No hard and fast line can be drawn between a nullity and an irregularity. But this much is clear that an irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it or is so essentially defective as to be of no avail or effect

(4) 24 Ind. Cas. 304; 42 C. 72; 41 I. A. 251; 18 C. W. N. 1058; 1 L. W. 567; 27 M. L. J. 150; 16 M. L. T. 353; (1914) M. W. N. 747; 16 Bom. L. R. 814; 20 C. L. J. 555; 13 A. L. J. 154 (P. C.).

(5) 35 C. 61; 11 C. W. N. 1011; 6 C. L. J. 320 (F. B.).

(6) 21 C. 66; 20 I. A. 176; 17 Ind. Jur. 534; 6 Sar. P. C. J. 324; Rafique and Jackson's P. C. No. 131; 10 Ind. Dec. (N. S.) 676 (P. C.).

(7) 21 C. 70; 20 I. A. 165; 17 Ind. Jur. 536; 6 Sar. P. C. J. 356; 10 Ind. Dec. (N. S.) 679 (P. C.).

(8) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.).

(9) 6 M. I. A. 134; 19 E. R. 50.

(10) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.).

whatever, or is void and incapable of being validated. One test is well-established and is often useful; as was observed by Coleridge, J. in *Holmes* v. *Russell* (11) "it is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity."

Now if the provision has been enacted on grounds of public policy, an individual cannot be permitted to waive it. On the other hand if the provision has been enacted for the benefit of an individual he is entitled to waive it. Tested from this point of view, what is the obvious purpose of section 158 B, sub-section 2. The object which the Legislature had in view was to protect the co-sharer landlord. The sale in execution of the decree made in the suit framed under sub-section (1) of section 158 B or under section 148A has the effect of a sale under the provisions of the Bengal Tenancy Act; in other words, the tenure or holding in the hands of the purchaser can no longer be pursued by the co-sharer landlord for the realization of his dues, if any. The co-sharer landlord who has been made a party to the suit is restricted to the sale proceeds for the satisfaction of his dues. It is consequently necessary for his protection that he should have notice of the execution proceedings in time to ensure their legality or regularity. From this point of view, it is open to the co-sharer landlord to waive the benefit of sub-section 2 of section 158B. This is precisely what has happened in this case. Here the co-sharer landlord was satisfied with the regularity of the execution proceedings. He withdrew the money which was in Court in satisfaction of his dues. In such circumstances, it is impossible for us to hold that the omission to serve upon the co-sharer landlord the notice contemplated by sub-section 2 of section 158B either nullified the sale or altered its character to that of a sale held in execution of a money decree. The conclusion follows that the Courts below have correctly held that the purchase by Kishori Mohan Srimany on the 11th September 1913 at the sale held in execution of the decree obtained by Deghapatia was to extinguish the interest of the plaintiffs, and the relationship of landlord and tenant was not in existence between the parties to this suit during the years in claim.

The result is that this appeal is dismissed. Nos. 2249, 2252 and 2280 of 1920.

In the view we take it is not necessary to consider whether these appeals are or are not competent. They are all dismissed.

Costs will be allowed in each of the appeals where the respondent has entered appearance.

K. S. D. *Appeal dismissed.*

(11) 9 Dow. 28 (?).

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 57 OF 1923.

December 4, 1923.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir B. K. Mullick, KT.

LALOO PRASAD SINGH AND OTHERS —DEFENDANTS—APPELLANTS

versus

LACHMAN SINGH AND OTHERS—PLAINTIFFS—RESPONENTS.

Hindu Law—Relinquishment of limited estate, proof of—Failure to contest suit, effect of—Procedure—Events during pendency of suit, whether can be considered.

The reversioners of a deceased Hindu claimed certain *kasht* land belonging to the latter on the allegation that his daughter, who was immediately entitled to the property and was a defendant in the suit, had relinquished the property in their favour. The contest was between the plaintiffs and the landlord. The daughter of the deceased did not enter appearance or contest the suit. There was no evidence of a relinquishment by her before the suit, but during the appellate stage she filed a petition expressing her willingness to relinquish her rights in favour of the plaintiffs:

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Held, (1) that the failure of the daughter of the deceased to appear and contest the suit did not amount to a relinquishment; [p. 512, col. 2.]

(2) that the petition filed by her before the Appellate Court did not affect the position of the parties, as the judgment of the Court must depend upon the rights of the parties at the date when the suit was instituted. [p. 513, col. 1.]

Letters Patent Appeal from the decision of Mr. Justice Ross, reversing the decision of the lower Appellate Court.

Messrs. *N. C. Sinha* and *N. C. Ghosh*, for the Appellant.

Mr. *R. T. N. Sahai*, for Mr. *R. G. S. Prasad*, for the Respondent.

JUDGMENT.

Miller, C. J.—The suit out of which this appeal arises was instituted on the 12th March 1919 by the plaintiffs as the sons of Dukhi Singh claiming a declaration that certain land measuring 3·67 acres and which previously belonged to their father's brother, Sheo Sahai Singh, was their *kasht* land and that they were entitled to retain possession of the same. As a matter of fact they were not in possession at the date when the suit was instituted because the land owing to disputes between the plaintiffs and the superior landlord, the defendant No. 1, had been attached by the Magistrate in proceedings under section 146 of the Criminal Procedure Code. The case made by the plaintiffs in their pleading was that their father, Dukhi Singh, and their uncle, Sheo Sahai Singh, had separated many years ago and that the land in suit after separation belonged to their uncle, Sheo Sahai, but that recently, when Sheo Sahai and his wife grew old and the plaintiffs' father was dead, the plaintiffs and their uncle had re-united and on the death of their uncle the latter's interest devolved on them by surviorship, and they entered into possession. In the alternative they pleaded that even if the plaintiffs and Sheo Sahai were not joint when the latter died in 1917 he left no male issue, and after his wife died (also in 1917) his next heir was his daughter, *Musammat* Marachi Kuer, the defendant No. 2, and that the plaintiffs were the next reversionary heirs entitled to succeed on the death of Marachi Kuer, but that she did not want to have the estate left by her father, Sheo Sahai Singh, but stood aside and gave up her claim and that consequently all the property left by him came into their possession.

Some time shortly before this suit was instituted the landlord, who is the first defendant in the suit, had instituted proceedings under section 87 of the Bengal Tenancy Act claiming possession of the land on the ground that it had been abandoned by the tenant, *Musammat* Marachi Kuer. What exactly was the result of those proceedings does not appear from the record before us but at the same time criminal proceedings were taken under section 145 of the Criminal Procedure Code with the result that the Magistrate, presumably being uncertain as to who was in possession of the property, attached the property under section 146 of the Criminal Procedure Code with the result that the plaintiffs have instituted the present suit claiming the declaration which I have stated.

The second defendant, *Musammat* Marachi Kuer, entered no appearance and filed no written statement. The landlord, however, the defendant No. 1, did appear and filed a written statement in which the allegations set out in the plaint are traversed and he further set up a case that Sheo Sahai Singh and Dukhi Singh were separate, that no daughter was ever born to Sheo Sahai Singh and that he never had any heir at all and that the landlord had after Sheo Sahai Singh's death entered into possession of the disputed land. He denied that Sheo Sahai Singh and Dukhi Singh were brothers or any relation or that the plaintiffs had any *locus standi* to institute the suit.

The learned Munsif before whom the case came for trial found in favour of the plaintiffs. He held that the brothers, Sheo Sahai Singh and Dukhi Singh, were not joint, that when Sheo Sahai Singh died his daughter, the defendant No. 2, was the next heir but that she had disclaimed, to use the learned Munsif's own word, her rights in favour of the plaintiffs. He found that she never succeeded to the property of her deceased father and that, therefore, it was not a relinquishment but as she did not succeed at all it must be taken that what she did was a disclaimer on her part of her rights to

the estate of her deceased father and that in these circumstances the plaintiffs were entitled as the next heirs to the estate. I may point out that there was no evidence at all apparently before the Court to the effect that *Musammat* Marachai Kuer had relinquished her rights or disclaimed her rights in favour of the plaintiffs except that she did not defend the suit. Indeed the attitude, as appeared from a subsequent petition, taken up by that lady was that she had no rights at all, that her father's family and that of her uncle were joint and that her only right was that of maintenance.

The case went on appeal to the Subordinate Judge who reversed the decision of the Munsif and dismissed the plaintiff's suit, because, although he considered that a Hindu widow or daughter could, by relinquishment of her limited right in her husband's or father's estate, accelerate the reversion, he found as a fact that such a case had not been made out in the plaint or made out in the evidence adduced by the plaintiffs. There was no documentary or orral evidence to prove that before the institution of the suit the defendant No. 2 had relinquished her right in the land in favour of the plaintiffs. That was a distinct finding of fact in favour of the defendants' case and against that of the plaintiffs and by that finding of fact this Court in second appeal is bound. It appeared, however, that during the progress of the appeal before the Subordinate Judge a petition, a copy of which had been placed before us to-day, was filed purporting to be on behalf of the defendant No. 2, who up to that moment had taken no part in the case, alleging in the first instance that she had no right or title to the property left by her father, Sheo Sahai Singh, and that in any event she gave up and disclaimed any right she might have in favour of the plaintiffs, her cousins. The learned Subordinate Judge considered that the plaintiffs were not entitled at that stage to rely upon this petition or to use it in any way when they had not in their pleadings set up such a case. He pointed out that all that had been mentioned in the pleadings was that Sheo Sahai Singh's daughter, the defendant No. 2, had stood by and had not claimed the estate. He considered that such an allegation in the plaint could not be regarded as being consistent with, far less amounting to a plea of relinquishment by the defendant No. 2 in favour of the plaintiffs which was the course then taken by her in the petition.

When the case came before the learned Judge of this Court in second appeal he considered that there had been raised by the plaint an alternative case of a relinquishment by the defendant No. 2 in favour of the plaintiffs and as the defendant No. 2 had not appeared and contested this allegation it must be taken as proved. He, therefore, overruled the decision of the Subordinate Judge and granted the declaration asked for in favour of the plaintiffs.

In my opinion the learned Judge's decision on this point cannot be sustained. The mere fact that the defendant No. 2 did not enter appearance or contest the suit is not, in my opinion, sufficient to bind the defendant No. 1, the landlord, so as to preclude him from either giving evidence or from contesting the allegation of the plaintiffs, even if such an allegation had been made that there was a relinquishment in favour of the plaintiffs by the defendant No. 2. When the case came for trial there was absolutely no evidence at all of any such case. The most that could be said or the most that could be inferred from the evidence was that the defendant No. 2 did not actively assert any claim to the property in suit. Indeed the attitude taken up by her was that the parties were all joint and, therefore, that her only right was that of maintenance. Anything in the nature of an actual relinquishment of the right in favour of the plaintiffs could never in the circumstances have taken place. Whether or not the learned Subordinate Judge was right in saying that no notice could be taken of the petition filed on behalf of the defendant No. 2 in the appellate

stage of the case, is not a matter which it is necessary for us definitely to determine because looking at that petition the most that could be said in favour of the plaintiffs is that although at the date when the suit was instituted there had been no relinquishment in their favour the defendant No. 2 was during the appellate stage of the case apparently willing to relinquish in their favour but as the judgment of the Court must depend upon the rights of the parties at the date when the suit was instituted it seems to me that the finding of fact of the learned Subordinate Judge in first appeal was amply justified by the evidence before him and it is not open to this Court in second appeal to disturb that finding of fact. The result is that the decision of the learned Judge of this Court will be set aside and the decision of the learned Subordinate Judge will be restored. In the circumstances I think that the appellant is entitled to his costs of this appeal and of the appeal before Mr. Justice Ross. The order of the Subordinate Judge as to the costs before the Munsif and on first appeal will stand.

I ought to mention that this decision does not determine one way or the other anything as to the right of the landlord to enter into possession of this property. All that is necessary and all that is determined by this decision is that at the date when this suit was instituted the plaintiffs had not made out that they had any right or title to the property. I understand that the property is still under attachment by the Magistrate and the question of who is entitled to possession has yet to be determined. If the plaintiffs in this suit can satisfy the Magistrate when the question of possession again arises that *Musammat* Marachi Kuer, who is undoubtedly the person entitled to succeed on the death of her father and mother to this property, has relinquished her rights in favour of the plaintiffs by way of accelerating the succession then the Magistrate will be perfectly justified in handing over possession of the property to the plaintiffs because the result of the judgment in the present case is that *Musammat* Marachi Kuer is the person really entitled to the property on the death of her father and mother and the only reason why the plaintiffs fail is because they have failed to make out that at the date of this suit there had been any relinquishment in their favour.

Mullick, J.—I agree.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL NO. 3 OF 1922.

January 29, 1923.

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

PARSOTAM DASS—DEFENDANT—APPELLANT

versus

SHIAM LAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151—Arbitration—Award out of Court—Some property left undivided—Application to file award—Application mentioning particular individual to carry out division—Decree in terms of award—Refusal of person nominated to act—Decree, whether executable—Powers of Court.

Where in an arbitration out of Court the arbitrator makes an award, but leaves certain items of property undivided, and the parties apply to Court for filing the award, at the same time naming a particular individual to carry out the division of the remaining property, and the Court draws up a decree in terms of the award, if the person nominated by the parties refuses to act, the decree does not thereby become incapable of execution. If the parties do not agree to nominate any other person, the Court must appoint some one to carry out the award, or if no one suitable can be found, proceed to carry it out itself. [p. 515, col. 2.]

Under section 151, Civil Procedure Code, every Court has the power to enforce its own orders, and to vary a matter of detail in an order made by the consent of the parties when by the accident of circumstances the carrying out of such detail according to the agreement can no longer be achieved. [p. 515, col. 1.]

Execution appeal from a decree of the Subordinate Judge, Benares, dated the 6th December 1921.

PARSOTAM DASS *v.* SHIAM LAL.

Dr. *K. N. Katju*, for the Appellant.
Mr. *Durga Prasad*, for the Respondent.

JUDGMENT.

Walsh, J.—In our opinion there is no substance in this appeal. Questions of form have been so entangled in the argument with questions of substance that it is really difficult to say what question of principle, if any, is intended to be raised by the appeal. On the face of it the matter appears extremely simple. Such difficulties as have been created have been rather due to the absence of material from the record of the Court below, due in its turn to the objection raised in the Court below to this application having taken a very much narrower form than it has taken in the discussion before us.

The original parties to the dispute, being related, went to arbitration and the Arbitrator passed an award which left certain matters outstanding for subsequent division, such as had to be provided for by machinery created for the purpose, but not such as involved the determination of any substantial controverted question. It was agreed that a decree should be drawn, or rather that the award should be filed in the form of a decree, and the parties by their Pleaders also agreed that a certain relative, who happened also to be a Vakil in the High Court, should make division or partition of the outstanding matters in accordance with the award, and should make it without any delay, that is to say, that very day, and the parties were to have no objection to it. The appointment of this gentleman was obviously a mere piece of machinery to carry out the outstanding details which the award had left open. I attach importance to the expression in the order of the Court which was finally drawn up, as expressing the agreement of the parties; "and the parties will have no objection to it". I think what that means is, that the parties mutually agreed to waive any question which up to that time or thereafter might conceivably be raised, as to the competancy of the Court to pass a decree at all, or as to the matter being considered a suit, or as to the various provisions relating to awards which differ in India according as the arbitration is undertaken with or without the intervention of the Court or as to any other matters of that kind, and have come together in a formal document with the intention, which they have carried out as fully as it was possible for any parties to do, of terminating all their mutual disputes, and have agreed that the Court shall enforce the agreement against either of them who attempts to repudiate it. That order was passed on the 13th of January 1921, and here are we in 1923 supposed to be trying to ascertain what it means. It was obviously intended to be carried out immediately, so that there should be, if possible, an end of the dispute within a few days. Unfortunately the Vakil selected for the purpose, either from misfortune or other unavoidable cause, was unable to carry out the task which he had accepted on behalf of the parties, and the present appellant seems to have taken advantage of that accident to try and render the whole compromise a nullity. Eventually the respondent applied to the Subordinate Judge to enforce the compromise or rather that part of it which was still unperformed. We are unable to see what else he could have done. The appellant's objection was that the appointment of Mr. Dang was merely a personal matter, which failed by his refusal to act, and that not only could no substitute be appointed, but the order itself could not be executed, and even the Court could not carry out its own order. In my opinion the Subordinate Judge was quite right in rejecting this view. When Mr. Dang was appointed and refused to act, it was open to the party objecting to offer a reasonable substitute, and if the parties could have agreed upon a reasonable substitute, in the same way as they had agreed about Mr. Dang, no trouble ought to have occurred. He did not even do that. He objected to the Court taking any steps in the matter at all. The Court below was clearly right in holding that it had power in the absence of an agreement between the parties to appoint what it calls a Commissioner in the place of Mr. Dang. There is no

virtue in the word "Commissioner". The object of the parties would be just as much achieved by saying that they had selected an Arbitrator, or some one to report.

A great deal of argument has been addressed to us directed to showing that there is no decree in this case, that there is nothing that can be executed, and that the appointment of Mr. Dang was no part of any executable decree, and, therefore, beyond the reach of the Court. It seems to me that such a view, if sound, would turn the law as an engine for the administration of justice for the settlement of disputes, into an absurdity. I do not think it can be contended for a moment that there is not abundant provision to be found in the Code apart from section 151 applicable to this order. But even if there were none, it would not create any difficulty to my mind, because every Court obviously has the power to enforce its own orders, and to vary a matter of detail in an order made by the consent of parties, when by the accident of circumstances the carrying out of such detail according to the agreement can no longer be achieved. In my view it is sufficient for this purpose to refer to section 151 of the Code of Civil Procedure. I cannot imagine a state of circumstances to which that section can apply, if this is not one. Before that section was enacted the Courts in India always held themselves invested with inherent powers to do what was necessary for the ends of justice. That section preserves the right which had already been recognised by the Courts. It corresponds to some extent (in my opinion the difference is so small as not to be worth consideration) to sub-section 7 of section 24 of the Judicature Act of 1873 in England. It recognises the natural power of the Court to do all things necessary to determine matters in controversy and to prevent the ends of justice being defeated. It would be a lamentable thing indeed if, in a matter of this kind the gentleman, either from sudden illness or other inability to fulfil his task, had to retire, a compromise accepted in substance by everybody as being the best method of settling the dispute, should be wrecked at the will of one obstinate party. In my view the Judge took the only view possible and this appeal must be dismissed with costs including fees on the higher scale.

Ryves, J.—I agree. I only wish to add that the parties agreed to settle the dispute between them by arbitration out of Court. The Arbitrator made his award and this was filed in Court and made a decree. The parties applied that when the award became a decree of Court, Mr. Dang should carry out the award and the Court so directed. Subsequently Mr. Dang refused to act. Some one clearly had to do what Mr. Dang refused to do to give full effect to the award. If the parties do not agree to nominate some one agreeable to both, the Court must, it seems to me, give effect to its own order and appoint some one to carry out the award, or if no one suitable can be found, proceed to carry it out itself. What the person appointed should do or should not do, does not concern us now. That depends entirely on the terms of the award which are not before us. The order under appeal shows I think that the elaborate and technical objections taken here were not pressed, even if raised, in the Court below. There the main objection was that as the parties had agreed to the appointment of Mr. Dang personally because he was related to both, no one else could be appointed. I agree in the order proposed.

By the Court.—The order of the Court is that this appeal is dismissed with costs including fees on the higher scale.

Of course the Commissioner now to be appointed by the Court on the application of the respondent, or the Court itself, if no such person can be found, must be guided in carrying out the task which it is called upon to perform by the terms of the award which have become part of the decree by the compromise.

M. A. A. *Appeal dismissed.*

GOVINDA *v.* LAXMAN.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 376 OF 1921.
July 7, 1922.

Present:—Mr. Hallifax, A. J. C.

GOVINDA—DECREE-HOLDER—APPELLANT

versus

LAXMAN—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Appealability of decision.*

It is no criterion of the non-operation of a decision as *res judicata* that the person affected thereby could not appeal from it, although it may form part of one of the criteria mentioned in section 11 of the Civil Procedure Code.

Appeal from the decree of the Additional District Judge, Nagpur, in Civil Appeal No. 280 of 1920, dated the 4th July 1921.

FACTS.—In Civil Suit No. 175 of 1919 plaintiff Govind Rao sued for possession of *malik makbuza* plot No. 175 in *Mouza* Waddhamn for two years, on the basis of a usufructuary mortgage-deed executed on 3rd October 1917 by *Musammat* Zeli defendent No. 2 as guardian of the then minor Laxman defendant No. 1. It was found that defendant No. 2 was the real purchaser and owner of the field and hence the mortgage could be enforced against her. But as the *two years* of the mortgage-deed expired, the Judge did not decree possession but passed a personal decree against defendant No. 2 alone. Defendant No. 1 was discharged and exonerated from the claim. No appeal was filed from this decree. Govindrao applied for execution of the decree against *Musammat* Zeli. In execution, he attached the aforesaid *malik makbuza* plot. Laxman put in an objection petition, claiming that the field is owned by him and does not belong to *Musammat* Zeli. The lower Court disposed of this objection petition on the preliminary ground that the finding in the proceedings of the original suit to the effect that *Musammat* Zeli owns the field operates as *res judicata* against the defendant No. 1 and, therefore, precludes him from raising the objection.

Mr. *S. C. Dutt Choudhary*, for the Appellant.

Messrs. *B. W. Joshi* and *K. K. Gandhe*, for the Respondent.

CHAMPI *v.* TARA CHAND.

JUDGMENT.—The learned Additional District Judge has held that the decision in the suit cannot operate as *res judicata* against Laxman because he could not appeal against it. That is no criterion, though it may form part of one of the criteria mentioned in section 11 of the Civil Procedure Code, in addition to which I can at present think of no others that are applicable. In this case the decision in the suit that *Musammat* Zeli was the owner of the property was not the basis or any part of the basis of the decree. The final decision of the whole case, that is the decree, would have been exactly the same if the decision on that point had been exactly the contrary. The matter was, therefore, not "directly and substantially in issue" in the former proceeding. Indeed it was not in issue at all in the suit; it was thought to be so at the beginning of the trial, but in the judgment it was found that the whole case could be decided on two preliminary issues, and it was not necessary to decide the question of ownership at all, that is to say, that the question of ownership was not in issue. For these reasons I hold that the decision in the suit that *Musammat* Zeli is the owner of the property does not operate as *res judicata* in these proceedings. The appeal is accordingly dismissed and the appellant must pay all the costs.

N. H. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 386 OF 1921.
May 12, 1924.

Present:—Mr. Justice Mukerji and Mr. Justice Dalal.

Musammat CHAMPI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Lala TARA CHAND—PLAINTIFF AND TIRLOKI NATH AND OTHERS—DEFENDANTS—RESPONDENTS.

Minor—Decree against minor, whether binding—Prejudice, question of, whether material—Civil Procedure Code (Act V of 1908), O. XXII, r. 6, scope of—Death of party after hearing and before

judgment—Decree against minor representative—Abatement of suit, if prevented—Procedure, rules of—Breach, effect of.

A decree passed against a minor is null and void, and is liable to be set aside at the instance of the minor. [p. 519, col. 1.]

Bhura Mal v. *Har Kishan Das*, 24 A. 383; A. W. N. (1902) 76, *Hanuman Prasad* v. *Muhammad Ishaq*, 28 A. 137; A. W. N. (1905) 229; 2 A. L. J. 615, *Khiaraj Mal* v. *Diam*, 32 C. 296; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1 (P. C.), *Ram Chander* v. *Chheda Lal*, 2 A. L. J. 460; A. W. N. (1905) 122 and *Purna Chandra Kunwar* v. *Bejoy Chand Mehtab*, 18 Ind. Cas. 859; 17 C. W. N. 549; 18 C. L. J. 18, followed.

In such a case the Court is not concerned with the question whether the minor has or has not suffered any prejudice by the decree. [p. 518, col. 2.]

Per *Dalal, J.*—Order XXII, r. 6 of the Civil Procedure Code covers cases where the Court is unaware of the death of a party and proceeds on the assumption that the parties are alive. It has no reference to a decree passed against a living person, a minor brought on the record as the legal representative of a deceased party. [p. 518, col. 1.]

Jungli Lall v. *Laddu Ram Marwari*, 50 Ind. Cas. 529; 4 P. L. J. 240; (1919) Pat 105, referred to.

Where the record of a suit itself shows that a minor is wholly unrepresented, or that he is represented by a guardian disqualified from acting as such a guardian under the express provision of a Statute, the result is that the minor is not properly a party to the suit, and a judgment rendered against the minor is without jurisdiction and null and void. But where he is properly a party to the suit—and as he is properly a party if he is represented in the record by a guardian not disqualified from acting—the jurisdiction of the Court to try and determine the cause as against the minor is complete, and such jurisdiction will not be ousted on proof that the Court did not follow the appropriate procedure for the appointment of the guardian. [p. 518, col. 2; p. 519, col. 1.]

Per *Mukerjee, J.*—Where a minor has been substantially represented and has not been prejudiced in the litigation, it is not open to him to obtain the relief of a declaration that the decree is not binding on him. [p. 520, col. 2.]

The objective law, namely the law of procedure, is merely a hand-maiden to justice and where substantial justice has been done a breach of a rule of procedure cannot by itself be a ground for a suit. [p. 521, col. 1.]

Where there is no prejudice, there is no grievance to be redressed. The mere fact that there has been a defect in following the procedure cannot be made a matter of grievance and there can be no redress. [*ibid.*]

A decree, however proper it may be, passed against a person who is already dead can be of no effect against the estate of the deceased and is a mere nullity. [*ibid.*]

In principle, there is nothing to differentiate the case of a decree passed against a dead man from a decree passed against a person who is suffering from the disability of minority withou having a person appointed to look after his interest. [p. 521, col. 2.]

First appeal from a decree of the Subordinate Judge, Meerut, dated the 22nd August 1921.

Messrs *Nihal Chand* and *Harendra Krishna Mukerji*, for the Appellants.

Dr. *K. N. Katju* and Mr. *S. B. Johri*, for the Respondents.

JUDGMENT.

Dalal, J.—The plaintiff, Tara Chand, who has since become a major, instituted a suit for cancellation of certain decrees of Court through his next friend *Musammat* Persauni, his certificated guardian. He is the son of Jainti Prasad, and was born on 13th November 1899. A guardian was appointed by Court of his person and property on 5th October 1907. He attained the age of majority on 13th November 1920. After the guardian was appointed, his uncle Banarsi Das adopted him. In 1916 one *Musammat* Champi sued Banarsi Das and others for partition of a house, and all proceedings were completed in the First Court on 20th March 1917. Judgment was reserved on that day and 30th March was fixed for delivery. Banarsi Das died between those two dates, and on 28th March *Musammat* Champi applied to bring Tara Chand on the record in place of his adoptive father, Banarsi Das. He appointed a Pleader and contested the suit. On 14th April 1917, a preliminary decree for partition was passed, and a final decree on the 21st June. Tara Chand himself appealed from both decrees to this Court, and the appeals were dismissed on 28th June 1920. The present suit for the cancellation of all the four decrees on the ground that they were passed against him while he was a minor and not represented by a guardian was instituted on the 14th of September 1920.

The learned Subordinate Judge of Meerut decreed the suit, and hence two of the defendants, *Musammat* Champi and *Musammat* Sona Dei, have appealed. The grounds of appeal are: (1) that the plaintiff failed to prove that he was born on the 13th November 1899, (2) that

on his adoption by Banarsi Das the guardianship certificate issued to *Musammat* Persauni, became inoperative, and the plaintiff attained majority at the age of 18 on 13th November 1917, (3) because the decree of the First Court sought to be cancelled is saved by the provisions of O. XXII, r. 6; (4) that the plaintiff was not entitled to a decree in this suit, because he was in no way prejudiced by the want of appointment of a guardian and he was able to conduct his defence effectively himself, and (5) that the plaintiff was barred by the rule of estoppel from questioning the decrees.

There is no force in any of these grounds. It was conceded during the argument that the plaintiff was born on the 13th November 1899. Once a guardian was appointed to him, it mattered little what other property he acquired. The adoption did not change his identity and the power of the guardian, *Musammat* Persauni, and of the District Court, which appointed her, continued to be the same.

Order XXII, r. 6, prevents abatement when death takes place between the conclusion of the hearing and the pronouncement of the judgment, and the decree is passed against a dead man. Obviously this provision of law covers cases where the Court is unaware of the death of a party and proceeds on the supposition that the parties are alive. It was urged that in the present case, hearing concluded on the 28th of March and judgment was delivered on the 14th of April 1917, and that the death of Banarsi Das took place between the two dates. This is not a correct way of summarising the proceedings of the Court. After the 28th March and before the judgment was pronounced, some proceedings took place, namely, those of bringing Tara Chand on the record; there was, therefore, no conclusion of the hearing prior to the death of Banarsi Das. The rule deals with a decree against a dead man and not with one against living persons. It indicates how a decree against a dead man is to be construed and can have no reference to a decree passed against living persons. Even where preliminary and final decrees were both passed against a dead person, the Patna High Court held that the final decree was a nullity and was not saved by the provisions of this rule. *Jungli Lall* v. *Laddu Ram Marwari* (1).

The four decrees sought to be cancelled were passed against a minor and were void. We have not to consider any question of prejudice to the plaintiff. The learned Counsel for the appellant quoted rulings in cases where the minor was not properly represented and the Courts refused to give him relief when it was discovered that he had not suffered any prejudice by improper representation. The first case is a Privy Council case of *Walian* v. *Banke Behary Pershad Singh* (2). A Bench case of this Court, *Ram Bareshha Ram* v. *Tarak Tewari* (3) was similar. The most recent case is that of the Patna High Court, *Pande Saldeo Narain* v. *Ramayan Tewari* (4). In this case, one of the learned judges (Das, J.) has pointed out the distinction between void and voidable decrees at page 352* of the report:—

"The Court has no jurisdiction to render judgment against one who is not a party to the suit, though it has jurisdiction to render judgment against one who is a party to the suit but who has not been brought before it by reason of the failure on the part of the Court to follow the particular procedure laid down in the Code. The one affects the existence of the jurisdiction of the Court; the other affects the exercise of it. To take a simple case, a minor is not a party to the suit, unless he is represented in the record of the suit by a guardian competent to act as such. Where the record of the suit itself shows that the minor is wholly unrepresented, or that he is represented by a guardian disqualified from acting as such a guardian under the express provision of the Statute, the result is that the minor is

(1) 50 Ind. Cas. 529; 4 P. L. J. 240; (1919) Pat. 105.

(2) 30 C. 1021; 30 I. A. 182; 7 C. W. N. 774; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.).

(3) 33 Ind. Cas. 805; 14 A. L. J. 589.

(4) 71 Ind. Cas. 705; 2 Pat. 335; 4 P. L. T 147; (1923) A. I. R. (Pat.) 242.

*Page of 2 Pat.—[*Ed.*]

not properly a party to the suit, and a judgment rendered against the minor is without jurisdiction and null and void. But where he is properly a party to the suit—and as he is properly a party if he is represented in the record by a guardian not disqualified from acting—the jurisdiction of the Court to try and determine the cause as against the minor is complete, and such jurisdiction will not be ousted on proof that the Court did not follow the appropriate procedure for the appointment of the guardian." A Full Bench of this Court held a decree passed against a minor without the appointment of a guardian *ad litem* to be void [*Bhura Mal* v. *Har Kishen Das* (5)]. This ruling was followed by a Bench of two Judges in *Hanuman Prasad* v. *Muhammad Ishaq* (6) where the force of the Privy Council case of *Walian* v. *Banke Behary Pershad Singh* (2) was explained, and the authority was quoted of the Privy Council case, *Khiarajmal* v. *Diam* (7). In the latter case their Lordships observed:—

"Their Lordships agree that the sales cannot be treated as void or now be avoided on the ground of any mere irregularities of procedure in obtaining the decrees, or in the execution of them. But, on the other hand, the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings, or properly represented on the record. As against such persons the decrees and sales purporting to be made would be a nullity, and might be disregarded without any proceeding to set them aside." The present case is similar. The decrees passed against the plaintiff are a nullity and might be disregarded without any proceeding to set them aside. In *Ram Chander* v. *Chheda Lal* (8) this Court held that where a minor was sued as a major and a decree passed against him, the decree was not binding upon him. That was a case where a certificated guardian was appointed under the Guardians and Wards Act to the minor and it was held that such a minor did not attain majority until the age of 21. In that case it was contended that a guardian having been appointed to the minor's property in one district, the minor would attain the age of majority at 18 with respect to property situated in another district. The learned Judges held that a person cannot be a major in one district and a minor in another. Similarly, it may be stated here that Tara Chand cannot be a minor with respect to the property of his father Jainti Prasad, and major with respect to the property inherited by him from his adoptive father Banarsi Das. The Calcutta High Court also has held a decree against a minor to be a nullity [*Purna Chandra Kunwar* v. *Bejoy Chand Mahtab* (9)].

As pointed out by the learned Judge of the lower Court the appellant did not come forward herself nor get any agent of hers examined to prove circumstances which would give rise to any question of estoppel. We were not told during the argument how the action of Tara Chand led the defendant, *Musammat* Champi, to act as she did in the previous litigation. It is not even alleged by an affidavit or otherwise that she was aware of how Tara Chand was acting, and had no knowledge of his being a minor. Her learned Counsel here represented that Tara Chand was playing a trick. Subsequent to the previous litigation, he had purchased more shares in the house (see paragraph 12 of the plaint) and by re-opening the litigation he desired to get a solid block for himself and oust *Musammat* Champi from the portion of the house allotted to her. I have, however, to decide a question of law and not of morality. These considerations may be submitted to the Trial Court in case there is a fresh trial of *Musammat* Champi's suit.

Though not mentioned in the grounds of appeal, an argument was advanced here that a declaration is discretionary for this Court to grant and the circumstances of the present case are such that the discretion should not be exercised. The decrees are a nullity and may be dis-

(5) 24 A. 383; A. W. N. (1902) 76.
(6) 28 A. 137; A. W. N. (1905) 229; 2 A. L. J. 615.
(7) 32 C. 296; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1 (P. C.).
(8) 2 A. L. J. 460; A. W. N. (1905) 122.
(9) 18 Ind. Cas. 859; 17 C. W. N. 549; 18 C. L. J. 18.

regarded, so it cannot be said that the lower Court exercised its discretion wrongly in granting the declaration sought by the plaintiff. It is also urged that the plaintiff's remedy was by way of injunction to restrain the defendants from executing the decrees and not by way of declaration. The case of *Kunhamed* v. *Kutti* (10) was quoted as an authority. The facts of that case are peculiar and in no way applicable here. The remedy granted to the plaintiff was a proper one.

I would dismiss the appeal with costs.

Mukerji, J.—This appeal raises the question whether a minor, who was unrepresented in the suit by any guardian, can be held to be bound by the decree passed against him, although he neither alleges nor proves that the decree passed against him is unjust or to his prejudice.

The facts of the case are no longer in dispute and are as follows. The appellant *Musammat* Champi filed the Suit No. 203 of 1916 against one Lala Banarsi Das and several others for the partition of a certain house. The case was duly heard and concluded except for the judgment during the lifetime of Banarsi Das. The Court reserved judgment and fixed the 30th of March 1917 for delivery of it. Banarsi Das died on the 23rd of March 1917. An application was made to the Court by *Musammat* Champi that the respondent, Tara Chand, the adopted son of Banarsi Das, might be brought on the record as his legal representative. This application was granted and ultimately on the 14th of April 1917 a preliminary decree was passed. The final decree for partition followed on the 21st of June 1917. Tara Chand on being brought on the record purported to appoint a Vakil and resisted the suit so far it lay in his power. He filed appeals to this Court against both the preliminary and final decrees which were, however, unsuccessful. Tara Chand was the natural son of one Jainti Prasad. On the death of Jainti Prasad Tara Chand's natural mother *Musammat* Persauni took out a certificate of guardianship, on the 15th of November 1907. It was after this certificate had been obtained that Tara Chand was adopted by Banarsi Das and passed into his family. Evidently everybody forgot that there was a certificated guardian and Tara Chand was throughout treated as a major. As already stated, he also regarded himself a major and accordingly resisted the suit and preferred the appeals. After the appeals were dismissed it struck Tara Chand that he might try his luck again and he accordingly brought the suit, out of which this appeal has arisen, to obtain a declaration that the decrees passed against him were not binding on him on the sole ground that he was unrepresented in the suit, by a duly appointed guardian. He nowhere stated in the plaint how the decrees passed against him were prejudicial to his interests. He made certain allegations about the plaintiffs being aware of his minority and of her having dishonestly put him forward as a major. But that allegation has not been substantiated. As I have stated, the sole question to be decided is whether the mere fact that no guardian had been proposed or appointed for Tara Chand is sufficient to vitiate the decrees passed against him. It may be mentioned here that Tara Chand has purchased the shares of certain co-sharers in the property and possibly the sole object of the present suit is to re-open the partition and to obtain a compact share in the property which would include not only his ancestral share but also the shares purchased by him.

Before the case of *Walian* v. *Banke Behari Prasad Singh* (2) was decided it was generally believed that a formal defect in the appointment of a guardian for the suit of a minor was in itself sufficiant to vitiate all the proceedings against the minor in the suit. The case of *Bhura Mal* v. *Har Kishan Das* (5) may be cited as an instance. But since the Privy Council decided the case of *Wallian* v. *Banke Behari Prasad Singh* (2) it is now clearly recogmised that where a minor has been substantially represented and has not been prejudiced in the litigation it is not open to him to obtain the relief of a declaration that the decree is not binding on him. Follow-

(10) 14 M. 167; 1 M. L. J. 328; 5 Ind. Dec. (N. S.) 119.

ing this case, it has been held that in order to find out whether the minor was substantially prejudiced or not, it would be necessary often to go into the merits of the case. If the representation is of a doubtful character the fact that the minor has not at all suffered would go to establish that the representation was substantial. The case of *Murli Dhar* v. *Pitambar Lal* (11) was of this nature.

The question, however, before me is what would be the effect of a decree in which the minor has not been at all represented. It has been urged with great force that unless the minor alleges that he was prejudiced for want of a guardian he has no right to succeed. It has been further pointed out that the objective law, namely the law of procedure, is merely a hand-maiden to justice and where a substantial justice has been done a breach of the rule of procedure cannot by itself be a ground for a suit. There can be no doubt that the last stated proposition is very correct. The Courts exist for granting redress. Where there is no prejudice, there is no grievance to be redressed. The mere fact that there has been a defect in following the procedure cannot be made a matter of grievance and there can be no redress. But the question raised in this appeal is not one of procedure but is one of substantive law. It is a question of status. There can be no doubt that a decree, however proper it may be, passed against a person who is already dead can be of no effect against the estate of the deceased. To quote an expression often used, the decree is a mere 'nullity'. The reason is this. The deceased person cannot be called upon to obey the decree and, therefore, the decree is of no consequence. The legal representives of the deceased cannot be called upon on foot of the decree, to perform what the deceased person was called upon to perform. A minor suffers from certain disabilities under the law of minority. One of the disabilities is that he cannot come to Court either to seek a relief or defend an attack on him, except through a person who can properly represent him. This is his disability owing to his being under a certain specified age. In this particular case that age was enhanced to 21 years owing to a certificate of guardianship having been granted to his natural mother. We have not been called upon to consider whether the factum of Tara Chand's adoption into another family in any way affected the guardianship certificate and whether his age for obtaining majority was reduced to 18 years. It has been conceded that Tara Chand was a minor when he was brought on the record as a major on the 29th March 1917. He was a minor when he preferred the appeals. Indeed, he was a minor when he brought the suit out of which this appeal has arisen. He attained majority during the pendency of the suit. Tara Chand was suffering from a disability to defend himself owing to his status of minority. In this particular case the minor (Tara Chand) was probably an intelligent person quite able to look after himself and his property. But he might have been only a baby one year old, when his father died. The law applicable would have been the same then, as in the present case. The question then is whether the bringing on the record of a person suffering from the disability of minority can be regarded as of no consequence if the ultimate result of the suit was in no way prejudicial to his interest. To my mind, in principle, there is nothing to differentiate the case of a decree passed against a dead man from a decree passed against a person who is suffering from the disability of minority without having a person appointed to look after his interest.

No direct authority of this Court has been cited. A number of rulings was cited at the Bar but most of them could be distinguished on account of the facts involved in each case. The only case which appears to be exactly in point is the case of *Purna Chandra Kunwar* v. *Bejoy Chand Mehtab* (9). In this case a decree for arrears of rent had been obtained against a minor who had been sued as a major without anybody to represent him in the litigation. It held that the decree could not be binding on him and was a nullity. On principle and

(11) 66 Ind Cas. 372; 20. A. L. J. 329; 44 A. 525; (1922) A. I. R (A.) 91; 4 U. P. L. R.(A.) 170.

authority, therefore, Tara Chand would be entitled to have it declared that the decrees are not binding on him.

It was urged that, having regard to the peculiar fact of the case, namely, the arguments having been concluded during the lifetime of Banarsi Das, the provision of O. XXII, r. 6 of the Code of Civil Procedure was applicable and the decree passed was binding on the estate of Banarsi Das. Assuming, but without deciding that O. XXII, r. 6 of the Civil Procedure Code has any application to the facts of this case, it is clear that as a matter of fact no decree was passed against Banarsi Das. On the other hand, the only decree that was passed was against Tara Chand himself. The provisions quoted, therefore, can be of no avail to the appellants.

The further question, however, still remains whether the plaintiff, Tara Chand, should wholly succeed in the suit or whether the Court should go into the merits of the case and see whether or not he was bound by the decree that was validly passed against the remaining defendants. For if the decree be such as to bind Tara Chand, without its having been specifically passed against him, he should not be allowed to escape the liability on the decree for the simple reason that he was without a guardian in the proceedings. He cannot be in a better position than he would have been in if he had not been at all made a party. In the Calcutta case *Purna Chandra Kunwar* v. *Bejoy Chand Mehtab* (9) the High Court remanded the case for a trial of the question whether the minor was or was not liable along with the other defendants on account of the arrears of rent. The minor in that case had sued for the recovery of decree-money already paid and it was held that if he was liable, as a matter of fact, he could not recover the money he had paid. Similarly, in the case of *Ram Chander* v. *Chheda Lal* (8) issues were remanded for ascertaining what advantages, if any, had been derived by the plaintiff by the decree impeached. In this case the decree impeached is a decree for partition. Tara Chand could not be bound by a decree passed against any other of the defendants. The result of a declaration that the decrees are not binding on Tara Chand would be that the partition suit will be re-opened at the stage at which Tara Chand came in. No relief in the nature of a refund has been asked for. There is no prayer that the costs paid under the decree should be paid back to him. In the circumstances there seems to be no bar to the plaintiff obtaining the declaration that the preliminary and final decrees, whether passed by the Court of first instance or appeal, are not binding on him.

The result is that the appeal fails.

By the Court.—The appeal is dismissed with costs here on the higher scale.

K. S. D. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1313 OF 1917.
November 27, 1922.

Present :—Mr. Justice Abdul Raoof and Mr. Justice Moti Sagar.

SEWA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GHULAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Alienation by non-proprietor of site of house—Sarhali Kalan, Tahsil *Tarn Taran, District Amritsar—Sale, proof of, effect of.*

There is no custom in the village of Sarhali Kalan in the Tarn Taran *Tahsil* of the Amritsar District whereby a non-proprietary resident has an unrestricted power to dispose of the site on which his house is built. [p. 525, col. 2.]

As regards sales by non-proprietors in a village, proof of particular sales having taken place without objection would be very good evidence of the title of the purchaser to the lands actually sold. But while such sales would give a good title to individuals in particular portions of the village site, they would not prove that the rights of the proprietary body over the remainder of the site had been extinguished, and that possession whether by proprietors or non-proprietors had come to be the only measure of right. [p. 525, col. 1.]

Second appeal from an order of the Additional District Judge, Amritsar, dated the 31st January 1917.

Diwan *Mehr Chand*, for the Appellants.

Mr. *Jagan Nath*, for the Respondents.

JUDGMENT.—The plaintiffs in this case are some of the proprietors of the land in Sarhali Kalan, *Tahsil* Tarn Taran, District Amritsar. The defendants are non-proprietors. Buta, the ancestor of defendants Nos. 1 to 4, was originally in possession of the house in dispute. On his death it was inherited by defendant No. 1 and the father of defendants Nos. 2 to 4. The shares of the other defendants were acquired by Jani, defendant No. 1, by transfer, who sold it to defendant No. 5. The present suit for possession of the house was instituted by the plaintiffs on the allegation that the house belonged to their ancestors, and that it had been given to Buta for residence on condition that he was to occupy the house as a *kamin* without any right of alienation. It was also alleged that the non-proprietors of Sarhali Kalan had no right to alienate their houses without the consent of the proprietors. The suit was resisted by the defendants on the ground that it belonged to Buta, and that the plaintiffs were not the owners thereof, and further that Sarhali Kalan was a town and that the non-proprietors had unrestricted powers to alienate their houses. The two principal issues in the case were issues Nos. 1 and 4 ; *viz* :—

"(1) Was the house in suit given by the grandfather of the plaintiffs to the ancestors of the defendants Nos. 1 to 4 for residential purposes ?

(2) Are the non-proprietors in Sarhali Kalan entitled to mortgage or sell their residential houses ?"

Upon the first issue both the Courts below have concurrently held that the house in suit was never given to the defendants or to their ancestors by the plaintiffs' ancestors. The decision on this point has become final and no question is raised with regard to it now. On the 4th issue the defendants produced both oral and documentary evidence. The documentary evidence consisted of a large number of mortgage-deeds, sale-deeds, sale certificates, and a few judgments in other cases. The plaintiffs also produced some documentary evidence and examined a larger number of witnesses to rebut the evidence given by the defendants. After considering the oral and documentary evidence on both sides the Trial Court held that the defendants had succeeded in establishing a special custon according to which the non-proprietors in Sarbali Kalan had an unrestricted right of alienation in respect of their houses and dismissed the suit.

The plaintiffs appealed to the lower Appellate Court which agreed with the Trial Court and upheld the decree.

The plaintiffs have preferred a second appeal to this Court, and the only question which has been argued before us and which requires decision is whether the non-proprietors of Sarhali Kalan have an unrestricted right of alienating their residential houses. The general custom which may be taken to be the common law of the land is thus stated in paragraph 236 of Rattigan's Digest of Customary Law :—

"In the absence of a well-established custom a non-proprietary resident in a village cannot dispose of the site on which his house is built, or a right of residence in the house, without the consent of the proprietors of the village, but he is ordinarily entitled to sell the materials, and the purchaser must remove the same within a reasonable period." A lagre number of authorities are quoted in support of this rule. It has been held in various cases that there is a presumption in favour of the right of alienation by non-proprietors in a town. It was accordingly contended on behalf of the defendants that Sarhali Kalan had attained the position of a *Kasba* or a town and, therefore, on the evidence given in the case, the non-proprietors of this place ought to be held to possess an unrestricted right of alienation. The admitted facts with regard to this point, are as follows :—

The population of the place consists of 5000 souls, there is no Municipality or notified area, there is no hospital, and the place possesses no commercial importance. It merely supplies troops, and is generally inhabited by blacksmiths,

carpenters, weavers, etc., besides the proprietors.

The District Judge has quoted a passage from the Amritsar Gazetteer of the year of 1892-1893 Edition which gives the description of the village in the following words:—

"Sarhali Kalan is a large *Sandhu Jat* village in the south-western corner of the Tarn Taran Tahsil. It has now a population of 5,750, and is a purely agricultural village, in no way deserving the name of a town. The land revenue in this tract, the Khira Manjha, has always been light and Sarhali Kalan now pays Rs. 6,500. It lies on the broad high road to Harikiferry from Tarn Taran, leading Ferozepur. The only public building is a Police Station, opposite to which is a *serai* with a rest-house in one corner, and a post office in the other. The encamping ground is rarely used except by Civil Officers on tour, and the *bazaar* is small and unimportant. The village supplies many recruits to the native army, and the money order business at the post office is extensive. There has never been a Municipality, nor is there ever likely to be any need of one."

The learned Judge, after considering the particulars given in the above passage and other evidence produced by the parties, was not able to hold definitely that Sarhali Kalan was a *kasba*, but he has tried to get over this point by adopting a middle course, and has held that though not a *kasba* it might very well be said to have, by this time, reached the dignity of a *kasba*. This conclusion can hardly be supported on the evidence in the case. Moreover, even if the learned Judge be right in his view and Sarhali Kalan may be said to be a village of some importance the presumption attaching to a town can hardly be applied to it, for it is after all a village.

We will, therefore, proceed to decide the question of custom involved in this case on this basis, namely, that Sarhali Kalan is an agricultural village, and must be governed by the general custom applicable to agricultural villages unless the special custom set up by the defendants is established. The evidence to be considered in this case was given in three different cases which were tried together by the Courts below. The three cases were Nos. 1886 and 1887 of 1912 and No. 446 of 1913. In cases Nos. 1886 and 1887 of 1912 the plaintiffs were the same, but the defendants were different. In case No. 446 of 1913 the principal defendants were the same as the plaintiffs in cases Nos. 1886 and 1887 of 1912. The question of custom involved in all the three cases was the same. The parties, therefore, gave their statements in all the three cases and relied on the oral and documantary evidence produced in all of them. According to the summary given in the judgment of the Trial Court the defendants in Case No. 1887 produced 156 documents, and in Case No. 446, 96 documents including 61 mortgage-deeds executed by non-proprietors in favour of proprietors, 67 mortgage-deeds executed by non-proprietors in favour of non-proprietors, 3 mortgage-deeds executed by proprietors in favour of non-proprietors, 29 sale-deeds executed by non-proprietors in favour of proprietors, 59 sale-deeds executed by non-proprietors in favour of non-proprietors, 10 sale-deeds executed by proprietors in favour of non-proprietors and 23 sale certificates. Fifty-nine witnesses were examined by the defendants in Case No. 1887 of 1912 and the same number of witnesses was produced in Case No. 446 of 1913. In addition to the above evidence the defendants also produced copies of judgments, Exhibits Nos. 144 and D. 156 in Case No. 1887 of 1912 and Exhibits Nos. P. 11, P. 12, P 14 and P. 21 in Case No. 446 of 1913.

At first sight the documentary evidence produced by the defendants appears to be formidable, but no evidence was given to show under what circumstances the sale-deeds and mortgage-deeds, etc., were executed,

In the case of *Bishen Chand* v. *Jawanda Mal*, No. 1313 of 1876 quoted at page 250 in P. R. of 1882 [*Kharak Singh* v. *Alladitta* (1)] the Court pointed out that the *abadi* or village

(1) 85 P. R. 1882.

site belongs to the proprietary body of the village and observed that "what has been done hitherto by the non-proprietary tenants in regard to selling the sites of their houses can afford no guide for the future. They may have been allowed so to do. But to carry this peculiar leave and license on the part of the proprietors so far as to hold that thence arises the evidence of a custom that the non-proprietors should sell what is not their own, never was their own, and cannot be made their own, without special agreement or some such causes operating, is going much too far." The learned Judges who decided the case reported as *Kharak Singh* v. *Alladitta* (1) after quoting the passage made the following partinent observation :—

"Proof of particular sales having taken place without objection would be very good evidence of the title of the purchaser to the lands actually sold. But while such sales would give a good title to individuals in particular portions of the village site, they would not prove that the rights of the proprietary body over the remainder of the site had been extinguished, and that possession whether by porprietors or non-proprietors had come to be the only measure of right."

The rule laid down in the case above cited appears to have been consistently followed in the Chief Court of the Punjab and applying this rule to the present case we have to see whether there is any evidence as to the circumstances under which the sales and the mortgages were effected. If the contention of the defendants were to be accepted they would practically become the owners of the sites of their houses, for they would have an unrestricted right of transferring their houses along with the right of occupation over the sites to others.

In the case of *Mahomed Usman* v. *Babu* (2) a Division Bench of the Allahabad High Court at page 63* made the following partinent observation with regard to the respective rights of the proprietors and the non-proprietors :—

"The evidence in support of alleged custom is most unsatisfactory. Several sale-deeds of houses in the village were put in evidence in support of it, but there is nothing to show under what circumstances these sale-deeds were executed. We think that the evidence in support of the custom is entirely insufficient to establish the custom, and that the case is governed by the ruling of a Full Bench of this Court in *Rama Bilas* v. *Lal Bahadur* (3). There is a tendency in this Province to set up in villages, customs which are subversive of the rights of property, as for example, in the present case a custom which in fact takes from the *zemindar* the right to the site of a tenant's holding on the determination of the tenancy. The claim of a tenant to transfer a right of residence really amounts to this, for it means that the tenant may by assignment transfer to a stranger a right of residence without the consent of the *zemindar*, and so force upon the latter a tenant who may be distasteful to him. It prevents the landlord from resuming the occupation of his land when a tenant, selected and approved of by him, chooses to give it up. It is the change of a right of tenancy into a right of permanent occupancy."

Every word of this passage is applicable with equal force to the present case. No doubt, in addition to the instances supplied by mortgage-deeds and sale-deeds, the defendants have produced a few judgments in support of their claim, but only two of them, *viz.*, Exhibits Nos. P11 and P21 relate to the village Sarhali Kalan. The majority of the instances cited on behalf of the defendants are of recent dates. Only one mortgage-deed of 1857 has been produced and a sale-deed of the year 1870. Sale-deeds of 1877, 1881, 1886, 1891; and some sale certificates of 1883 have been filed. The rest of the transactions relied upon are of recent dates only. It is not possible, therefore, to hold in this case that the general custom has

(2) 9 Ind. Cas. 314; 8 A. L. J. 61.
*Page of 8 A. L. J.—[*Ed.*]

(3) 30 A. 311; A. W. N. (1908) 112; 5 A. L. J. 456; 4 M. L. T. 169.

been abrogated by the special custom set up by the defendants.

The oral evidence in this case is equally useless, because the witnesses have either simply expressed their own opinions or have cited instances of certain transfers without stating the circumstances under which they were made. Thus there is no evidence, oral or documentary, on the record disclosing the circumstances under which the documents relied upon were executed. We are, therefore, constrained to hold that the evidence produced in this case is legally sufficient to establish the alleged custom, and the suit ought to have been decreed.

We accordingly accept the appeal, and setting aside the decrees of the Courts below, decree the claim of the plaintiff-appellants with costs in all Courts.

W. C. A. *Appeal allowed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 85 OF 1922.
April 28, 1924.

Present:—Mr. Justice Sulaiman and Mr. Justice Kanhaiya Lal.

Shah LALCHAND AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Shah RAM CHAND AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Pre-emption — Wajib-ul-arz — Interpretation—Ambiguity, effect of—Pre-emptive clause containing extraneous matter—Presumption of custom, whether arises—Custom of pre-emption—Burden of proof.

Plaintiffs sued for pre-emption alleging that they were co-sharers in the *thok* while defendants were strangers. It appeared that the village comprised two *thoks*, that the plaintiffs were co-sharers in the *thok* in which the property in suit was situated and that the defendants were co-sharers in the other *thok*. The paragraph of the *wajib-ul-arz* dealing with the right of pre-emption provided that in the case of a transfer by sale or mortgage but not by a gift, the claim to the right of pre-emption shall belong first to an own brother, and nephew, then to a paternal cousin, a partner in the property, then to the co-sharer in the *thok* and then to the co-sharer of the village. It provided further that "gift will be made in favour of an own brother and nephew or daughter's son or for a charitable purpose and not otherwise";

Held, (1) that the inclusion of extraneous matters in the same clause which could not possibly be the subject of a custom, precluded the possibility of the clause being treated as a record of custom in regard to any of the matters of which that clause formed a part; [p. 529, col. 2.]

(2) that the terms of the *wajib-ul-arz* were ambiguous and capable of two interpretations; [p. 532, col. 1.]

(3) that for these reasons the plaintiffs' claim was bound to fail. [p. 530, col 1.]

Mathura Singh v. *Ramlal Singh*, 64 Ind. Cas. 486; 19 A. L. J. 903, followed.

Per *Kanhaiya Lal, J.*—A *wajib-ul-arz* is in the absence of intrinsic or extrinsic evidence to the contrary a *prima facie* evidence of the custom it records. [p. 527, col. 2.]

Digambar Singh v. *Ahmed Sayed Khan*, 28 Ind. Cas. 34; 37 A. 129; 13 A. L. J. 236; 19 C. W. N. 393; 17 M. L. T. 193; 2 L. W. 303; 21 C. L. J. 237; 28 M. L. J. 556; 17 Bom. L. R. 393; (1915) M. W. N. 581; 42 I. A. 10 (P. C.), *Sher Muhammad Khan* v. *Parbhulal*, 79 Ind. Cas. 41; 46 A. 47; 21 A. L. J. 801, followed.

Each *wajib-ul-arz* must be interpreted according to its own terms, and in the absence of any terms of limitation in a pre-emption clause confining its operation to a transfer in favour of a stranger, the right of pre-emption can be enforced, so far as it may be, between the persons belonging to the different categories mentioned in the *wajib-ul-arz inter se*. [p. 528, col. 1.]

Where all the lands belonging to the parent *khatas* are held in severalty, the mere existence of a common *khata* containing certain barren, uncultivated or *abadi* lands, which usually remain the property of all the co-sharers of the village till a partition is formally effected, cannot make a person who belongs in other respects to one class or category, a joint co-sharer with another who belongs to another class or category, as regards any separate interest the latter may sell. [p. 529, col. 2.]

Where a *wajib-ul-arz* contains matters which cannot properly or possibly be the subject of a custom, then the ordinary presumption that the *wajib-ul-arz* is a *prima facie* record of a custom is overturned by the internal evidence afforded by the other terms embodied therein though they may be separable from the rest. [p. 529, col. 2; p. 530, col. 1.]

Per *Sulaiman, J.*—The burden of proving the custom of pre-emption lies on the plaintiff. The plaintiff pre-emptor cannot succeed by merely proving that a custom of pre-emption exists in the village. He has to show that that particular custom exists which would entitle him to a decree against the defendant vendee. [p. 530, cols. 1 & 2.]

If the only evidence which the plaintiff can produce is ambiguous, that is to say, is capable of two interpretations, and if on one of such interpretations the suit cannot succeed, then the suit must fail, and it is not the duty of the Court to give it necessarily the other interpretation which would entitle the plaintiff to a decree. [p. 530, col. 2.]

Bechu Singh v. *Lachmi Narain Singh*, 15 Ind. Cas. 54, *Jahangiri* v. *Amir Singh*, 23 Ind. Cas. 245; 12 A. L. J. 19, *Din Dayal* v. *Ramdhan*, 28 Ind. Cas. 306, *Nageshar Prasad* v. *Ram Harakh*

Pande, 79 Ind. Cas. 417; 22 A. L. J. 342; 46 A. 370, referred to.

If the clause of pre-emption contains matters which cannot possibly be a record of custom, then the ordinary presumption which arises that the entry is one of custom, is negatived. [p. 532, col. 2; p. 533, col. 1.]

Randhir Singh v. *Rajpal Misir*, 81 Ind. Cas. 25; 22 A. L. J. 561; 46 A. 478; (1924) A. I. R. (A.) 321, *Balwant Singh* v. *Hari Singh*, 74 Ind. Cas. 322; 21 A. L. J. 542; (1924) A. I. R. (A.) 52, *Fazal Husain* v. *Muhammad Shariff*, 24 Ind. Cas. 464; 36 A. 471; 12 A. L. J. 800, *Suraj Bali Singh* v. *Mohammad Nasir*, 48 Ind. Cas. 220; 16 A. L. J. 879, followed.

First appeal from the decree of the Officiating Subordinate Judge, Mainpuri, dated the 22nd December 1921.

Mr. *N. P. Asthana*, for the Appellants.

Dr. *S. N. Sen* and Mr. *Badri Narain*, for the Resdondents.

JUDGMENT.

Kanhaiya Lal, J.—This appeal and the cross-objection arise out of a suit for pre-emption and the main question for consideration is whether the plaintiffs-respondents are entitled to a preferential right of purchase as against the defendants vendees. The sale in question was effected by the defendants Nos. 3 to 13 in favour of the defendant No. 1 and the father of defendant No. 2 for a consideration of Rs. 22,000 on the 27th of May 1919; and the property sold comprised a 3 *biswas* share in *patti* No. 14 with the rights appertaining thereto in *shamilat pattis* Nos. 17 and 18 in the *thok*, known by the name of *thok* 12 *biswas* in the village Kadipur. The allegation of the plaintiffs was that they were co-sharers in that *thok* and that the defendants vendees were strangers. The Court below found that the village Kadipur comprised 2 *thoks*, that the plaintiffs were co-sharers in the *thok* in which the property in suit was situated and that the defendants vendees were co-sharers in the other *thok*. It further found that the plaintiffs were entitled to a preferential right as against the defendants vendees and that the sale consideration actually paid was Rs. 22,000 It accordingly decreed the claim of the plaintiffs subject to the payment of the above amount.

Paragraph 14 of the *Wajib-ul-arz* of the village Kadipur, dealing with the right of pre-emption states that in the case of a transfer of property by a sale or mortgage but not by a gift, the claim to the right of pre-emption (*dava haq shafa*) shall belong first to an own brother and nephew then to a paternal cousin, a partner in the property, then to the co-sharers in the *thok* and then to the co-sharers of the village. The contention here is that the right to claim pre-emption arises only when a sale or mortgage is effected in favour of a person outside these categories and that no right of preference is given by the *wajib-ul-arz* between the co-sharers of the different categories *inter se*. In other words it is argued that the right of pre-emption is at best recognised only where a sale or mortgage is effected in favour of a stranger and not where it is effected in favour of a member of one or other of the categories above mentioned. It is further urged that the clause itself does not establish any custom of pre-emption in the village because it mentions that which could hardly be the subject of a custom, namely, that no gift could be made by a co-sharer except in favour of an own brother and nephew or a daughter's son or except for a charitable purpose. The last condition is clearly extraneous to the scope of the paragraph, which purports to deal with the right of pre-emption. But it is contended that if that entry could not be the record of a custom the previous entry could hardly be treated as a record of a custom of pre-emption.

The questions raised present features of some difficulty. As pointed out in *Digambar Singh* v. *Ahmed Sayed Khan* (1) and *Sher Muhammed Khan* v. *Prabhu Lal* (2), a *wajib-ul-arz* is in the absence of intrinsic or extrinsic evidence to the contrary a *prima facie* evidence of the custom it records. It may, however, record a custom about certain matters and a contract as regards others. If it records a custom, the incidents of that custom and the occasion which would give an opportunity for its enforcement

(1) 28 Ind. Cas. 31; 37 A. 129; 13 A. L. J. 236; 19 C. W. N. 393; 17 M. L. T. 193; 2 L. W. 303; 21 C. L.J. 237; 28 M. L. J. 556; 17 Bom. L. R. 393; (1915) M. W. N. 581; 42 I. A. 10 (P. C.).

(2) 79 Ind. Cas. 41; 46 A. 47; 21 A. L. J. 801.

may be proved by its production or by external evidence or by both.

The *wajib-ul-arz* here produced does not say that the right of pre-emption or a claim to enforce that right would only accrue where a co-sharer has transferred his share to a stranger or a person outside the co-parcenary body. It mentions the different classes of persons who can enforce that right in their due order whenever a transfer is effected. Such a transfer may, however, be effected in favour of a stranger or in favour of a person belonging to a remoter category to the prejudice of a person belonging to a nearer category. In the absence of any terms of limitation, the right of a pre-emption can be enforced, as far as it may be between the persons belonging to the different categories *inter se*. Each *wajib-ul-arz* requires to be interpreted according to its own terms. While in some cases it has been held on the interpretation of the particular *wajib-ul-arz* produced that the co-sharers belonging to the different categories have preferential rights *inter se*, in other cases it has been held that such preferential rights only exist where a sale is effected in favour of a stranger.

The Court below relying on the decisions in *Ram Lal* v. *Niadar* (3) and *Gurdial* v. *Mathura Singh* (4) has found that such a right of preference exists even where a co-sharer of one *thok* sells to a co-sharer of another *thok*. In the former case, the *wajib-ul-arz* provided that in the event of a sale a co-sharer should sell his property to his own brother or *ekjaddi* and after him to co-sharers in the *patti* or *thok* and after them to other co-sharers, and further said that the person falling within the first category would have to give the same price as was offered by a stranger. The view taken by this Court was that a right of pre-emption was given to the successive categories of the pre-emptors *inter se*, that is one against the other and that such right did not arise only in the event of a sale to a stranger. In the latter case the custom record in the *wajib-ul-arz* gave a right of pre-emption in the case of a sale or mortgage to a co-sharer in a *patti*, then to the *pattidars* of the *mahal*, then to the owners of the other *mahals*, and in case of their refusal to an outsider at the same price as a stranger would be willing to give. The view taken by this Court was that a right of pre-emption between the persons mentioned in the *wajib-ul-arz* was enforceable *inter se*.

The learned Counsel for the defendants-appellants has referred to the decisions in *Khatun Bibi* v. *Sayida Bibi* (5) and *Mathura Singh* v. *Ramlal Singh* (6) where under circumstances said to be similar to the present case, no right of pre-emption as between the co-sharers of different categories *inter se* was allowed.

Personally speaking, it appears to me questionable how far we can import into the terms of a *wajib-ul-arz* a limitation or restriction, which does not there exist. The *wajib-ul-arz* does not in terms say that the right of pre-emption would be available only where there is a sale to a stranger. It is wide enough in its terms to govern all cases where a sale is effected in favour of a person whether he is a stranger or belongs to one or other of the categories mentioned. It merely declares the order in which the right of preference is to be exercised as between the different classes of co-sharers or as against a stranger. For the purpose of enforcing the right of pre-emption, the village is practically divided into different concentric circles. One of those concentric circles is the *thok* and the other is the village unit. A person who belongs to an inner concentric circle is entitled to claim pre-emption as against a person who belongs to an outer-concentric circle, because so far as the former is concerned the latter is virtually a stranger. A claim to a right of pre-emption does not necessarily connote a suit. It may be enforced either by private treaty or by suit. It implies an assertion of a right which may be asserted before a transfer is effected or after it is effected.

(3) 4 A. L. J. 352; A. W. N. (1907) 95.
(4) 6 Ind. Cas. 920; 7 A. L. J. 610.
(5) 27 A. 457; 2 A. L. J. 689; A. W. N. (1905) 45.
(6) 64 Ind. Cas. 486; 19 A. L. J. 903.

It may be asserted out of Court or, if the vendee refuses to reconvey the property, by a suit. The right arises from a sale if the order of preference laid down by the *wajib-ul-arz* is disregarded by the vendor. If it had been intended to limit the exercise of the right to an occasion when a sale was made to a stranger, the *wajib-ul-arz* would have said so.

In *Sukhdeo Singh* v. *Bahadur Singh* (7) where a *wajib-ul-arz* provided that if a co-sharer wanted to sell his property he should do so for whatever price was obtained from others, first to a near co-sharer in the same *patti*, secondly to any other co-sharer in the same *patti*, thirdly to a near co-sharer in another *patti*, fourthly to a co-sharer in the *mahal* and fifthly to an outsider, it was held that the right conferred was a right enforceable between the different classes of persons mentioned *inter se*.

In *Sukhdeo Singh* v. *Bahadur Singh* (7) where the pre-emptive clause described the right of pre-emption as existing in (1) a near co-sharer in the same *patti*, (2) any other co-sharer in the *patti*, (3) a near co-sharer in another *patti*, and (4) a co-sharer in the *mahal* for whatever price was obtainable from another, the contention that the right of pre-emption arose only in case of a sale to a stranger was repelled.

In *Dhanraj Misir* v. *Rameshwar Misir* (8) no such restriction was read into the terms of the *wajib-ul-arz* as is now contended for.

It is urged in differentiation of those cases that where the pre-emptive clause of the *wajib-ul-arz* imposes no duty on a co-sharer to offer the property in the first instance to a person of the class first named and then to the persons mentioned in the other classes in their order, no cause of action can accrue to the co-sharers of the different classes *inter se*, by a sale to a member of one of those classes. But there is no difference in principle between a clause which casts a duty on a co-sharer to sell the property to the different classes of persons mentioned in their order, and a clause which defines the classes of persons among whom the right of pre-emption would be enforceable whenever a sale was effected by a co-sharer in respect of his share. Obviously if a pre-emptive clause contains no restriction, limiting its operation *to a sale or transfer in favour of a stranger*, it will be doing violence to the spirit and intention of the framers of the *wajib-ul-arz* to import that limitation and preclude a person belonging to a superior category from enforcing it as against a person who, so far his *thok* is concerned, is as much a stranger as a complete outsider.

Where all the lands belonging to the parent *khatas* are held in severalty, the mere existence of a common *khata* containing certain barren, uncultivated or *abadi* lands, which usually remain the property of all the co-sharers of the village till a partition is formally effected, cannot make a person who belongs in other respects to one class or category, a joint co-sharer with another who belongs to another class or category, as regards any separate interest the latter may sell. No account is taken of the appurtenances in the *shamilat khatas* for the determination of his right of pre-emption.

Interpreted, however, in the light of the Full Bench decision in *Randhir Singh* v. *Rajpal Misir* (9) which follows a previous decision in *Balwant Singh* v. *Hari Singh* (10) and is binding on us the inclusion of extraneous matters in the same clause which could not possibly be the subject of a custom, precludes the possibility of the clause being treated as a record of custom in regard to any of the matters of which that clause forms a part. It has been there pointed out that where a *wajib-ul-arz* contained matters which could not properly or possibly be the subject of a custom, then the ordinary presumption that the *wajib-ul-ars* was a *prima facie* record of a custom was overturned by the in-

(7) 26 A. 544; 1 A. L. J. 272.
(8) 78 Ind. Cas. 904; 46 A. 170; 21 A. L. J. 928; (1924) A. I. R. (A.) 227.
(9) 81 Ind. Cas. 25; 22 A. L. J. 561; 46 A. 478; (1924) A. I. R. (A.) 321.
(10) 74 Ind. Cas. 322; 21 A. L. J. 542; (1924) A. I. R. (A.) 52.

ternal evidence afforded by the other terms embodied therein though they might be separable from the rest.

The claim of the plaintiffs must in these circumstances fail and it is hereby dismissed with costs. The cross-objection is not pressed and is also dismissed with costs. The costs in either case will include fees in this Court on the higher scale.

Sulaiman, J.—It is notorious that before the year 1911 there were numerous cases on pre-emption, which were more or less irreconcilable. In that year a special Pre-emption Bench was, therefore, constituted with the professed object of laying down certain principles which should as far as possible be consistently followed. Ever since that year the principle of *stari decisis* has been rigorously attempted to be followed.

Now in these Provinces two kinds of custom of pre-emption generally prevail. The first is of a kind where it is the duty of every co-sharer before he sells his property to offer it to the other co-sharers in a certain prescribed order. The other kind of custom is that when a property has gone out of the hands of the co-parcenary body by a sale to a stranger certain classes of pre-emptors have a right to pre-empt the sale in a certain order of priority. Under the second kind there is no right *inter se*, that is to say, no right of pre-emption, when a sale takes place in favour of any of co-sharers, but there is a priority of claim when rival suits of pre-emption are instituted against a stranger transferee. That both these kinds of custom do exist in these Provinces cannot for a moment be disputed.

Instances of the second kind of custom are to be found in cases like *Sheobalak Singh* v. *Lachmidhar* (11), *Khatun Bibi* v. *Sayida Bibi* (5), *Narain Saran Singh* v. *Sidh Sarain Singh* (12) as well as in a number of other cases to some of which I shall refer later on.

It has been well established that the burden of proving the custom lies on the plaintiff. The plaintiff pre-emptor cannot succeed by merely proving that a custom of pre-emption exists in the village. He has to show that that particular custom exists which would entitle him to a decree against the defendant vendee. The Pre-emption Bench has always held that if the only evidence which the plaintiff can produce is ambiguous, that is to say, is capable of two interpretations, and if on one of such interpretations the suit cannot succeed, then the suit must fail, and it is not the duty of the Court to give it necessarily the other interpretation which would entitle the plaintiff to a decree: *vide* the cases of *Bechu Singh* v. *Lachmi Narain Singh* (13), *Jahangiri* v. *Amir Singh* (14), *Din Dayal* v. *Ramdhan* (15) and *Nageshar Prasad* v. *Ram Harakh Pande* (16).

In the present case the *wajib-ul-arzs* contains a clause which when literally translated runs as follows: "The claim to (or suit for) a right of pre-emption in case of transfer of property by sale and mortgage, except a gift, shall be first, to own brother and nephew and then a paternal uncle's son, a partner in the property, then co-sharers in the *thok* and then co-sharers in the village." ("*Dawa haqqi shufa dar surat intiqal haqiat ba zaria bai wa rehan sewai heba awwal bhai bhatija haqiqi phir bhai chachazad sharik haqiat phir hissadaran* thok *phir hissadaran gaon ko hoga.*") With the other portion of the clause I am not concerned at this stage.

It is clear that the clause is not like the clauses which are found in many *wajib-ul-araiz* and which say that in case a co-sharer wishes to transfer his property he should offer it first to one class of co-sharers and then to another class. Obviously in such latter cases, if no offer is made to the first class of co-sharers, the condition is broken, which gives a co-sharer of the first class a right of pre-

(11) 23 A. 427; A. W. N. (1901) 120.
(12) 5 A. L. J. 655; A. W. N. (1908) 251.
(13) 15 Ind. Cas. 54.
(14) 23 Ind. Cas. 245; 12 A. L. J. 19.
(15) 28 Ind. Cas. 306.
(16) 79 Ind. Cas. 417; 22 A. L. J. 342; 46 A. 370.

emption even if a sale takes place in favour of a co-sharer of the second class. In the present case the right comes in after the transfer has taken place. If the word "transfer" in the clause were given its wide meaning so as to include even a transfer to any of the classes of pre-emptors mentioned therein, the clause as it stands cannot in its entirety be operative. For instance, let us substitute the words "transfer to own brother" in place of the word "transfer," the clause would then read "in case of transfer to own brother of property by sale and mortgage except a gift, first own brother and nephew and then a paternal uncle's son, a partner in the property and then co-sharers in the *thok* and then co-sharers in the village shall claim right of pre-emption". Such a provision is of course absurd. Similarly if for the word "transfer", we substitute "transfer to any of the other classes of pre-emptors mentioned," part of the clause would be meaningless, as no right of pre-emption can exist in favour of persons of that class or an inferior class.

The learned Counsel for the respondents is accordingly forced to admit that in such cases either the whole or a portion of the clause must be omitted as being inapplicable. It follows that if we give the word "transfer" its general meaning so as to include transfers to persons mentioned in the various categories, then the whole clause as it stands may not be applicable. On the other hand, if no portion of this clause is to be omitted in any possible case, then the only meaning which can consistently be given to the word "transfer" would be a transfer to a person not coming within the categories mentioned.

No case has been brought to our notice which contains a clause similar to the one before us, and where it has been held that there is necessarily a right of preference *inter se*. The cases referred to by the Court below as well as the cases cited in argument on behalf of the respondents are all cases where the clause expressly provided that the vendor should offer or transfer his property first to one class of co-sharers and then to another class. In such cases if the transfer or the offer is not made to the first class of pre-emptors then the custom has not been complied with and the members of that class have a right to claim pre-emption even though the sale has been made to co-sharers in other categories. On the other hand there are at least three cases which support the view that a *wajib-ul-arz* of this kind is at least capable of an interpretation that the right was intended to be given only when a sale had taken place in favour of a person other than those coming within the categories mentioned therein. This would imply that at least one meaning of the *wajib-ul-arz* may be that when a transfer of property has taken place by sale or mortgage other than a gift then among the persons who will have the right to institute a suit would be first own brothers and nephews, then paternal uncle's sons, then co-sharers in the property, then co-sharers in the *thok* and lastly co-sharers in the village. The last mentioned co-sharers would not have been mentioned unless the transfer under contemplation was one in favour of a stanger.

This was the view clearly expressed in the case of *Mathura Singh* v. *Ramlal Singh* (6). Tudball, J., (who had been a member of the Pre-emption Bench from the very beginning of its constitution) joined in coming to the conclusion that a *wajib-ul-arz* of that kind was ambiguous and capbale of two interpretations and that, therefore, the plaintiff pre-emptor could not succeed. This case was referred to subsequently by Lindsay, J., and myself in the case of *Dhanraj Misir* v. *Rameshwar Misir* (8) which, though different on facts, is certainly a case where the distinction sought to be drawn by the Pre-emption Bench was very prominently brought out, and the earlier case of *Mathura Singh* v. *Ramlal Singh* (6) distinguished. I may note that the *wajib-ul-arz* in the case reported as *Mathura Singh* v. *Ramlal Singh* (6) was

very much similar to the one before us. We have sent for the record of that case and the words of the *wajib-ul-arz* were as follows:—"In the case of transfer of property the claim to (or suit for) pre-emption shall be first to heirs descended from a near common ancestor, then to co-sharers in the *patti*, and after them to co-sharers in the village". (*Bahalat intiqal haqiyat kisi hissadar ke, dawa shufa pahle warisan ekjaddi qaribi zan bad hissadaran patti pas az shurkayan mauza ko paunchhega*".)

In the case of *Ganpat Rai* v. *Jamna Prasad* (S. A. No. 78 of 1924, decided on the 31st of January 1924) the Pre-emption Bench (Lindsay, J., and myself) had before it the *wajib-ul-arz* which was almost identical in its terms with the one in the present case. The words of the *wajib-ul-arz* in the latter case were as follows; "The claim to (or suit for) a rignt of pre-emption in the case of transfer of property by sale and mortgage, except a gift, shall be, first, to own brother and nephew, a paternal uncle's son, a partner in the property, then, co-sharers in the *thok* and then co-sharers in the village.' "*Dawa haq shufa ka dar surat intiqal haqiyat bazaria bai wa rehan sewai heba ke awwal bhai bhatija heqiqi, aur phir bhai chachazad sharik haqiyat aur phir shurkayan patti zan bad hissedaran deh ko hoga*".

It is apparent that with the exception of two or three synonymous words all the words were exactly identical with the words in the *wajib-ul-arz* before us. That case also came from the same district, Mainpuri. It was held therein that the terms were ambiguous and capable of two interpretations, and that the plaintiffs' suit must, therefore, fail,

I find it impossible, therefore, to distinguish the present case from the case reported as *Mathura Singh* v. *Ramlal Singh* (6) and *Ganpat Rai* v. *Jamna Prasad* (S. A. No. 78 of 1924). It is also noteworthy that in all these three *wajib-ul-araiz* the word "*dawa*" is used which in ordinary parlance means a 'suit', and that word does not occur in any of the cases cited on behalf of the respondents.

Now that the Pre-emption Act has been passed and all subsequent cases would be governed by it, cases of the present kind have lost much of their importance. But as regards cases which are not yet governed by the new Act, I would consider it lamentable if this High Court is to accept two different interpretations of *wajib-ul-araiz* of exactly the same language and prepared at the same Settlement in the same district. And, therefore, even if I had entertained any doubt as to the correctness of the interpretation, which was adopted in the cases referred to by me, I would not have felt inclined to deviate from that interpretation. My conclusion is that the documentary evidence adduced by the plaintiffs in this case was capable of two interpretations according to one of which the plaintiffs' claim cannot be decreed. The evidence was, therefore, wholly insufficient to establish the claim against the defendants.

The suit also fails on another ground. After reciting the right of pre-emption, the same clause goes on to add "gift will be made in favour of an own brother and nephew or daughter's son or for a charitable purpose and not otherwise". This is a part of the same clause which records a right of pre-emption. It is intended to lay down that gift to persons other than those mentioned therein or for the purposes mentioned therein are altogether invalid. It is obvious that such a rule cannot be the result of the growth of a custom. It has been held in a number of cases [*vide Fazal Husain* v. *Muhammad Shariff* (17), *Saraj Bali Singh* v. *Mohammad Nasir* (18) and *Balwant Singh* v. *Hari Singh* (10) as well as the recent Full Bench case of *Randhir Singh* v. *Rajpal Misir* (9)], that if the clause of pre-emption contains

(17) 24 Ind. Cas. 464; 36 A. 471; 12 A. L. 800.

(18) 48 Ind. Cas. 220; 16 A. L. J. 879.

matters which cannot *possibly* be a record of custom, then the ordinary presumption which arises that the entry is one of custom, is negatived. Here we have a part of the clause which cannot possibly be the result of the growth of a custom. It follows, therefore, that there is internal evidence to show that the entry in paragraph 14 cannot be a record of custom. It is also noteworthy that the word "custom" itself is not mentioned in paragraph 14. The exact year when this *wajib-ul-arz* was prepared is not given in the copy, but it is noted therein that this is a record of the former Settlement. The entry, therefore, if it was a record of contract, cannot now be in force as that Settlement has come to an end.

In my opinion, therefore, on both these grounds the appeal should be allowed and the plaintiffs' suit dismissed.

The respondents have filed certain cross-objections, but they are not pressed. In the view which I have taken they also could not have been allowed.

By the Court.—The appeal is allowed and the claim of the plaintiffs-respondents dismissed with costs here and hitherto including in this Court fees on the higher scale. The cross objection is dismissed with costs including in this Court fees on the higher scale.

K. S. D. *Appeal allowed.*

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 410 OF 1922.
August 17, 1923.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Crump.

SANGAWA *kom* GURUBASAPPA —PLAINTIFF—APPELLANT

versus

HUCHANGOWDA *bin* HUCHANGOWDA GOWDAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17 (1) (b), (c), (2) (v)—Agreement to reconvey property—Registration, whether necessary—Limitation Act (IX of 1908), Sch. I, Arts. 91, 144—Suit to recover possession of property on allegation that certain transfer is inoperative—Limitation.

An agreement by a purchaser of immoveable property to reconvey the property to the vendor at any time that the latter requires, does not fall within the purview of clauses (*b*) and (*c*) of sub-section (1) of section 17 of the Registration Act, and is, in any case, covered by clause (*v*) of sub-section (2) of the section, and does not, therefore, require registration.

A suit to recover possession of immoveable property on the allegation that a deed of transfer executed in favour of the defendant was inoperative and a mere paper transaction is governed by Art. 144 and not by Art. 91 of Schedule I to the Limitation Act.

Petherpermal Chetty v. *Muniandi Servai*, 35 I. A. 98 at p. 104; 10 Bom. L. R. 599; 12 C. W. N. 562; 5 A. L. J. 290; 7 C. L. J. 528; 14 Bur. L. R. 108; 35 C. 551; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 266 (P. C.), *Narsagauda Savantganda* v. *Chawagauda Adganda Patil*, 47 Ind. Cas. 581; 42 B. 638; 20 Bom. L. R. 802 (F. B.), followed.

Second appeal against a decision of the First Class Subordinate Judge, A. P., at Bijapur, reversing a decree passed by the Joint Subordinate Judge at Bangalkot.

Mr. *Nilkant Atmaram*, for the Appellant.

Mr. *H. B. Gumaste*, for Respondent No. 1.

JUDGMENT.—This appeal arises out of a suit filed by the plaintiff to recover possession of the lands mentioned in the plaint on the ground that the sale-deed executed by her husband on the 13th December 1913 in favour of defendant No. 1 was merely a paper transaction and was not intended to be operative. The plaint referred to misrepresentation and fraud on the part of defendant No. 1, but no further particulars of the alleged fraud or misreprentation were given, and in substance the suit was based on the ground that the transaction was an inoperative and hollow transaction. The defendant No. 1 was the step-uncle of Gurubasappa, the husband of the minor plaintiff, and the suit is filed by the plaintiff's next friend, her father, Sangappa Basappa.

The defendant No. 1, who is the principal defendant, contended that it was a genuine and real sale by Gurubasappa to him, that it was passed for valuable consideration, and that he was rightfully in possession. He also contended

that the claim was time-barred under Arts. 91 and 95 of the Indian Limitation Act. The issues framed on those pleadings were these :—

1. Whether the conveyance, Exhibit 16, was intended to transfer ownership over the lands mentioned therein to defendant No. 1 as alleged by him ?

2. Whether he paid any and what consideration therefor ?

* * * * * *

4. Whether the suit is barred by Art. 91 of the Limitation Act ?

The learned Trial Judge was statisfied on the evidence that the conveyance was not intended to transfer ownership over the lands mentioned in Exhibit 16, and that in fact it was a hollow transaction. He also held that the consideration of Rs. 600 was not proved. He accordingly decreed the plaintiff's claim for possession and mesne profits.

The defendants appealed to the District Court, and the learned First Class Subordinate Judge, with appellate powers who heard the appeal, came to the conclusion that Exhibit 18, which is a *yadi* said to have been passed by defendant No. 1 after the execution of the sale-deed, was not admissible in evidence, as it was not registered. He also came to the conclusion that the evidence as to the payment of consideration was not "quite unreliable" and that the burden of proving the payment of consideration was wrongly thrown on the defendant. He ultimately came to the conclusion that the sale-deed was not proved to be hollow or to have been the result of any misrepresentation or fraud. He also held that under Art. 91 or 95 the claim of the plaintiff was barred. He accordingly allowed the appeal and dismissed the plaintiff's suit.

The plaintiff has appealed to this Court from the decree of the Appellate Court. The first point that has been urged in support of the appeal is that the lower Court was wrong in its view that Exhibit 18 was not admissible in evidence for want of registration. That document is in these terms :—

"To

Gurubasappa father Basangowda residing at Hireyarankeri Pavti (lit. receipt) to wit. The receipt passed by me Puchangowda father Huchangowda residing at Hireyarankeri is as follows :—I shall without any objection give up your land at any time that you may ask me to give up. Dated 25th December 1913."

It is signed by defendant No. 1 and attested by two witnesses. We do not think that this document could be held to be inadmissible for want of registration. It is at the most an agreement to reconvey when Gurubasappa would ask him to give up the property. In the Trial Court when the objection was taken the point as to registration was disallowed and the document was admitted in evidence on the footing of its being an agreement after the usual penalty for want of stamp was paid. We are not at all sure that the document in terms comes under section 17 (*b*) or (*c*), Indian Registration Act. It does not purport to do any of the things mentioned in that section, clause (*b*) or (*c*). But even if it did, it seems that it would clearly be saved under clause (*v*), sub-section (2) of section 17 of the Indian Registration Act.

As to the execution of this document, the Trial Court found that it was duly proved. That Court disbelieved the evidence of the witness Jaffar, one of the attesting witnesses, and believed the evidence of Basappa, as to the execution : and defendant No. 1 admitted his signature on it.

No objection seems to have been taken before the lower Appellate Court as to the genuineness of this document and in any case as there is no finding on that point, it is open to us under section 103 of the Civil Procedure Code to determine, if necessary, the question as to whether this document was executed by defendant No. 1.

We have heard Mr. Gumaste for the respondent No. 1 on this point, and we have heard nothing from him which would go to show that the finding of the Trial Court on this point is open to any objection. The Trial Court was perfectly right in its conclusion that the document was executed by defendant No. 1,

As the document is admissible in evidence and as the decision of the lower Appellate Court is based upon the view that it ought to be excluded from evidence, it seems to us that the findings of the lower Appellate Court cannot be accepted. It is difficult to say that the lower Appellate Court could have come to the conclusion at which it arrived, if it had been of the opinion that this document, Exhibit 18, was admissible in evidence. That document affords very strong proof of the case made by the plaintiff that the sale-deed of December 1913 was intended to be a mere paper transaction. Indeed the document does not even mention that Huchangowda will have no objection to give up the land at any time if he was called upon to give up the same on payment of any sum. But it is an unconditional undertaking on his part to give up the land when called upon to do so, which is consistent only with the view that at the time no consideration really passed.

The next point to be considered with reference to the main question of fact as to whether the transaction was a hollow transaction or not, is whether there was any consideration for it. On that point the Trial Court came to the conclusion that no consideration was proved to have been paid. Issue No. 2 on this point was not framed in a proper way. Undoubtedly the burden in the first instance lay upon the plaintiff. But on the evidence adduced by both the parties, the case made by defendant No. 1 as to how the consideration was made up had to be considered. According to the defendant's allegation the sum of Rs. 600 was paid in three parts, each consisting of Rs. 200. The learned Judge dealt with each item of consideration in detail, and came to the conclusion with reference to each that the story was not reliable, and that the allegation was not proved. In the document itself there is no such specification of the consideration.

The Appeal Court has dealt with the question of consideration in a halting manner. As to the item of Rs. 200 said to have been paid to Sangappa Kelur, the learned Judge has referred to Exhibit 68, which is the judgment of the *mamlatdar* in a *vahivati* suit With regard to the sum of Rs. 200 said to have been paid to Gurubasappa himself, the learned Judge has relied upon the evidence of Jaffer which was disbelieved in terms by the Trial Court, and that too because in his opinion the other two items are proved. As regards the third item of Rs. 200 said to have been paid to one Sanganbasappa Gardi, the lower Appellate Court simply refers to the fact that the account-books show a payment of Rs. 177, but does not deal with the further difficulty in the case that the payment evidenced there appears to have been made in the month of May, 1914, whereas according to defendant No. 1, the sum was paid on the day after the sale-deed of December 1913. The lower Appellate Court relies upon the evidence of Jaffer, which was entirely disbelieved by the learned Trial Judge who saw him in the witness box. In fact the learned Trial Judge referred to that part of the story as being clearly an after-thought on the part of defendant No. 1.

On a close examination of the judgment of the lower Appellate Court on this point it seems to us that the finding as to consideration cannot be accepted in second appeal. No doubt the question would still remain as to whether under the circumstances it is necessary to call for a fresh finding on the question from the lower Appellate Court, or we should deal with the case here. Having regard to all the circumstances and particularly to the fact that Huchangowda agreed to give up the lands at any time when he was called upon to do so, it seems to us to be unnecessary to remand the case for any fresh finding.

We have considered the case as stated in the judgement of the Trial Court and having regard to the reasons given by the lower Appellate Court on the question of consideration, it seems to us to be unnecessary to remand any issue to the lower Appellate Court on this point. Exhibit 18 puts quite a different colour upon the whole case, and after hearing the arguments urged on behalf of respondent No. 1, we are satisfied that as defendant No. 1 executed the *yadi*, and as that

yadi is held to be admissible in evidence he has really no just or honest answer to the plaintiff's present claim.

As regards the question of limitation it presents no difficulty. If this transfer was inoperative, and a mere paper transaction, it would not require to be set aside. It would be enough to refer on this point to the observations in *Petherpermal Chetty* v. *Muniandi Serrai* (1) and to the decision of this Court in *Narsagauda Sarantgauda* v. *Chawagauda Adgauda Patil* (2). The Article that would apply to a case of this kind where the document is found to be inoperative is Art. 144 and then the claim would be in time.

We reverse the decree of the lower Appellate Court and restore that of the Trial Court with costs here and in the lower Appellate Court on the respondents.

Z. K. *Appeal accepted.*

(1) 35 I. A. 98 at p. 104; 10 Bom. L. R. 590; 12 C. W. N. 562; 5 A. L. J. 290; 7 C. L. J. 528; 11 Bur. L. R. 108; 35 C. 551; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 266 (P. C.).

(2) 47 Ind. Cas. 581; 42 B. 638; 20 Bom. L. R. 802 (F. B.).

1925 Jan. 16

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 655 OF 1921.
February 15, 1924.

Present:—Mr. Justice Wallace.

P. L. A. R. M. S. VENKATACHALAM CHETTIAR BY AGENT KADIRESAN CHETTIAR (DIED) AND ANOTHER—PLAINTIFFS AND HIS LEGAL REPRESENTATIVES—APPELLANTS

versus

PONNUSAMI AYYANGAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 91—Purchase of goods through commission agent—Consignment by Railway, uninsured—Loss in transit—Agent's liability—Interests Act (XXXII of 1839), whether exhaustive—Interest, award of—Discretion of Court.

A purchase of goods by a commission agent, implies as between the principal and agent, only a contract of agency and not one of purchase and sale, though it will attract to the commission agent certain reliefs ordinarily open to a vendor *viz.*, the right of stoppage in transit. The property in the goods passes to the principal immediately on purchase by the agent irrespective of the manner of delivery. To such a case section 91 of the Contract Act does not apply. [p. 538, col. 1.]

The measure of reasonableness as to the method of delivery of goods as between agent and principal has to be decided on what the parties themselves in their usual course of business and trade custom consider reasonable. It is not the same as that laid down in section 91, Contract Act, as between vendor and purchaser. [p. 538, cols. 1 & 2.]

Ireland v. *Livingston*, (1872) 5 H. L. 395 at p. 408; 41 L. J. Q. B. 201; 27 L. T. 79, *Cassaboglou* v. *Gibb*, (1883) 11 Q. B. D. 797; 52 L. J. Q. B. 538; 48 L. T. 850; 32 W. R. 138, considered.

Where a comission agent for a buyer was usually sending goods to him uninsured without objection and certain goods so consigned were lost in the way:

Held, that the property in the goods on purchase passed to the buyer, and non-insurance being the implied customary method, the agent by sending goods uninsured was not guilty of any negligence and was not liable to bear the loss. [p. 538, col. 2.]

The Interests Act is not exhaustive of all cases in which interest is allowable. The award of interest is more or less a matter of discretion for the Court and not a matter of law. [*ibid.*]

Muhammad Abdul Gaffur Rowther v. *Hamida Beevi Ammal*, 52 Ind. Cas. 505; 42 M. 661; 25 M. L. T. 212; 36 M. L. J. 456; (1919) M. W. N. 484, relied on.

Second appeal against the decree of the Court of the Subordinate Judge, Kumbakonam, in A. S. No. 98 of 1919, preferred against the decree of the Court of the District Munsif, Kumbakonam, in O. S. No. 613 of 1917.

Messrs. *A. Krishnaswami Iyer* and *K. V. Ramachandra Iyer*, for the Appellants.

Mr. *S. Duraisami Iyer*, for the Respondents.

JUDGMENT.—The original suit was to recover a sum of Rs. 1,691, principal and interest due on account of dealings by the defendants with the plaintiff in silk goods. It is not denied that the plaintiff was a commission agent in Bombay for the defendants at Kumbakonam, for the purchase of silk thread. In his capacity as such, the plaintiff had purchased two bundles of silk thread for the defendants and despatched them by rail to the defendants. One of them lost on the way. The plaintiff in his present suit for the balance due in the matter of his agency account included the price of the lost bundle. The defendants repudiate liability for this and claim that it was lost

through the plaintiff's negligence in not insuring the bundle as required by Railway Rules to ensure safe transit of all parcels of such a nature whose value is over Rs. 100. The defendants also call in aid section 91 of the Indian Contract Act.

The District Munsif held that section 91 did not apply to a case of a commission agent and that no negligence had been proved. The lower Appellate Court held that section 91 applied and that the plaintiff had not followed its provisions and was guilty of negligence and the loss must fall on him.

The chief point argued in appeal by the plaintiff was whether section 91 applied to the case of a commission agent. Section 91 comes under Chapter VII, which is headed "Sale of Goods" and under the sub-heading "Delivery", and no doubt it applies to the case of an ordinary vendor and vendee. The question then is whether a commission agent and his principal stand on the same footing of vendor and vendee when goods have been purchased in the ordinary course of the agency by the commission agent for the principal and despatched to him. Defendants rely on the *dictum* of Lord Blackburn in *Ireland* v. *Livingston* (1) that "it is quite true that the agent who in thus executing an order, ships goods to his principal, is in contemplation of law a vendor to him..... The legal effect of the transaction between the commission merchant and the consignee, who has given him to the order, is a contract of sale passing the property from one to the other and consequently the commission merchant is the vendor and has the right of one as to stoppage *in transitu*". But the learned Judge goes on to point out that the contract between principal and agent is in no way superseded by this *quasi*-sale but that "this superseded sale is not in any way inconsistent with the contract of agency existing between the parties".

This dictum has been explained in a later case by Brett, M. R., and Fry, L. J., in *Cassaboglou* v. *Gibb* (2). It is clear from the notes of argument in that case that the question was clearly raised whether, if any foreign agent has purchased goods for his principal and shipped them, the position of the agent to his principal is not that of vendor and purchaser. The other side there pointed out that there was no contract such as would be between a vendor and a purchaser, that the plaintiff should have the goods, whether or not they were procurable and that it had never been decided that damages for any breach of duty by an agent was to be assessed on the same principle as they are in the case of a vendor and purchaser. The clear question which the Master of Rolls put to himself there was, was a breach of duty by an agent as agent not a breach of contract as vendor and, if there was a breach what damages has the plaintiff suffered thereby? And the idea that the plaintiff was entitled to get damages as though his agent was a vendor bound to supply him with the goods ordered by him was negatived. It was pointed out that Lord Blackburn "has not said that as long as the contract between principal and agent is executory, the principal can sue the agent and make him pay as though the contract was that of vendor and purchaser," and the learned Judge goes on to say: "It is obvious to my mind that the contract of principal and agent is never turned into a contract of vendor and purchaser, for the purpose of settling the damages for the breach of duty of the agent." No doubt it can be argued that in that case, since the agents did not ship the goods ordered but inferior ones, they can never have been in the position, as regards their consignee, of a vendor; while in this case the plaintiff did send the actual goods ordered.

I can find nothing in these judgments—tending to show that the legal effect of the transaction of a purchase of sepecified goods by a commission agent has the effect of turning his contract as between principal and agent wholly into

(1) (1872) 5 H. L. 395 at p. 408; 41 L. J. Q. B. 201; 27 L. T. 79.

(2) (1883) 11 Q. B. D. 797; 52 L. J. Q. B. 538; 48 L. T. 850; 32 W. R. 138.

one as between vendor and purchaser. They imply only that the agency contract is in some respects analogous to that of a contract of purchase and sale; and not identical with it, analogous in the sense that it will attract to the commission agent certain reliefs ordinarily open to a vendor, for example the right of a stoppage *in transitu*. On the other hand property in goods specified would pass to the principal immediately on purchase by the agent. The passing of the property in the goods would not depend on the manner of the delivery.

Let us take a case where the principal has definitely instructed his agent to purchase and forward specified goods by railway without the insurance insisted on by the railway as the price of its responsibility for the carriage, I do not imagine it would be reasonably contended that section 91 would nevertheless apply, on the principle that the agency contract was, on consignment by the agent, wholly converted into a contract as between vendor and purchaser. Clearly the agency contract and its terms are throughout the dominating feature of the transaction and damages for loss are to be calculated on the footing of that, and not as between vendor and purchaser. I am, therefore, clear that section 91, Indian Contract Act, does not in terms apply to the case. Hence if plaintiff is liable for the loss it must be on proof of negligence or proof of breach of duty as agent.

It is then argued that even if section 91 does not apply in terms, the principle of it applies, that is, that the plaintiff as agent was bound to take reasonable care in the despatch of the goods, and that reasonable care is what has been statedly set out in section 91, that the plaintiff having neglected to despatch the goods in such manner that his principal could hold the carrier responsible for safe delivery, is guilty of the negligence involved. Now I am clear that it cannot be laid down in all cases that the measure of reasonableness as between agent and principal is what is laid in section 91 as the proper method of delivery as between vendor and purchaser. It has to be decided on what the parties themselves in their usual course of conduct and trade custom considered reasonable. It is in evidence here that not only before the loss but even after it, the defendants have sent similar orders for silk thread valued at over Rs. 100 and have received them, sent uninsured, in the same manner from the plaintiff. The non-insurance was clearly acquiesced in by the principal prior to this loss and after it, and the plaintiff even after this loss has not received any instructions that such goods should be sent insured. I conclude the non-insurance was the implied customary method. I see no reason, therefore, to hold that the plaintiff is guilty of negligence in sending them in the manner, implicitly, if not explicitly, approved of by his principal, who was evidently prepared to take the risk of loss. He has implicitly told the plaintiff that he does not want the goods to be sent insured and he cannot, while refusing thus to incur the cost of insurance, put the whole risk of the loss on the plaintiff and charge him with negligence in following his own implicit instructions.

I must, therefore, hold that the plaintiff is entitled to the value of the lost silk bundle and that the lower Appellate Court's decision on this issue was wrong. I, therefore, reverse the decree of the lower Appellate Court and restore that of the District Munsif on this point. Plaintiff will get his costs throughout.

There is a memo. of cross objections filed by the defendants that the plaintiff is not entitled to the interest decreed by the lower Courts, the contention being that he is not entitled to any interest at all. It is urged that no custom to charge interest on the agency account is alleged or proved, and that no demand for interest was made. The charging of interest is not exculded by the Interests Act which is not exhaustive of all cases in which interest is allowable—See *Muhammad Abdul Gaffur Rowther* v. *Hamida Beevi Ammal* (3), where the matter is discussed at length. It follows that the award of interest is more or less a matter of discretion for the Court and not a matter of law. Both the lower Courts have on the evi-

(3) 52 Ind. Cas. 595; 42 M. 661; 25 M. L. T. 242; 36 M. L. J. 456; (1919) M. W. N. 484.

dence come to the conclusion that there was a custom or rule of trade by which the plaintiff should get interest; and I am not prepared to find that that conclusion is unreasonable.

I, therefore, dismiss the memorandum of cross-objections with costs.

V. N. V. *Appeal allowed; Cross-objections dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 1138 OF 1920.
September 26, 1921.
Present:—Mr. Raymond, A. J. C.
JAINARAIN BABULAL—PLAINTIFFS
versus
NATHOOMAL MANOHARLAL—DEFENDANTS.

Civil Procedure Code (Act V of 1908), s. 10—Stay of suit—"Matter in issue," meaning of—Appeal, whether continuation of suit.

For the purpose of section 10 of the Civil Procedure Code, an appeal is a continuation of a suit. [p. 540, col. 1.]

In order to attract the operation of section 10, Civil Procedure Code, it is necessary that every matter in dispute should be directly and substantially in issue in the two suits. The expression "matter in issue" in the section has reference to the entire subject-matter in controversy between the parties and is not equivalent to "any of the questions in issue." [p. 540, col. 2.]

Kirparam v. *Detaram Munshiram*, Civil Revision Application No. 62 of 1920, *Bepin Behary Mozumdar* v. *Jogendra Chandra Ghosh*, 36 Ind. Cas. 641; 24 C. L. J. 514, *Sital Singh* v. *Sitla Bakhsh Singh*, 50 Ind. Cas. 212; 6 O. L. J. 96, *Kesho Prasad Singh* v. *Shiva Saran Lal*, 51 Ind. Cas. 36; (1919) Pat. 284; 4 P. L. J. 557, followed.

Wahid Ali v. *Nusrat Ali*, 58 Ind. Cas. 629; 23 O. C. 214; 7 O. L. J. 520; 2 U. P. L. R. (O.) 166, not followed.

Application by the defendants under section 10, Civil Procedure Code.

Mr. *Rupchand Bilaram*, for the Plaintiffs.

Mr. *Dipchand Chandumal*, for the Defendants.

JUDGMENT.—This is an application under section 10, Civil Procedure Code, for the stay of Suit No. 1138 of 1920 pending in this Court on the ground of a prior suit filed in the Court of the First Class Sub Judge, Delhi, which is between the same parties and in which the matter in issue is directly and substantially in issue in the suit filed in this Court.

The facts of the case are similar to those set out by me in my order in *Jai Narain Babu Lal* v. *Naraindas Janimal* (1) except that in the present case Jai Narain Babulal instead of referring the disputes between him and Nathoomal Manoharlal to arbitration, has filed a suit against the latter for the recovery of damages for failing to take delivery of certain white Mulls which they had contracted to purchase. The suit in this Court was filed on the 26th October 1920 Now on the 14th May 1920 the firm of Nathoomal Manohar Lal filed a suit in the Court of the Sub-Judge, Delhi, asking for a declaration that there was no contract between the parties, that in any case the contract was void and unenforceable and that an injunction be issued against the defendants restraining them from referring the disputes to arbitration. (It may here be mentioned that the written contract beteeen the parties contain the usual reference clause to arbitration and that Jainarain Babulal had expressed their intention of referring the disputes to arbitration). This suit was dismissed on a preliminary point on the 23rd October 1920 and an appeal was filed on the 19th January 1921 which has been admitted to regular hearing in the High Court, Lahore, and is at present pending. A written statement has been filed to the suit in this Court though no issues have yet been framed. Two main points which are identical in both the suits are (1) that there was no contract between the parties and (2) that in any event the contract is void by reason of fraud and mis-representation. The other issues in the two suits would be divergent. In the suit in this Court apart from the issue as to jurisdiction, the Court would have to try the question as to the *quantum* of damages and whether the real sale was justified and none of these points arise for de-

(1) 66 Ind. Cas. 796; 16 S. L. R. 79; (1922) A. I. R. (S.) 6.

cision in the Delhi suit. Further Mr. Rupchand has contended that in the Delhi suit the main relief sought was for an injunction to restrain Jainarain Babulal from proceeding to arbitration and that it is necessary before a suit is directed to be stayed under section 10, Civil Procedure Code, that not only some but all the matters in issue are identical in the two suits. Two preliminary observations may be made (1) that though the Delhi suit has been disposed of yet an appeal has been filed against the judgment of the lower Court and has been admitted, and an appeal is reckoned as a continuation of the suit and (2) section 10 has now been made applicable though the relief claimed in the subsequent suit is not the same as that in the first suit. Now the object of section 10 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. As said in the case of *Balkishan* v. *Kishan Lal* (2) "the policy of the law is to confine the plaintiff to one litigation, thus obviating the possibility of contradictory verdicts by two or more Courts." Section 10 lays down that "no Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties". Must the words "the matter in issue" be taken as comprising all the points in issue between the parties? Various judgments reported in the Volumes of Indian Cases have been cited by the respective Pleaders.

Mr. Dipchand argued that the words "the matter in issue" as used in section 10 means *any* of the matters in issue, and it is not necessary to justify the application of the section that *all* the matters in issue should be identical. It is remarkable that no decided case pertinent to the point is to be found in the Indian Law Reports, but there is a judgment of an eminent Judge, Sir Austosh Mukerjee reported in 36 Indian Cases 641 [*Bepin Behary Mozumdar* v. *Jogendra Chandra Ghosh* (3)] where it was held that the expression "the matter in issue" has reference to the entire subject in controversy between the parties and that if it was the intention of the framers of the section to hold the expression as equivalent to any of the questions in issue, as Mr. Dipchand now contends, appropriate words might have been used to bring out such sense. This view of the words "matter in issue" has been adopted in *Sital Singh* v. *Sitla Bakhsh Singh* (4) and in *Kesho Prasad Singh* v. *Shiva Saran Lal* (5) where it was held that "in order to attract the operation of section 10 it was necessary that every matter in dispute should be directly and substantially in issue in the two suits." Lastly there is a judgment of the Bench of this Court which is binding on me; Civil Revision Appeal No. 62 of 1920 [*Kirparam* v. *Detaram Munshiram*] where it was held that section 10 did not apply "as the *whole* matters in issue in the Karachi suit were not directly and substantially in issue in the Sialkote suit." The only case on which Mr. Dipchand has relied as justifying his interpretation of the words "the matter in issue" is *Wahid Ali* v. *Nusrat Ali* (6) where it was held that there should be in both suits or in the suit and appeal some matter which is directly and substantially in issue in both cases. This is the judgment of a Single Judge and at any rate I am bound by the judgment of our High Court.

The result is that I must reject the application for stay with costs.

This order governs No. 1277 of 1920.

P. B. A. *Application rejected.*

(2) 11 A. 148; A. W. N. (1889) 42; 13 Ind. Jur. 309; 6 Ind. Dec. (N. S.) 523

(3) 36 Ind. Cas. 641; 24 C. L. J. 514.

(4) 50 Ind. Cas. 212; 6 O. L. J. 96.

(5) 51 Ind. Cas. 36; (1919) Pat. 284; 4 P. L. J. 557.

(6) 58 Ind. Cas. 629; 23 O. C. 214; 7 O. L. J. 520; 2 U. P. L. R. (O.) 166.

MAHARAJ BAHADUR *v.* NAWALKISHORE.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 363 OF 1923.

July 30, 1924.

Present:—Mr. Baker, J. C.

Baboo MAHARAJ BAHADUR—PLAINTIFF—APPELLANT

versus

Baboo NAWALKISHORE—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 66—Execution sale—Decree-holder instructing third person to bid for him after obtaining permission—Purchase by third person in his own name—Suit for possession by decree-holder, whether barred.

If a person purchases property in his own name disregarding the instructions of the decree-holder to bid at the sale for him after obtaining permission of the Court, the purchase is *benami* for the decree-holder whose suit for possession of the property from the certified purchaser is barred under section 66 of the Civil Procedure Code.

Case-law reviewed.

Appeal against a decree of the District Judge, Saugor, dated the 3rd July 1923, in Civil Appeal No. 32 of 1923.

Dr. *H. S. Gour*, for the Appellant.

Sir *B. K. Bose* and Mr. *V. Bose*, for the Respondent.

JUDGMENT.—The facts of this appeal are extremely simple and only one question of law arises.

The plaintiff and the defendant are related, their wives being sisters.

The plaintiff lives at Lucknow and the defendant at Saugor. The plaintiff's father obtained a decree against a debtor at Saugor. In execution of that decree the judgment-debtor's house was attached and sold. The plaintiff wrote to the defendant at Saugor to obtain the permission of the Court to allow the decree-holder to bid and to purchase the house at the auction in the decree-holder's name. The defendant did not obtain the permission and purchased the house in his own name. For four years he admitted the plaintiff's title and then set up an adverse title in himself. The plaintiff sued for possession, but his suit was dismissed on the ground that it was barred by section 66, Civil Procedure Code, and on appeal the decree was confirmed by the District Judge, Saugor. Plaintiff makes this second appeal.

The learned Counsel for appellant has quoted a very large number of rulings of all the High Courts and the Privy Council to show that the present suit is not one falling under section 66, which is meant solely to check *benami* transactions and does not apply where the purchase is made, not *benami* for plaintiff, but for the benefit of plaintiff.

In order to appreciate this distinction it will be necessary to deal with these rulings in detail.

Section 66, Civil Procedure Code, is to the following effect.

"(1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims."

The second part of the section does not apply. This is not a suit to obtain a declaration that the name of the purchaser was inserted in the certificate fraudulently or without the consent of the real purchaser. It is found by the Courts below that there was no fraud at the date of the purchase and for some years after, and the plaintiff was fully aware of what had taken place and raised no objection till the defendant denied his title, and, therefore, the plaintiff's consent must be presumed.

Admittedly the plaintiff asked the defendant to buy the property in the plaintiff's name, it is true, but on the plaintiff's allegations it is clear that the purchase was made on his behalf.

Prima facie, therefore, section 66 applies. The learned Counsel for the appellant relies on the following cases :—

Bodh Singh Doodhooria v. *Guneshchunder Sen* (1), *Patrachariar* v. *Ramaswami Chettiar* (2), *Aghore Nath Chuckerbutty* v. *Ram Churn Chuckerbutty* (3), *Lokhee*

(1) 19 W. R. 356 at p. 358; 12 B. L. R. 317; 3 Sar. P. C. J. 253 (P. C.).

(2) 49 Ind. Cas. 734; 9 L. W. 276.

(3) 23 C. 805 at p. 813; 12 Ind. Dec. (N. S.) 535.

Narain Roy v. *Kallypuddo Bandopadhya* (4), *Ganga Sahai* v. *Kesri* (5), *Suraj Narain* v. *Ratan Lal* (6), *Ramathai Vadivelu Mudaliar* v. *Peria Mamicka Mudaliar* (7), *Amrutam Venkatappa* v. *Vavilala Jalayya* (8), *Sankunni Nayar* v. *Narayanan Nambudri* (9) and *Kumbalinga Pillai* v. *Ariaputra Padiachi* (10).

The respondent relies on *Ganga Baksh* v. *Rudra Singh* (11), *Rama Kurup* v. *Sridevi* (12) and *Hanuman Persad Thakur* v. *Jadunandan Thakur* (13). It may at once say that after reading all these cases the only one that gives rise to any difficulty is *Patrachariar* v. *Ramaswami Chettiar* (2) and I will deal with that last.

The first case quoted, *Bodh Singh Doodhooria* v. *Guneshchunder Sen* (1), lays down that the provisions of section 260 of Act VIII of 1859 (which correspond to section 66 of the present Code) were designed to check the practice of making *benami* purchase at execution sales and cannot be taken to affect the rights of members of a joint Hindu family, who, by the operation of law, are entitled to treat as part of their common property an acquisition, howsoever made, by a member in his sole name, if made by the use of the family funds.

This has no application to the facts of the present case.

(4) 23 W. R. 358.

(5) 30 Ind. Cas. 265; 37 A. 545; 13 A. L. J. 999; 29 M. L. J. 329; 18 M. L. T. 203; 19 C. W. N. 1175; 22 C. L. J. 508; (1915) M. W. N. 713; 2 L. W. 837; 17 Bom. L. R. 998; 42 I. A. 177 (P. C.).

(6) 40 Ind. Cas. 988; 40 A 159 at p. 170; 21 C. W. N. 1065; 20 O. C. 211; 2 P. L. W. 160; 33 M. L. J. 180; 15 A. L. J. 684; 19 Bom. L. R. 737; 22 M. L. T. 121; 26 C. L. J. 267; 6 L. W. 509; (1917) M. W. N. 477; 4 O. L. J. 762; 44 I. A. 201 (P. C.).

(7) 56 Ind. Cas. 395; 43 M. 643; 24 C. W. N. 699; 18 A. L. J. 584; 28 M. L. T. 13; 39 M. L. J. 11; 12 L. W. 1; (1920) M. W. N. 389; 2 U. P. L. R. (P. C.) 90; 47 I. A. 108 (P. C.).

(8) 51 Ind. Cas. 111; 42 M. 615; 9 L. W. 598; 26 M. L. T. 46; (1919) M. W. N. 355; 37 M. L. J. 98 (F. B.).

(9) 17 M. 282; 4 M. L. J. 64; 6 Ind. Dec. (N. S.) 195.

(10) 18 M. 436; 5 M. L. J. 200; 6 Ind. Dec. (N. S.) 653.

(11) 22 A. 434; A. W. N. (1900) 152; 9 Ind. Dec. (N. S.) 1327.

(12) 16 M. 290; 2 M. L. J. 173; 5 Ind. Dec. (N. S.) 909.

(13) 29 Ind. Cas. 787; 43 C. 20; 20 C. W. N. 147.

Aghore Nath Chuckerbutty v. *Ram Churn Chuckerbutty* (3) has no application. The facts were that at a sale in execution of a decree against the plaintiffs, the Pleader who had acted for the plaintiffs purchased their property with his own money, but in the name of his clerk and, for a very inadequate sum.

The remedy that was asked for was not against the certified purchaser, which at once distinguishes it from the present case and the suit was not upon the ground that the purchase was made by the Pleader "on behalf" of the plaintiffs.

Lokhee Narain Roy v. *Kallypuddo Bandopadhya* (4) was a suit by the certified purchaser against the real owner who was in possession.

Section 66, Civil Procedure Code, deals only with a suit against the crertified purchaser, like the present. *Ganga Sahai* v. *Kesri* (5) lays down that section 317 of the Civil Procedure Code, 1882, is designed to create some check on the practice of making so-called *benami* purchases at execution sales for the benefit of judgment-debtors and in no way affects the title of persons otherwise beneficially interested in the purchase. That was a case of joint decree-holders, one of whom purchased the property at the sale. This defferentiates it from the present case.

Suraj Narain v *Ratan Lal* (6) does not deal with the point at all, except for a few lines, holding that section 317 of Code of 1882 applies to certain property purchased at auction. No details are given, and the rest of the judgment deals with the Hindu Law of the joint family.

Ramathai Vadivelu Mudaliar v. *Peria Manika Mudaliar* (7) approving *Amrutam Venkatappa* v. *Vavilala Jalayya* (8) is a case in which fresh agreements were made to convey subsequent to the purchase, and I may remark that on page 649* their Lordships seemed disposed to hold that if the agreement entered into before the auction stood alone, the suit would be barred by section 66, Civil Procedure Code. They say: "The object of section 66 was to put an end to purchases by one person

*Page of 43 M.—[*Ed.*]

in the name of another, and the distinction between a purchase on behalf of another, and a purchase coupled with an undertaking to convey to another at the price of purchase, is somewhat narrow." I draw special attention to these words because in some of the cases referred to above the object of the section has been stated to be the prevention of *benami* purchases on behalf of the judgment-debtors, and it might be urged that *benami* purchases on behalf of the decree-holder should be looked on less unfavourably. But their Lordhsips of the Privy Council have in this very recent case in unequivocal language laid down that the section is meant to put an end to purchases by one person in the name of another, whoever he may be. This case was expressly decided on the reasons laid down in *Amrutam Venkatappa* v. *Vavillala Jalayya* (8) that an agreement subsequent to a purchase is not affected by the section and this differentiates it from the present case.

Sankunni Nayar v. *Narayanan Nambudri* (9) is a case of a purchase by the manager of an infant and is based on the fact that he bought the land as such.

Kumbalinga Pillai v. *Ariaputra Padiachi* (10) is also a case of an agreement by the certified purchase to execute a conveyance to the plaintiff.

It will thus appear that all the decisions quoted by the learned Counsel for the appellant are distinguishable from the present case, and I now proceed to consider the case of *Patrachariar* v. *Ramaswami Chettiar* (2) which at first sight seems to support his contentions.

I may briefly refer to a local case quoted by the appellant's Counsel, *Abdulla Khan* v. *Jalam Singh* (14), which lay down that section 66, Civil Procedure Code, does not make *benami* transactions illegal. That is not the point in the present case. The case on which the appellant chiefly relies is *Patrachariar* v. *Ramaswami Chettiar* (2). It lays down that section 66 of the Civil Procedure Code, 1908, is not bar to a suit brought by the principal against the agent for the recovery of properties purchased by the agent in his own name but with the principal's money and for the principal's benefit in a Court auction, though without the knowledge of the principal.

If the plaintiff does not seek relief on the ground that the certified purchaser is a namelender, but relies on a certain state of facts as establishing certain other kinds of legal relations between himself and the certified purchaser, and entitling him to the property purchased, he can rely on such facts and circumstances notwithstanding section 66 of the Civil Procedure Code.

It is contended on behalf of the appellant that the facts of this case are exactly similar to those of the present case.

The facts in that case were that the defendant was the paid agent of the plaintiff, that the plaintiff obtained a decree against the judgment-debtor to whom the plaint house belonged and that in execution of that decree the plaint house was sold and purchased by the first defendant with his master's money in his hands and for the benefit of his master, the plaintiff, though without the knowledge of his master.

It will appear, therefore, that the plaintiff did not instruct the defendant to buy the house for him and that it was purchased without his knowledge. Sadasiva Aiyar, J., appeared to have felt some doubt on the point, for he admitted that if section 66 had to be construed in an absolutely literal manner there would be very great force in the contention of the appellant that it barred the suit, because on such construction the plaintiff could not succeed in this suit except on the ground that the purchase by the first defendant was made by him on behalf of the plaintiff as the plaintiff's agent. The Judges, however, considered that the point was covered by the authority of the Privy Council in *Bodh Singh Doodhooria* v. *Guneshchander Sen* (1) and *Ganga Sahai* v. *Kesri* (5) and that the same view had been taken by the Madras High Court in *Sankunni Nayar* v. *Narayanan Nambudri* (9) and *Kumbalinga Pillai* v. *Ariaputra Padiachi* (10) the

(14) 68 Ind. Cas 559; (1923) A. I. R. (N.) 11.

facts of which last case they considered to be in principle on all fours with the present case.

I have already discussed all these cases in the preceding portion of this judgment. I have already pointed out that *Bodh Singh Doodhooria* v. *Gunesh-chunder Sen* (1) is a case of the rights of members of a joint family to share in an acquisition made by one member, that *Ganga Sahai* v. *Kesri* (5) is a case of joint decree-holders, that *Sankunni Nayar* v. *Narayanan Nambudri* (9) was a case of the manager of an infant's estate, and that *Kumbalinga Pillai* v. *Ariaputra Padiachi* (10) was a case of an agreement by the certified purchaser to execute a conveyance to the plaintiff. In each of these cases, therefore, there was some legal relation between the plaintiff and the certified purchaser other that of a name-lender, and though I find it difficult to see the similarity between the facts in *Patrachariar* v. *Ramaswami Chettiar* (2) and those of *Kumbalinga Pillai* v. *Ariaputra Padiachi* (10). I can appreciate that the fact of the defendant being plaintiff's agent and of the plaintiff having no knowledge of his purchase at the Court sale may furnish reasons for taking the case out of the operation of section 66, Civil Procedure Code.

In the present case, however, the defendant was not the plaintiff's agent execept in respect of this particular transaction, nor was the purchase without his knowledge. On the contrary, it was at the plaintiff's request that defendant bid at the auction, though he did not carry out the plaintiff's instructions as regards the obtaining of permission for the decree-holder to bid, and purchased the property in his own name.

Paragaph 10 of the plaint states that the plaintiff's father and plaintiff acquired the ownership of the house by virtue of the purchase made by the defendant while executing the decree as their agent. The plaint further shows that the defendant was instructed to purchase the house in the name of his father.

It appears to me that every person who at the request of another purchases in his own name for the other's benefit becomes his agent for that particular transaction. If that takes the case out of the section, the section would be a nullity.

The plaintiff was the decree-holder and, therefore, could not purchase without permission. A decree-holder who has not got permission is, in my opinion, in precisely the same position as a decree-holder to whom permission has been refused, as in the case quoted by the lower Appellate Court, *Ganga Baksh* v. *Rudar Singh* (11).

The respondent further relies on *Hanuman Persad Thakur* v. *Jadu Nandan Tahkur* (13).

In the persent case it has been found that the defendant made the purchase on behalf of the decree-holder. It appears that the plaintiff gave the defendants instructions to bid at the sale, after obtaining permission for the plaintiff to bid, it is true. None the less, had the defendant not had these instructions, he would possibly not have bid. It is clear that he purchased on behalf of the decree-holder under his instructions which is exactly what section 66 is intended to prevent. All the cases quoted to the contrary, with the exception of *Patrachariar* v. *Ramaswrmi Chettiar* (2) are clearly distinguishable, and that case may also be distinguished on the ground that the purchase was made without the knowledge of the decree-holder and hence could not be considered a *benami* transaction, while in the present case the purchase was made with the decree holder's knowledge and under his instructions, though the instructions were not completely carried out.

In these circumstances I am of opinion that the view of the lower Appellate Court is correct. No question of equity arises, as, if the plaintiff succeeds, he will have successfully evaded the provisions of O. XXI, r. 72, Civil Procedure Code, to say nothing of section 66.

The appeal is consequently dismissed with costs.

G. R. D. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 257 OF 1924.
May 14, 1924.
Present:—Mr. Wazir Hasan, J. C.
RAM AUTAR AND ANOTHER—PRISONERS—APPELLANTS
versus
EMPEROR—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 421, 430—Jail appeal, rejection of—Appeal through Counsel, whether maintainable.

Where an appeal has once been presented by a prisoner in Jail through an officer in charge of the Jail and dismissed, it is no longer open to him to file another appeal through Counsel. The order on the first appeal is final and cannot be re-opened.

Gaya Din v. *Emperor*, 65 Ind. Cas. 612; 9 O. L. 1; 24 O. C. 304; 23 Cr. L. J. 148; (1923) A. I. R. (O.) 56 and *Khiali* v. *Emperor*, 68 Ind. Cas. 41; 20 A. L. J. 739; 23 Cr. L. J. 505; 4 U. P. L. R. (A.) 163; (1922) A. I. R. (A.) 480; 44 A. 759, followed.

Hulai v. *Emperor*, 36 Ind. Cas. 133; 3 O. L. J. 326; 17 Cr. L. J. 453, not followed.

Appeal against an order of the Sessions Judge, Fyzabad Division at Sultanpur, dated the 14th March 1924.

Mr. *Hyder Husain*, for the Appellants.

ORDER.—This appeal was presented to me in Court on the 13th May 1924 by Mr. Hyder Husain, Barrister-at-Law on behalf of the appellants, Ram Autar and Rahmat, who are prisoners in Jail. Previous to this presentation, a petition of appeal was sent on their behalf by the officer in charge of the Jail to this Court and it was rejected summarily by one of the Judges of this Court on the 5th April 1924.

While presenting the present petition of appeal Mr. Hyder Husain contended that its entertainment was not barred by order of the 5th April already mentioned. I am unable to accept this contention. The latest ruling of this Court on the subject was given by Mr. Daniels, Permanent Judicial Commissioner of Oudh, in July 1921 and is reported as *Gaya Din* v. *Emperor* (1). Having regard to the practice which has prevailed in this Court for some years past, I am not prepared to disagree with the ruling just now mentined. I may respectfully add that the view taken by Mr. Daniels is correct in law.

The procedure under which the learned Judge of this Court disposed of the petition of appeal received from Jail is expressly sanctioned by the provisions of section 421 of the Code of Criminal Procedure. His order was, therefore, valid in law and under section 430 of the Code, judgments passed by an Appellate Court upon appeal are final. The order of the learned Judge, therefore, cannot be re-opened by presenting the present petition of appeal. The matter was recently discussed at some length by the High Court at Allahabad in the case of *Khiali* v. *Emperor* (2) and a previous decision of this Court in the case of *Hulai* v. *Emperor* (3) was not followed. I am of opinion that the view taken in the Allahabad case is a correct one. The appeal is, therefore, rejected.

G. H. *Appeal rejected.*

(1) 65 Ind. Cas. 612; 9 O. L. J. 1; 24 O. C. 304; 23 Cr. L. J. 148; (1923) A. I. R. (O.) 56

(2) 68 Ind. Cas. 41; 20 A. L. J. 739; 23 Cr. L. J. 505; 4 U. P. L. R. (A.) 163; (1922) A. I. R. (A.) 480; 44 A. 759.

(3) 36 Ind. Cas. 133; 3 O. L. J. 326; 17 Cr. L. J. 453.

CALCUTTA HIGH COURT.

CRIMINAL APPEALS NOS. 646 AND 649 OF 1922 AND GOVERNMENT APPEAL No. 1 OF 1923.
May 31, 1923.
Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Thomas Richardson, KT.
P. E. BILLINGHURST AND OTHERS—APPELLANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 120B, 420, 511—Criminal Procedure Code (Act V of 1898), s. 237—Conspiracy to cheat—Charge covering three transactions—Different overt acts—Charge, whether bad—Transactions intervening over tacts, effect of—Cheating, charge of, what must contain—Omission to mention persons deceived, whether fatal—Fraudulent bills presented at different times—Offences, whether separate—Evidence sufficient to prove attempt to cheat—Accused whether can be convicted of attempt—Evidence of cheating whether material for proving conspiracy—Criminal trial—Prolonged proceedings—Sentence.

A charge against certain accused, of having "conspired with each other to commit an offence punishable under section 420, Penal Code, to wit,

BILLINGHURST *v.* EMPEROR.

to cheat the Government of India of large sums of money in respect of the supply of linseed oil, turpentine, and water-soluble oil, and of having thereby committed an offence punishable under sections 120B and 420, Penal Code", though not clearly worded, is capable of being interpreted as alleging one general conspiracy to commit an offence or offences under section 420, Penal Code, the three transactions mentioned constituting overt acts, from which the conspiracy might be inferred: and the defect in the charge is not fatal if the accused are fully aware of the charge being of one general conspiracy and not of three different conspiracies. [p. 547, col. 1.]

A charge under section 420, Penal Code, should contain an allegation of the person or persons alleged to have been deceived and induced to part with property as the result of that deceit. [p. 569, col. 1.]

But where the charge against an accused is that he cheated the Government of India by dishonestly inducing the Government to deliver a cheque, the property of Government, in payment of fraudulent bills and thereby committed an offence under section 420, Penal Code, an omission to mention therein the person or persons alleged to have been deceived and induced to issue the cheque, is not a fatal defect in the charge, if the accused is not misled and there is no failure of justice by reason of the omission. [*ibid.*]

If in the course of a transaction between two persons different false and fraudulent bills are presented for realization at different dates, that does not make them matters for so many different offences under section 420, Penal Code, inasmuch as an offence in relation to any one of them is not complete until the money is paid or the cheque is issued and if one cheque is obtained through the inducement of all such bills, there is only one offence and not so many different offences of cheating. [*ibid.*]

If in a charge intended to allege one general conspiracy, several transactions are mentioned in which the accused took part in pursuance of that conspiracy, they are to be taken as so many overt acts from which a general conspiracy to commit offences might be inferred. [*ibid.*]

The gist of the offence of criminal conspiracy to commit offences lies in the agreement or common intention of the accused and the question whether such an agreement or common intention exists, is a matter of inference to be deduced from the facts of the case and the acts of the accused proved in evidence and alleged to have been committed by them in pursuance of such agreement or common intention. [p. 548, col. 1.]

If between the dates of different matters alleged as overt acts amounting to criminal conspiracy of the accused there are transactions by them which are not false or fraudulent, they are not inconsistent with the existence of a general conspiracy. [p. 568, col. 1.]

Under section 237, Criminal Procedure Code, an accused may be convicted of an attempt to commit an offence even though he has not been charged with it. [p. 571, col. 1.]

However guilty an accused person may be, it is most undesirable that he should be subjected to the strain and anxiety of prolonged proceedings unless it is absolutely unavoidable, and such delay may be legitimately taken into consideration in passing the sentence. [p. 571, col. 2; p. 572, col. 1.]

Appeal against an order of the Chief Presidency Magistrate, Calcutta, dated the 28th November 1922.

Mr. *B. C. Chatterji*, Babus *Satindra Nath Mukerjee*, *Manmatha Nath Mukherjee* and *Bir Bhushan Dutt*, for the Appellants in Appeals Nos. 646 and 649 1922.

The Advocate-General, Messrs. *J. Camell*, *N. C. Sen* and Babu *Romoni Mohan Banerjee*, for the Crown in Government Appeal No. 1 of 1923 and in Appeals Nos. 646 and 649 of 1922.

Mr. *Arabinda Ray*, Babus *Satindra Nath Mukerjee* and *Santosh Kumar Pal*, for the Respondent in Government Appeal No. 1 of 1923.

JUDGMENT.—Nos. 646 and 649 of 1922 are appeals by Billinghurst and Michael against conviction by the Chief Presidency Magistrate who found them guilty on each of the two charges and sentenced them to one year's imprisonment. Blackburn and Stoddart were charged with the same offences but were acquitted by the Magistrate.

The first charge is as follows :—" That you, J. Stoddart, H. P. Blackburn, P. E. Billinghurst, and P. H. Michael, during the period from June 1918 to July 1919, in Calcutta conspired with each other and with C. S. Waite and other persons unknown to commit an offence punishable under section 420, Indian Penal Code, to wit, to cheat the Government of India of large sums of money in respect of the supply of linseed oil, turpentine, and water-soluble oil by Messrs. Spalding & Co., to the Munitions Board, Calcutta, and you thereby committed an offence punishable under sections 120B and 420, Indian Penal Code, and within the cognizance of my Court."

Objection was taken by learned Counsel on behalf of Billinghurst to the first charge on the ground that it contained allegations amounting to charges of three different conspiracies and that consequently it was a bad charge.

The learned Advocate-General admitted that the first charge might have been framed in a better and clearer manner but he contended that it was intended to allege one general conspiracy to commit an offence or offences under section 420 of the Indian Penal Code by cheating the Government of India of large sums of money and that the transactions in linseed oil, turpentine, and water-soluble oil were overt acts from which the conspiracy might be inferred.

It is clear from the judgment of the learned Magistrate that this was explained to the Counsel, who appeared for the accused at different periods of the trial. The petition of Billinghurst, dated the 31st August 1921, paragraph No. 38, stated as follows:—"That the charge against your petitioner is one of conspiracy to cheat and three overt acts are alleged in proof of that conspiracy—(1) in case of an order for linseed oil your petitioner supplied short measure; (2) in case of turpentine the price charged was excessive and that your petitioner had not the quantity of turpentine required in stock while representing that they had; (3) in case of an order for water-soluble oil the price was excessive and the quality was not up to sample. No money was paid in respect of this and is put forward as a case of an attempt to cheat."

The petition of all the accused dated the 8th December 1921, paragraph 20, was as follows:—"That in so far as the first count of the charges is concerned your petitioners have been advised and beg to submit that regard being had to the nature of the charge, which is one of a general conspiracy entered into by the said Mr. C. S. Waite and your petitioners to cheat the Government of India during the period of one year from June 1918 to July 1919, of large sums of money, and to the importance and magnitude of the same in which the Crown has engaged the services of the learned Advocate-General of Bengal from its very inception, it is desirable that the case should be tried by a Jury."

It is clear, therefore, that the accused fully understood the nature of the charge. In our judgment the first charge is capable of the meaning which was placed upon it by the prosecution and which every one connected with the trial thoroughly understood and consequently the objection raised by the learned Counsel cannot be sustained.

The next objection to the first charge was taken both by the learned Counsel appearing for Billinghurst and the learned Vakil appearing for Michael.

It was urged that, assuming the first charge to be a charge of one general conspiracy, the prosecution had not proved it, but that if they had proved any conspiracy at all, they had proved three conspiracies, and consequently the first charge must fail.

This objection must depend upon the evidence and the inference to be drawn from the proved facts, and we will state our conclusion on this point after dealing with the facts of the case.

Another objection was taken by the learned Vakil that the charge alleged a conspiracy to commit an offence punishable under section 420 of the Indian Penal Code, to wit, to cheat the Government of India of large sums of money in respect of the linseed oil, turpentine, and water-soluble oil.

It was urged that in order to substantiate this charge it must be proved that there was an agreement to commit the offence of cheating under section 420, Indian Penal Code, in respect of each of the three transactions; that the facts proved in respect of the turpentine and water-soluble oil cases did not constitute cheating within the meaning of that section. In other words, that it was not proved that what the alleged conspirators intended was cheating within the meaning of the above-mentioned section 420, Indian Penal Code.

On behalf of the prosecution it was argued that it had been proved that such of the transactions, alleged as overt acts, if completed, would have constituted an offence under section 420 of the Indian Penal Code.

But it was further argued by the learned Advocate-General that in order to sustain the first charge, it was not

necessary to prove that each, or indeed any of the above-mentioned transactions if completed, would have constituted an offence under section 420, but that it would be sufficient if the facts which had been proved and materials which had been placed before the Court showed that there was a criminal conspiracy between Waite and the two appellants to commit an offence or offences under section 420, Indian Penal Code, by cheating the Government of India of large sums of money.

There is no doubt that as regards the first charge the gist of the alleged offence, *viz.*, a criminal conspiracy to commit an offence or offences under section 420, Indian Penal Code, lies in the agreement or common intention of Waite and the two appellants, and in our judgment, the question whether such an agreement or common intention existed, is a matter of inference to be deduced from the facts of the case and the acts of the parties which have been proved in evidence, and which are alleged to have been done by them in pursuance of such agreement or common intention.

It is necessary, therefore, to examine the facts of the case which are relied upon by the prosecution, and the explanations and defences put forward by the two appellants respectively.

We do not think it necessary to deal in detail with the numerous documents which have been referred to in this case. This has been done at great length by the learned Magistrate who tried the case, and our attention has been drawn to them many times during the hearing of the appeal by the learned Counsel and the learned Vakil, who appeared for the appellants, and the learned Advocate-General on behalf of the Crown.

On the 2nd November 1917, Waite was appointed Deputy Controller of Inspection in connection with the Munitions Board at Calcutta.

His duties were to assist the Controller of Munitions at Calcutta, to apply an independent check on the quality of stores and materials procured under the Munitions Board's orders for various intending officers and to scrutinize and advise on the suitability of rates paid for them.

On the 2nd May 1918, in addition to the other duties, he was appointed purchasing officer as regards oils and manufactured metals. In such capacity it was his duty, on receiving an indent from the Indian Munitions Board, Simla, to purchase the materials required. It was his duty to get the materials at the cheapest rate possible, as long as they were in accordance with the indent or specification. If firms asked too high a price it was open to Waite to ask the Controller to commandeer the materials, the price to be settled later by arbitration.

Waite went on leave on 23rd January 1919 and his service under the Munitions Board terminated on or about 23rd February 1919.

Michael was alleged to be a broker. From the evidence it appears that he was on intimate terms with Waite; he was frequently, almost daily, in Waite's office, and sometimes was seen at Waite's house. It was Michael who negotiated the business with which this case is concerned, all the orders from the Munitions Board having passed through Michael. He was also frequently in the office of Messrs. Spalding & Co., and he was largely interested in the transactions which took place between the Munitions Board and Spalding & Co.

The total value of the orders given to Spalding & Co., was a little less than three *lakhs* and Michael's bills, according to his own statement, for excess rates and commission, amounted to no less than Rs. 49,777. We are satisfied on the evidence that in the transactions in question the position of Michael cannot be correctly described as that of a mere broker. The part taken by him in the various transactions will be dealt with when they are separately considered.

Billinghurst was a member and head of the firm of Messrs. Spalding & Co., and it was through the instrumentality of Michael that the firm obtained orders to the extent of about Rs. three *lakhs* from the Munitions Board, which orders were given by Waite.

The first order in point of date was given to Spalding & Co., on the 15th June 1918, for 600 gallons of raw linseed oil and 1,000 gallons of double boiled linseed

oil. On the day prior to that, *viz.*, on the 14th June 1918, an agreement was entered into between Spalding & Co. and Michael to the following effect:—

Letter, dated 14th June 1918, *from Messrs. Spalding & Co. to Mr. Michael.*

"Dear Sir.

"We confirm the arrangements made with you to-day and agreed upon, whereby we appoint you exclusively to represent us for the sale of boiled and raw linseed oils for which we have the sole selling rights, and also for the sale of varnishes and bithulithic paint manufactured by us and for any other paints, varnishes, and oils that we may be interested in hereafter upon the following terms:—

"1. That we agree to pay you a commission of 1 per cent. on orders for linseed oils on prices as per list handed you.

"2. We agree to pay you a commission of 2½ (two and-a-half) per cent. on all orders for varnishes and bithulithic paints on prices as per list handed you. That we agree to pay you the above commissions on all repeat orders for linseed oils, varnishes, and paints directly or indirectly received by us.

"3. That we further agree to pay you in addition to the commissions as stated above on linseed oils, varnishes, and bithulithic paints any extra amount you may fix with the buyer and consumers on the prices quoted to you by us as per list.

"4. That all orders to be secured in the name of the firm of Messrs. Spalding & Co.

"5. That the agreement stands good for a period of 12 months from date provided we get reasonable orders.

"6. In the event should you be unable to secure orders owing to illness or any other unforeseen circumstances, this agreement becomes null and void, but you shall continue to receive your commission and excess prices on all repeat orders.

"Yours faithfully,
"SPALDING & Co."

It was urged on behalf of the prosecution that there was no evidence to show that Messrs. Spalding & Co. had any sole selling rights in respect of any linseed oils, and it was to be noted that the agreement referred not only to linseed oils but also to any other paints, varnishes, and oils that Spalding & Co. might thereafter be interested in.

It is not unreasonable to infer from this, as was urged by the prosecution, that Michael must have been in communication with Waite before the date of the agreement, inasmuch as on the 15th June 1918, in addition to the two orders already mentioned. Messrs. Spalding & Co. obtained orders from the Munitions Board for 50 gallons raw linseed oil, 80 gallons double boiled linseed oil, and 600 gallons Copal varnish.

On the 17th June 1918 Waite received an indent dated the 12th June 1918, from the Indian Munitions Board, Simla, for 150 tons of oil, linseed, genuine boiled. It was marked "Very urgent." The oil was to be shipped to the Deputy Controller. Transit for Munitions Board, Bombay. On the 20th June 1918 Waite gave an order for 50 tons of the oil to Messrs. Spalding & Co. at the rate of Rs. 3-12-0 per gallon and with a note in "cask of 40 gallons."

A suggestion apparently was made on behalf of the defence in the Trial Court that the words "in cask of 40 gallons" were not in the order when it was sent to Spalding and Co. and that they had been added after the documents were seized by the Police in order to support the case for the prosecution.

The evidence of J. N. Bhattacharjee, in our judgment, shows that the suggestion is without foundation, and that the words were placed on the order by him at the time the order was given and in consequence of the note appearing on Exhibit 42.

On the 27th June 1918 a further order of 100 tons of linseed oil was given by Waite to Messrs. Spalding & Co. at the same rate, Rs. 3-12-0 per gallon.

Messrs. Spalding and Co. had to purchase the oil in order to comply with these two orders. They got six consignments of oil from the firm of Mohin & Co. ranging from the 2nd July 1918 to 12th July 1918. The remainder of the oil was purchased from Messrs. Birla Brothers, the deliveries ranging from 4th July 1918 to 5th September 1918. Spalding & Co. paid for the oil purchased by them at a rate less

than Rs. 3-12-0, *viz.*, at about Rs. 3-8-0 or Rs. 3-8-9.

The net amount of oil received by Spalding & Co. and paid for by Spalding & Co. was 32,038 gallons or 32,029, it is not quite clear which is the correct figure. The oil was delivered in cask by Mohin & Co. and Birla Brothers direct to the Railway in Calcutta for transit to Bombay.

Spalding & Co. presented bills to the Munitions Board in Calcutta in respect of this soil for 39,975 gallons. In other words, taking the measure of about 9 lbs. to the gallon; which was the rate at which Spalding & Co. purchased from Mohin & Co. and Birla Brothers, they charged the Munitions Board for about 7,937 gallons of oil more than they purchased from Mohin & Co. and Birla Brothers. It is to be noted that this extra charge was made in respect of the identical casks of oil delivered by Spalding & Co.'s sellers to the Railway in Calcutta for transit to Bombay.

The prosecution case is that Spalding & Co. took the gross weight of the casks and the oil, reduced such gross weight to lbs., and then divided the total number of lbs. by 9, and thereby ascertained the number of gallons. The prosecution urged that by so doing Spalding & Co. were charging the Munitions Board for 7,937 gallons of oil which they had not delivered, and that such additional weight was represented by the weight of the casks for which Spalding & Co. charged, as if it were oil.

It was pointed out by the prosecution that if the gross weight of the various consignments is divided by 9, the resultant in gallons is the same as the number of gallons charged for by Spalding & Co., in their bills with a variation of a fraction in some instances.

The defence of Billinghurst in this respect is that Messrs. Spalding & Co. did, not charge for the weight of the casks at the price of oil. It was stated that the number of gallons in each bill presented by Spalding & Co. was ascertained by taking the gallon to represent 7½lbs. and not 9 lbs. or thereabouts. It was contended that this measure was known in Calcutta, and that although Spalding & Co. bought the oil at the rate of about 9 lbs. to the gallon, they were entitled to sell at the rate of 7½ lbs. to the gallon, especially as Spalding & Co. were to take the risk of the oil in transit to Bombay.

In support of Billinghurst's case in this respect some documents which have been called EEEE were put in on behalf of Billinghurst at the trial for the purpose of showing how the number of gallons charged for was ascertained. The documents were put in cross-examination by the learned Counsel for Billinghurst to a witness Ashutosh Dutt, who had been an Accountant in the firm of Messrs. Spalding & Co. They were not found by the Police when the search for documents was made at Spalding & Co.'s premises.

It appeared from Dutt's evidence that when Spalding & Co. were purchasing oil from Mohin & Co. and Birla Brothers, one of Spalding & Co.'s *sircars* used to be present at the weighing. He used to bring the difference of the *tare* weight on slips of paper and before bills were made out calcultation used to be made on sheets of paper. The slips were alleged to represent the actual weight of the casks before they were filled with oil and the calculations were alleged to have been made in the handwriting of a lady typist. Neither the *sircar* nor the typist was called as a witness by the defence. Ashutosh Dutt, however, said he had no doubt that the slips were brought to him by the *sircar* and he knew the handwriting of the lady typist.

The learned Magistrate came to the conclusion that the documents marked EEEE were not genuine and were fabricated for the purpose of the defence. He gave his reasons in full and we need not repeat them here.

The evidence of the witness Ashutosh Dutt was described as untrustworthy both by the learned Advocate-General and by the learned Vakil for Michael and in our judgment there are some valid reasons for that conclusion.

Mohin & Co.'s bills were not produced but Messrs. Birla Brothers in delivering the accounts to Spalding & Co. deducted the *tare* weight of the casks, the *tare* weight being given on each bill. Spald-

ing & Co. accepted these *tare* weights as correct. Yet it is to be noticed that in the calculations and documents known as the EEEE, Spalding & Co. allowed for the *tare* weight of the casks in every instance less than the tare weights given by Birla Brothers. Birla Brothers' *tare* weights were arrived at by weighing the casks before they were filled with oil, and it is not reasonable to suppose that they would allow Spalding & Co. more than the actual tare weight. It is, therefore, surprising to find that in the calculations EEEE, Spalding & Co. give the *tare* weights in all cases as less than those given by Birla Brothers. If this matter had been an honest and straightforward transaction and if Billinghurst honestly thought they were entitled to charge the Munitions Board at the rate of 7½ lbs. per gallon instead of about 9 lbs. per gallon, we are at a loss to understand why Spalding & Co. did not take net weights of oil given by Birla Brothers arrived at after the deduction of the *tare* weights and divide the net weight by 7½ in order to obtain the number of gallons.

If the matter was an ordinary business transaction there does not seem to have been any good or valid reason or necessity for the elaborate calculations contained in the Exhibit EEEE. But apart from this, we are of opinion that these documents contain in themselves evidence (as was pointed out by the learned Advocate-General) which goes to show that they were not genuine documents.

We, therefore, come to the conclusion that they were made for the purpose of the defence in this case.

In this connection it is necessary to notice an argument put forward by the learned Counsel for Billinghurst; he argued that if we come to the conclusion that the Exhibits EEEE were not genuine documents, the Court should still hold on the evidence that Billinghurst was not aware of the extra number of gallons charged for, and was innocent of any misrepresentation.

It is difficult to follow the argument; for if Billinghurst was in fact innocent of any misrepresentation, as alleged, we do not understand why it was thought necessary to put forward documents which were not genuine, to support the method upon which, it was alleged, the bills were made out.

In our judgment the reason alleged for Spalding & Co. selling at the rate of 7½ lbs. to the gallon, when they bought at the rate of about 9 lbs. to the gallon, *viz.*, that Spalding & Co. were to take the risk of transit to Bombay, has no substance in it.

The 23 bills in respect of the supply of linseed oil were signed in the name of Spalding & Co. by Billinghurst and were submitted by Spalding & Co. to Waite. The first twelve bills were sent direct by Waite to the Deputy Controller of War Accounts (Munitions Branch), Simla, the remainder were forwarded by Waite to Simla through the Deputy Controller of War Accounts (Munitions Branch), Calcutta.

Inasmuch as the order for the linseed oil was placed before the 1st August 1918, these bills were passed on by the Deputy Controller, War Accounts, Calcutta, without any audit or check in accordance with the practice then prevailing as to orders placed before August 1918.

In the office of the Deputy Controller of War Accounts, Simla, the audit officers passed the bills, the evidence of J. P. Dutt being that his only concern was to see that the bills were duly countersigned by the purchasing officer, who in this case was Waite, and that they were arithmetically correct.

The audit officers being thus satisfied endorsed the bills and passed the amounts of the bills and another officer relying on the audit officer's endorsement, drew cheques for the bills. The bills were paid before the duplicate bills were received from Bombay.

It was urged on behalf of the appellants that the authorities at Bombay must have realized that the casks contained about 50 gallons each, according to the bills, which showed that the gallon must have been taken to be 7½ lbs. and that they accepted these as a correct rate.

We are not prepared to accept this suggestion. The evidence shows that

the Bombay authorities did not check the contents of the barrels, nor did they weigh them, unless there was something out of the ordinary, such as bad leakage.

Ordinarily the barrels were not weighed before being put into the ship, if there was no leakage.

If there was a leakage they checked the portion of the consignment in which the leakage occurred and in respect of the leakage only the weight.

The goods were checked as regards number of packages with the Railway Receipts and vouchers. In view of this evidence, it is not possible to hold that the authorities at Bombay accepted the weight of the oil as correct.

There are two entries in Spalding & Co.'s journal showing how the profits made in respect of the 23 bills for linseed oil were dealt with.

The first entry under date 29th October was cancelled and another entry under the same date appears on a subsequent page after another entry dated 13th November.

The second entry contains the words "being 23 bills made out by Mr. Michael" and "now considered as part of profits" which were not in the first entry.

Ashutosh Dutt said in his evidence that both entries were made by him and that the second entry [Exhibit 85 (3)] was made by him because Michael asked him to write the entry.

Michael now disputes this: but he does not seem to have disputed it at the trial.

We do not understand, however, why Michael should be anxious to have it noted in the journal of Spalding & Co., that he had made out the bills.

The entry "now considered as part of profits" is applied to the "difference realized on excess measurement" and it is relied upon as supporting Michael's case that he was not aware of the excess measurement being made by Messrs. Spalding & Co. until after the bills were sent to Waite by Spalding & Co. and that when he did ascertain this he claimed half the difference realized by reason of the excess measurement.

The entry is to this effect:—

[Exhibit 85 (3)—Entry in Exhibit 85.]

Entry in Spalding's Journal page 29.

Journal entries 1918.

	Rs.	A.	P.	Rs.	A.	P.
October 29th—						
Stock purchase account Dr. 24	10,953	1	10½			
To P. H. Michael commission account 84	....			10,953	1	10½
For statement of linseed oil supplied to Indian Munitions Board as per bills Nos. 106 to 117, 124, 125 and 129 to 137 being 23 bills made out by Mr. Michael for as under—						
Tatal amount billed on 39,975 7/12 gallons	1,49,908	7	0			
Total paid for purchasing 32,029¼ gallons	1,13,240	2	3			
Hence difference realised on excess measurement between 39,975 7/12 and 32,029¼ gallons now considered as part of profits as per his statement, dated 1st October 1918	36,668	4	9			
Less amount of excess rates credited as per his statements, dated 9th October 1918, up to 12th September 1918, and B. 137 ..	8,673	0	3			
Amount of commission on same	1,589	0	9			
This is the total amount for commission and rates	10,262	1	0			
Then leaves a balance of	26,406	3	9			
Less amount payable to him as arranged as per his statement, dated 9th October 1918	4,500	0	0			
Half of which is to be his share now transferred to his credit as per his statement, dated 9th October 1918	Rs. 21,906	3	9			
	10,953	1	10½			
October 29th—						
Stock purchase account Dr. 24	4,500	0	0			
To P. H. Michael commission account 84	....			4,500	0	0
For amount Rs. 4,500 debited to former account in order to adjust the latter account as per particulars given in Mr. Michael's statement, dated 9th October 1918.						

These entries show that in respect of the linseed oil transaction Michael was either paid or credited with Rs. 8,673-0-3 in respect of the extra price which he obtained from the Munitions Board.

He obtained Rs. 1,589-0-9 for commission, Rs. 4,500 as per his statement of 9th October 1918, and Rs. 10,953-1-10½, which represented his half share of the difference realized by reason of excess measurement or a total of about Rs. 25,715.

The statement of 9th October 1918, referred to, has not been produced and no explanation has been given in respect of what the Rs. 4,500 was recognised as payable to him. Spalding & Co. received in respect of these transactions a commission from the sellers of the oil and half the excess profits realized in respect of the excess measurement.

Michael gave a receipt on the 6th September 1918 to Spalding & Co. for Rs. 10,000, being payment in part, *viz.*, about 75 per cent. of his share of the excess profit as arranged on linseed oil supplied to the Indian Munitions Board exclusive of the excess rate of three annas three pies per gallon and commission of one per cent. due and payable to him.

It was pointed out on behalf of the prosecution that this receipt of 6th September 1918, was given at or about the time of the last delivery of linseed oil in respect of the 150 tons and a considerable time before the Government of India made the final payment and that Michael then knew how much he was entitled to in respect of the excess profits by reason of the difference in measurement, inasmuch as, on the figures being ascertained, it appears that Rs. 10,000 was only Rs. 143 less than 75 per cent. of Michael's share.

Another receipt, dated the 19th December 1918, for Rs. 2,500 was given by Michael to Spalding & Co. being further payment on account of certain bills for commission, difference in rates, and division of excess profits on double boiled linseed oil as per statement, and this was debited to his account and paid by cheque.

This transaction, even when considered by itself, is an extraordinary one and having regard to the above-mentioned facts, it is not possible to accept the suggestion put forward by Michael that he was a mere broker, and that the sums which he received were in respect of the services which he rendered as broker.

It is true that Ashutosh Dutt said that he posted these entries to the credit of Michael's "Commission Account"—which apparently is correct, inasmuch as the account to which these sums were credited was called "Commission Account."

In this case, however, the name under which the account was carried, conveys little indication of the real character of the transaction.

The question inevitably arises why Spalding & Co. were willing to pay such large sums to Michael in respect of the transaction of linseed oil. No broker in the ordinary sense could possibly be entitled to such remuneration: he received 1 per cent. commission, but over and above that commission he was allowed to receive the sum realized by the difference between the price quoted by Spalding & Co. and the price paid by the Munitions Board for the oil and half the excess profits realized by the difference in measurement. In addition to these sums, the amount of Rs. 4,500, in respect of which no explanation is forthcoming, was either paid or credited to him. The allegation of the prosecution is that this can only be explained by the fact that Michael was as much a principal as Billinghurst.

The prosecution further point to the fact that Michael took part in the correction of some of the bills which were initialled by him, that he was constantly in Spalding & Co.'s office, and that in other transactions he had taken an active part in Spalding & Co.'s business, as for instance, the water-soluble oil case in which Michael had arranged with Grandage, Moir & Co., for the supply of 50 gallons of water-soluble oil to Spalding & Co.

We are satisfied that Michael was not a mere broker but that he was acting

with Billinghurst and that he knew as much as, if not more, than Billinghurst as to the details and nature of the transaction in linseed oil.

There was no evidence of any of the money received by Michael in respect of this linseed oil transaction passing into the hands of Waite; and the learned Advocate-General admitted that if the case of linseed oil stood by itself it would not be sufficient to prove that Waite was involved in the conspiracy alleged by the prosecution, though he argued there was much ground for suspicion, having regard to Michael's intimacy with Waite, the large sums of money received by or credited to Michael, and the entire absence of explanation as to the reason why the Rs. 4,500 was paid to Michael, the suggestion being that some of the money must have been paid to Waite.

The evidence, however, goes to show that the checking of the bills in Waite's office was of a meagre kind.

The Accountant merely took the figures from the bill, satisfied himself that the rate was correct and then multiplied the number of gallons given in the bills by the rate and saw that the arithmetical calculation in the bills was correct.

The bills were then laid before Waite for signature and he signed them and the forwarding letter as well, relying on the clerks who placed them before him, and without making any calculation or check on his own account.

If the bills had been checked in Waite's office in a proper way, especially having regard to the note on the order that the casks were to be 40 gallons, the real nature of the transaction would probably have been discovered. There is, however, no evidence that they were properly checked and we agree, therefore, with the learned Advocate-General that, if the linseed oil case stood by itself, it would not be sufficient to prove that Waite was involved in the alleged conspiracy.

Turpentine.—As regards the turpentine transaction, on the 26th June 1918, the Board of Munitions at Simla despatched a telegram in the following terms which was received by the Controller of Munitions, Calcutta, on the 27th June and referred to Waite as Deputy Controller, Inspection, "for favour of disposal and report within 10 days":—

"Require 5,000 gallons genuine turpentine. What quantity can you obtain and at what price? Also say whether Indian or imported. Must know rate. Difficulty in obtaining full requirements from Forest Department."

Then follows, in the official file, a note in Waite's handwriting of quotations given to him by Mr. Pratt, a dealer in the article:—

"American, 200 gallons, price (20 cases)—per case Rs. 50; Rs. 5 per gallon.

Government, 25 to 30 gallons—Rs. 26 per 5 gallon drum.

Yellow, No. 1, containing 250 gallons—5 gallon drum at Rs. 4-12-0 per gallon.

Habbock's 500 gallons—Rs. 13-12-0 per gallon."

There is also a note in Stoddart's handwriting of Messrs. Spalding & Co's. quotation:—

	Rs.
"Black Japan, as per specification sent (2,500 gallons)...	20
Turpentine, Java, No. 1 (5,000 to 10,000 gallons) ...	9
Turpentine, Java, No. 2 (5,000 to 10,000 gallons) ...	8
Turpentine, special, imported, 2,000 gallons ...	13

Immediate delivery."

On 1st July, Waite telegraphed to Simla Spalding & Co's. quotations for Java, Nos. 1 and 2, and Special American (2,000 gallons at Rs. 13). He also mentioned Pratt's quotation for Habbock's No. 1. Simla inquired whether he considered Java, No. 2, quite suitable and suggested that he should consult Director of Ordinance Factories. Waite or Stoddart, the latter being Waite's personal assistant, and under his immediate orders then telephoned to Spalding & Co. for samples and received three bottles of Java, No. 1, Java No. 2 and best American. These were sent to the Director who replied on 6th August that Java, No. 1 and No. 2 were not correct to specification and that the American sample was correct. Copies of the Director's letter were sent

to Spalding & Co. and Pratt with an inquiry as to the quantity of turpentine available in stock. There is a reply from Pratt, dated 23rd August, stating that he could supply immediately 20 cases American turpentine and 2,500 gallons in November. It will be remembered that the price given by Pratt to Waite for American turpentine was Rs. 5 a gallon. There is no reply from Spalding & Co. on the record and no further reference was made by Waite to Simla. His next step, taken on the 31st August, was to place an order with Spalding & Co. for 3,500 gallons at Rs. 13 a gallon to be delivered at once.

It is not clear why he ordered that quantity. The original inquiry from Simla mentioned 5,000 gallons. In his own telegram to Simla he had given the quantity of American turpentine available as 2,000 gallons. We can only suppose that the order was the result of personal communications between Waite and Michael.

It is now, however, clear beyond dispute that Spalding & Co. could have had nothing approaching 3,500 gallons available for immediate delivery at the time. In any case, Waite's action was precipitate to the point of recklessness and it is difficult to accept the suggestion that he was under a double mis-apprehension both as to Spalding & Co's. ability to supply so large a quantity and as to the instructions which he had received from Simla. Simla had in fact given him no final instructions to buy turpentine and in the state of the market ought to have had the opportunity of considering Pratt's offer of 2,500 gallon in November at Rs. 5 a gallon.

Having secured this order, on the 3rd September, Spalding & Co., in a letter to Michael, confirmed their quotations to him for the supply of turpentine to Munitions. "Any rate," they added, "that you have quoted or may quote over and above the prices quoted you the excess or difference in rates are payable to you as remuneration for services rendered." The rate given to Michael for English or American turpentine was Rs. 8 per gallon.

It may be assumed that in the usual course a copy of the order of 31st August was sent to Simla and on the 12th September Waite telegraphed to Simla referring to the inquiry of 26th June as "your telegraphic indent of 26th July (apparently a mistake for June) for 5,000 gallons turpentine" and asking for despatching instructions. The Controller, Indian Indents, replied by letter dated 17th September, that "no further quantities are wanted at present as arrangements have already been made to secure our requirements from elsewhere." Waite did nothing on this letter. It is said that by the words "no further quantities" he understood Simla to mean that no more was required beyond the 3,500 gallons already ordered. But, if so, why were no despatching instructions given in respect of that quantity? After a delay of more than a month Waite again telegraphed to Simla referring to the telegraphic indent of 26th July (meaning June) and said that 3,500 gallons were "waiting despatching instructions.," These words are misleading. In the order of 31st August, Spalding & Co. had been directed to deliver the turpentine to the Munitions Stores Depôt at Narculdanga. Waite was moved to obtain despatching instructions not by Messrs. Spalding & Co. but, in anticipation of delivery by the depôt, to which a copy of the order had been sent. Up to the 29th October not a single gallon of the turpentine had actually been delivered. On the 9th November Simla replied through the post, merely enclosing a copy of their previous letter of 17th September. Then on the 15th November Waite wrote to Spalding & Co. and asked them to treat the order of 31st August as cancelled.

Here again the suggestion can hardly be resisted that the delay which occurred after receipt of the Simla letter of 17th September was deliberate in order to give Spalding & Co. more time in which to deliver the turpentine. The order was not cancelled till Waite felt that he could delay no longer.

Spalding & Co., however, did not accept the cancellation of the order. On the 21st November, Michael called on Mr. Peterson, then Controller of Munitions, who noted that he had told Spalding & Co. "that they should reply to us stating that they do not see their way to cancel

the contract and request us to take delivery." He added: "I think we will have to take the material. For the present their letter may be awaited."

Spalding & Co.'s letter 22nd November illustrates the firm's methods. "Our Mr. Michael," it says, "called on you yesterday and explained our position that we are unable to sell this stock, when you were good enough to inform him that you will stand by the order. Kindly have the letter cancelling the order withdrawn. We also await your instructions to deliver the quantity ordered." Mr. Peterson was thus asked to believe that the firm had the whole quantity ordered in stock. But it was as true in the months of November and December 1918 and January 1919, as at the time of the order that Messrs. Spalding & Co. had nothing like 3,500 gallons available for delivery.

Mr. Peterson did not at once reply to Messrs. Spalding & Co's. letter. Mr. R. D. Bell, Controller of Oils and Paints, had been sent from Simla to inspect Waite's office. On the 28th November he recorded a note, to which both sides have referred, stating among other things that "the rate Rs. 13 per gallon charged by Spalding seems exorbitant" but that he did not see how the order could be cancelled. Acting on this note, Mr. Peterson on the 29th November called on Waite for an explanation which was received later on on the 14th January:—

At this stage of the negotiations, Billinghurst, on behalf of Spalding & Co. addressed a letter, dated 16th December, to Michael which we had better give in full, as Billinghurt's learned Counsel placed considerable reliance upon it on his client's behalf. The letter runs:—

"16th December 1918.

"P. H. MICHAEL, ESQ., Calcutta.

"Dear Sir,

"Against the Munitions Department order for 3,500 gallons of turpentine which was purchased and which we delayed sending on your advice till the full consignment had been collected and which is now left in our hands owing to cancellation of order, we would ask you what we are to do with this large expensive stock on which heavy interest charges are accruing. We understand that while we quoted you Rs. 8 per gallon leaving us a bare 10 per cent. difference to cover leakage, cartage and profit, you quoted, Rs. 13 per gallon to the Munitions Department, which extortionate price probably caused the cancellation of the order, that is, while Messrs. Spalding & Co. would have cleared a legitimate profit of about Re. 0-8-0 to Re. 0-12-0 per gallon, you would have bled the departmemt to the tune of Rs. 5, and this without risk to yourself of any business losses. As the appointed receiver of this firm I am naturally anxious to prevent any loss and, therefore, ask you what is to be done with this stock and write to you to learn if you have any prospects of selling this.

"Yours faithfully,
(*Sd.*) SPALDING & Co."

Learned Counsel argued that this letter showed that Billinghurst was not responsible for any guilty dealings Michael may have had with Waite. But in the first place the letter is not ingenuous. As it begins and ends, it merely follows the line which had been taken at and after Michael's interview with Mr. Peterson on the 21st November and regard being had to Michael's relations with Spalding & Co. we cannot suppose that it was not as well known to him as it was to Billinghurst that the full consignment had not been collected. Then as to the price, Spalding & Co. had adopted the price quoted by Michael to Waite and the letter shows that they knew perfectly well that the department was being bled. We regard the letter merely as a hint to Michael that he was to do his best to obtain the restoration of the order on the lines already agreed upon between him and the firm. We may add that the exhibit is not the original letter but the copy taken from Spalding & Co's. press copy book. No answer to the letter from Michael is forthoming.

On the 9th January Spalding & Co. wrote again to Mr. Peterson: "We beg to inform you" they said, "that storage charges and interest on the above

(the 3,500 gallons) are accumulating. We were asked to store the turpentine on your account in September last as there was no accommodation at Narculdanga Depôt pending despatching instructions. We regret we cannot undertake any further responsibility as we are unable to insure the goods; moreover, we are suffering loss on account of interest on heavy outlay of capital, and cannot continue it any longer." They were bold enough to continue: "We have, therefore, to request you to arrange to store it elsewhere, and release the space for our own use which we are in urgent need of."

Waite's explaination was, as we have said, received on 14th January. As regards the giving of the order of 31st August and the price agreed to, the explanation, in view of all the facts, is insufficient and unconvincing. But in his concluding paragraph, Waite said this: "If the Controller desires that the order should be cancelled on the firm, there should, in my opinion, be no difficulty. As the firm did not make any attempt at delivering the turpentine. I am rather inclined to stand by my letter of cancellation owing to the reason of their failure or non-compliance of the order." Waite must, therefore, be acquitted of being a party to the representation made by Spalding & Co. to procure the withdrawal of the letter of cancellantion. It must be remembered that Waite's conduct of his office had come under examination and it was incumbent on him at this stage to be circumspect. The main question, moreover, is not whether the re-instatement was procured by mis-representation but whether the original order was or was not collusive and dishonest.

Mr. Peterson then had before him Mr. Bell's opinion and Waite's explanation. Neither Mr. Bell nor Mr. Peterson, however, was aware of the arrangement under which Michael was to receive Rs. 5 on every gallon of turpentine sold to Munitions, so that Spalding & Co. must have expected to make a profit on their share of Rs. 8 a gallon. Mr. Peterson may, perhaps, have noticed that Waite's statement that Spalding & Co. had made no attempt at delivering the turpentine was inconsistent with the case they were making that they had been asked to store the turpentine. On the 15th January he replied to Spalding & Co's. letters of 22nd November and 9th January in a letter from which the following paragraphs are taken:—

" 2. If you can prove to me that you have contracted for the supply of this turpentine on our account before receipt of Mr. Waite's letter No. 5535-P—292, dated the 15th November 1918, cancelling the order, I should be obliged if you send your representative to me with the papers giving evidence of this.

"3. You state in your letter, dated the 9th January, that you were requested to store the turpentine on our account in September last, pending despatching instructions. I should be obliged if you would let me know whether this was a verbal arrangement or whether you have any document to this effect as the order for supply was for immediate supply and was not apparently complied with.

"4. If you can satisfy me on the above points, I am prepared to take delivery of the turpentine in accordance with the order."

On the same date, 13th January, Mr. Peterson worte to Simla that he had been endeavouring to cancel the turpentine order but was doubtful whether he would be able to do so as the firm insisted on delivery being taken.

On the 29th January Spalding & Co. replied in a letter of some length headed "withont prejudice" in the course of which they said:

"On the 1st September we received Deputy Controller, Inspection, Demand No. 3379-P—292, dated 31st August 1918, for 3,500 gallons of turpentine. About the 9th September our Mr. Michael approached the Deputy Controller, Inspection, for instructions for making the cases which had been omitted on the order, when he was asked to await his instructions which would be given in a few days.

"A week later, we again asked for instructions to mark the packages to enable us to proceed with the delivery when we were informed not to deliver the turpentine at Narculdanga, as there was no room to store combusitible goods under cover, all the space there being urgently required for other valuable stores, and we were instructed to store the turpentine until we received despatching orders.

"Our representative informed the Deputy Controller, Inspection, that we would store the turpentine, but we could not accept any responsibility for damages or loss by fire, and at the same time we would charge a nominal rent for storage; this was accepted by the Deputy Controller, Inspection, which we had confirmed, *vide* our letter, dated 18th September 1918.

"Since then we did not trouble the Deputy Controller, Inspection, any further and awaited his instructions for despatching. On 17th November last we received Deputy Controller, Inspection, letter No. 5535-P—292, dated the 15th, which was most surprising and inexplicable to us. At that time our Mr. Michael, who had this matter in his hands was away at Simla and on his return he called on the Deputy Controller, Inspection, when he was informed that he was ill, not attending office, Mr. Michael then called on your goodself and explained the position when you assured him that you would stand by the order.

"Under the circumstances you will see that there was no delay or want of attention on our part; we had to the best of our endeavours and at a loss of interest on the outlay, gone much out of our way to assist the Deputy Controller, Inspection, in agreeing to store the turpentine and it is matter of deep regret to us that we should now be placed in such a position, which we least expected, more particularly in view of the fact that on all occasions we were very prompt in supplying and despatching all indents placed with us.

"We request that you will be good enough to take delivery of the turpentine without further delay, as it is impossible for us to suffer the loss of interest and run any further risks. You are, no doubt, aware that the bank rate of interest has increased and our loss in this direction alone will be great.

"As regards your request to produce the correspondence in connection with this order, we shall be glad to comply with same if you will kindly appoint a day when it will be convenient for you to see them".

The comments we have already made apply to this letter for which Billinghurst was undoubtedly responsible. It is only necessary to add as regards the reference to a letter of 18th September, that no such letter is forthcoming and there is no copy of it in Spalding & Co's. press copy book. Mr. Peterson has left Calcutta and has not been called as a witness. There is no evidence that he accepted Spalding & Co.'s offer to show him their correspondence or that he made any further enquiry. Spalding & Co.'s reiterated statements that they had been storing the turpentine, which we regard as wholly false, were certainly calculated to mislead.

On the 11th February, Mr. Peterson wrote to Spalding & Co., directing them to deliver the 3,500 gallons after test and inspection by the Deputy Controller, Oils and Paints. There was some further correspondence as to the samples which Spalding & Co. submitted. But in the result a sample was approved. Spalding & Co. delivered 3,499 gallons and their bills, dated 30th April 1919, for Rs. 45,487, signed by Billinghurst in the name of Spalding & Co., was duly paid.

It must be emphasized that an examination of Spalding & Co.'s books shows, and that it is not now denied, that the firm could never have supplied anything like this quantity of turpentine from their own stock. Their books show that their stock increased from 8 gallons in June to 168 gallons in November 1918, and dwindled to 90 gallons on the 14th March 1919.

It is proved that of the 3,499 gallons ultimately supplied, 3,026 gallons were purchased from the Standard Oil Company, on various dates, ranging from the 17th to the 28th April, at the rate of Rs. 34 per 5 gallon drum or just over Rs. 6-12-9 a gallon.

Michael's share of the Rs. 45,487 paid to Spalding & Co. came to Rs. 17, 495 for which he submitted a bill and received payment.

As regards this transaction, we conclude that when Waite sent a copy of his order of 31st August to Simla, he must be taken to have presented that he had done his duty and that the order was a proper order at a reasonable price. It may be that at the time there was a scarcity of turpentine with a consequent rise in price, but it is evident that Spalding & Co. were in no position to fulfil the order till the market was replenished when the price would fall and in that state of things, the price charged was preposterous. No tenders were called for from such firms as the Standard Oil Company and in the circumstances it is not surprising that the transactions seemed to the authorities to demand inquiry and examination. The whole of the facts were not then elicited. Regard being had to the close relations which existed between Waite and Michael and to other facts which have now come to light, the transaction, even if it stood alone, would arouse a strong suspicion that an unlawful agreement existed between Waite and Michael to which Billinghurst, on behalf of Spalding & Co., and possibly other members of the firm, were willing parties. But the transaction does not stand alone and it must be considered along with the other two transactions which are in question.

On the evidence as a whole, we are forced to the conclusion that this was a dishonest transaction. In our opinion it was engineered by Michael in conspiracy with Waite and there is equally no doubt as to Billinghurst's complicity. There is the arrangement between the firm and Michael and there is the fact that Billinghurst was responsible for the letters and representations by which the restoration of the order was induced. Michael was too closely associated with the firm to make it possible to accept the suggestion that he acted independently and the undertaking involved in the acceptance of an order for the immediate delivery of 3,500 gallons could not have been honest. We must accept the conclusions arrived at by the learned Magistrate.

Water-soluble oil.—We turn to the transaction relating to water-soluble oil. The indent from Simla for this oil is dated 19th August, 1918, and was registered in Waite's office on the 23rd August. The indent was for 1,800 gallons, 800 to be supplied at once and the remainder at the rate of 200 gallons a month. It appears that this oil is used in the Ichapur Rifle Factory in connection with machines for the cutting of component parts of metal fittings and the indent stated in its column 2 that the oil was required "for cutting compounds." In the same column Waite was instructed that "particulars of any substitute other than those proposed should be communicated for acceptance before the order is placed" and that "samples should be sent through the Superintendent, Rifle Factory, Ichapur." Then still in the same column, the statement is made that "the Asiatic Petroleum Company has an oil and the Barma Oil Company a composition which is suitable". It is clear that this oil and this composition are referred to in the antecedent phrase "particulars of any substitute other than those proposed.

In the remarks column, opposite the entry in column 2 referring to the Asiatic and Burma Companies, the note occurs.

"Sample is being sent separately by parcel post registered." It does not appear of what oil the sample consisted or what became of the sample, but it is clear that Waite's attention was expressly drawn to the fact that the Asiatic Petroleum Company had an oil which was suitable. It is further be-

yond dispute that in August, 1918, the Company had an ample and immediately available stock of a water-soluble oil which they called "*turnol*," and which they were selling at Rs. 2-14 a gallon. If Waite be credited with nothing more than ordinary intelligence, there was no room for mistake on his part. He had only to apply to the Company and he would have obtained at the price stated an oil which would have satisfied the urgent needs of the Ichapur Factory.

He did not, however, take that simple course. In the first place, he was dilatory. He did nothing till he received a reminder from the Director of Ordinance Factories, Bengal, referring to the Simla indent, upon which he noted that "samples of this and home oil have been promised by Spalding & Co." Then comes a letter, dated 20th September signed by P. H. Michael "for Spalding & Co.," informing Waite that they were in a position to supply him with his requirements and forwarding a sample in a pint bottle of an oil which they were prepared to deliver at Rs. 12 per gallon packed in one gallon tins. For the present we pass by the question of what oil the sample consisted.

On the same date, the 20th September, Spalding & Co. wrote to Michael to confirm their quotations to him "for water-soluble oil as per sample handed to you for the Indian Munitions Board at Rs. 8 per gallon packed in one-gallon tins." They continued: "You are at liberty to cover yourself with any extra price. Such difference or excess price obtained by you will be payable to you as your remuneration for services rendered."

The sample in the pint bottle was sent on the 21st September, under Waite's order given on the 20th to the Ichapur Factory with a statement that it had been received from Messrs. Spalding & Co.

Another reminder, dated 20th September, this time from Simla, requesting the very early supply and despatch of the oil required, did not lead Waite to make further inquiries or change his line of conduct.

By a letter, dated 5th October, the Superintendent informed Waite that the sample had been "tested and found suitable" and asked him "to arrange for a supply as soon as possible." On the 10th October Spalding & Co. were informed by letter of the result of the test and that an order would be placed for the supply and that deliveries must be made immediately. Nevertheless, the formal order was not issued till the 23rd October. The order was for the immediate delivery of 1,800 gallons of "oil water—soluble as per sample approved" at the rate, including all charges, of Rs. 12 per gallon. By a foot-note Spalding & Co. were directed to despatch the oil direct to the Ichapur Factory.

Thus there was a delay of two months in placing an order which might have been placed at once and much more advantageously if Waite had made proper inquiries in the quarters indicated on the face of the Government indent.

Learned Counsel for Billinghurst suggested that Waite was concerned to obtain "real" water-soluble oil. But the term is merely descriptive. The evidence shows that there are various preparations in the market which come within the description. They differ in their qualities and composition, some having a basis of vegetable oil and some a basis of mineral oil. Under his instructions it was Waite's clear duty to obtain as quickly and cheaply as possible an oil which would serve the purposes of the Ichapur Factory. It was not a question of academic chemistry but a practical question and there is no room for doubt that the Asiatic Company's oil at Rs. 2-14-0 or Rs. 3 a gallon would have been a very much better bargain than the oil supplied by Spalding & Co. at Rs. 12 a gallon.

The delay did not end with the issue of the order of the 23rd October. Another reminder, dated 31st October, was addressed to Waite by the Director of Ordinance Factories which led to Spalding & Co. being told that "if no intimation is received" of the despatch of the oil ordered, "before the 13th instant, the demand will be cancelled on you." This letter bears date the 14th

November, though the sentence quoted shows that the draft must have been prepared before the 13th. The office copy exhibited is not intialled but as issued the letter must have been signed by or for Waite and a copy was sent to the Director. Replying on the 15th November Spalding & Co. informed Waite that 240 gallons of water-soluble oil had been despatched on the 14th November and that they expected to forward the balance during the ensuing week. As a matter of fact the Railway Receipt shows that the first consignment of 6 barrels was despatched on the 16th November.

What appears is that when Spalding & Co. stated as far back as the 20th September that they were in a position to supply water-soluble oil, they were promising more than they could then perform.

Towards the middle or end of October they addressed some forty firms in Calcutta, including Messrs. Shaw, Wallace & Co., (agents for the Burmah Oil Company), Messrs. Heatly & Gresham, and the Asiatic Petroleum Company asking for quotations for water-soluble oil.

These inquiries were for the most part infructuous and at the hearing of the appeal learned Counsel for Billinghurst obtained leave to prove a letter, dated 26th October, received from Mr. Edwin William Harlow of Messrs. Gillanders, Arbuthnot & Company, the agents of the Asiatic Petroleum Company.

Mr. Harlow was accordingly examined in this Court. He proved his signature on the letter which stated inability to supply the quotations asked for. In cross-examination, however, by the learned Advocate-General, he explained that he had water-soluble oil at the time but he understood that the inquiries were made on behalf of the Government and he or his firm wished to keep all Government business in their own hands with a view to supplying the Government direct.

In this case at any rate refusal to furnish Spalding & Co., with the quotations for which they asked did not mean that Waite could not have obtained water-soluble oil if he had himself made the inquiries made by Spalding & Co. On the contrary, this evidence shows that if Waite had done what he ought to have done, *viz.*, inquired of the Asiatic Petroleum Company, he would have obtained the oil at a reasonable price.

The oil which Spalding & Co. eventually supplied was obtained as to two barrels from Messrs. Healty & Gresham and as to the remaining 38 barrels from Messrs. Grandage, Moir & Co.

The transactions with the two firms named are on record. To begin with there is a bill, dated 26th October of Messrs. Grandage, Moir, against Michael for Rs. 20 on account of five gallons of their oil, called "koolkut" at Rs. 4 a gallon. The receipt on the bill shows that it was paid by cheque on the same date.

There was some dispute at the trial whether Messrs. Healty & Gresham supplied one or two barrels of their oil called "thresol." Before us the learned Advocate-General did not press the point and it seems to us on the evidence that as contended for the defence, Spalding & Co. received two barrels from this source, the first on the 29th October and the second on the 14th November.

On the 9th November, Messrs. Spalding & Co. gave an order to Messrs. Grandage, Moir & Co., for 500 gallons at Rs. 4 a gallon as arranged by Michael and understood that "you will deliver us at the rate of 80 gallons or two casks, each containing 40 gallons from next week." On the 21st November Messrs. Grandage, Moir & Co., were asked for a further 500 gallons and were told that "it is very important that we should have further quantities delivered to us daily."

A book called Spalding's Factory Stock Book, relating to their depôt at Entally, shows the following receipts of Messrs. Grandage, Moir & Company's Oil (koolkut):—

15th November 1918	...	4	barrels.
21st do.	...	4	do.
28th do.	...	6	do.
4th December 1918	...	10	do.
2nd January 1919	...	6	do.
6th do.	...	5	do.
9th do.	...	3	do.

It is very pertinent to compare the dates on which Spalding & Co. were negotiating for obtaining their supplies with the delay on Waite's part in placing the order and with the date—14th November—on which Spalding & Co. were threatend with the cancellation of the order. It is difficult to resist the inference that the order was delayed to enable Spalding & Co. to feel their way and that the threat to cancel was held back till Spalding & Co. had some prospect of obtaining supplies on a sufficient scale. In other words, the principal parties to the transaction were acting in concert.

On the 29th November the Ichapur Factory wrote to Spalding & Co. acknowledging the receipt (through the Gun and Shell Factory where they had been miscarried) of the six barrels despatched on the 16th. The case for the defence is that the six casks included the two casks supplied by Messrs. Healty & Gresham, and the first four casks supplied by Messrs. Grandage, Moir & Co. The Factory complained that all the barrels were not equally full. They added : "Please also note that the barrels do not appear to contain the same quality of oil ; it is, however, all soluble."

By the 20th December the Factory had received 25 barrels and by a bill of that date Spalding & Co. claimed payment of Rs. 14,340, the equivalent of 1,195 gallons as Rs. 12 a gallon. The bill was sent to the Factory for verification under cover of a letter, dated 8th January 1919. By a letter also of 8th January signed by Meek for the Deputy Controller, Inspection, (Waite was at the time absent from the office), Spalding & Co. were requested to consider the order cancelled in respect of the balance of the 1,800 gallons, namely, 605 gallons. On the 9th January, Spalding & Co. replied that they had already complied with the demand in full, and on the 23rd January they submitted a further bill for Rs. 7,752 as for 646 gallons.

The position taken by Spalding & Co., therefore, was that they had supplied 1,195 gallons in 26 barrels before the 20th December and 646 gallons in 14 barrels thereafter. The last three of the 14 barrels were received by the Factory on the 10th January. By computation the 26 barrels contained an average of just under 46 gallons a barrel and the 14 barrels an average of just over 46 gallons a barrel.

It had to be conceded in argument that the total of 1,841 gallons was from 80 to 100 gallons in excess of the whole quantity of oil originally supplied by Messrs. Heatly & Gresham and Messrs. Grandage, Moir & Co. The excess may have been more but it was certainly not less than from 70 to 80 gallons.

We have said that Spalding & Company's bill was sent to the Factory for verification. It drew from the Superintendent, Captain Kinloch, a letter, dated 14th January 1919, of which some part must be quoted. Captain Kinloch began by regretting that he could not certify the bill as correct in respect of the quantity or condition of the goods supplied.

As regards quantity he said : "Had the barrels sent all been full, the quantity would have been correct, but 10 of them were not, and as my reducing a bill without reference to the firm causes annoyance I wrote to them under my No. 393, dated 29th November 1918, pointing out that the oil was not all of the same quality, and asking them to say what the measurement of the doubtful barrels was, but up to now they have not answered and I have accordinly not completed the measurement. Could you kindly ask them to send some one along to see to this ?"

As regards conditions he said this: "As far as condition goes, No. 3 barrels seem to be alike. Out of the whole consignment, only two appear to be really soluble oil. The others are slightly emulsified and they vary each from the other. I send you three samples marked A. B, and C. I had two of them analysed. The sample marked 'A' had a specific gravity of-925, that marked 'B' 1·001, and the latter was reported to be in a semi-emulsified condition. It is evident they are not the same, and if one of them is according to the sample supplied by the firm the other cannot be."

Then he truned to the price and said : "I notice from the bill that the price charged is Rs. 12 per gallon ; surely this is an error. I purchased a really good

soluble oil from the Asiatic Petroleum Company during 1917 at Rs. 2-6-9 per gallon, and I notice that on the D. O. F. No. 14638-S., dated 13th August 1918, transferring the order to the Indian Munitions Board, a note to the effect that the Asiatic Petroleum Company supply a suitable oil, is mentioned."

He continued: "For example, if the whole quantity invoiced had been received from Messrs. Spalding & Co., *i. e.*, 1,195 gallons, as each gallon as supplied makes 11 gallons for use at the machines, the total quantity of lubricants produced would have been 13,145 gallons, and the cost Rs. 14,340—17·44 per gallon. Of the Asiatic Petroleum Company's compound only 215½ gallons would have been required to make the same quantity of lubricant and the cost would have been Rs. 598-10-0—62 per gallon".

"I recognize that the price has been agreed upon with Messrs. Spalding & Co. and had the oil supplied all been the same and up to sample, I should have had no legal ground for complaint, but as it is not all the same and is mostly very inferior, and as these costs are all debited to the rifles produced here, I should be glad if you could see your way to obtain a reduction of the rate."

He concluded by asking that a representative of the firm might be sent out to discuss the matter with him and see the supply in bulk.

A copy of this letter was sent to Spalding & Co. and acknowledged by them in a letter, dated 30th January. "In reply," they said, "we beg to state that we were not asked to supply water-soluble oil to any specified specific gravity, nor had we undertaken to do so. The indent placed with us distinctly stated 'water-soluble oil' only and in accordance with this indent we have supplied the required quantity commencing from November last, and it was not till our bill was presented in January that for the first time the question of price and specific gravity have been raised by the Superintendent, Rifle Factory, Ichapur."

They went on to say that "when the enquiry for water-soluble oil was placed with us for the required quantity, there was no contractor who was in a position to comply with this order." That shows how little they knew of the market. "We are, however," they added, "quite prepared to meet the Superintendent as desired by you."

In answer, Meek, on the 26th February drew the attention of Spalding & Co. to the fact that the order of 23rd October distinctly stated "oil water-soluble as per sample approved," and to the further fact that the result of the test of their sample had been communicated to them.

Spalding & Co. did not write again till the 29th April, when in a letter headed "without prejudice" they maintained their position. "We supplied the oil," they then said, "according to the sample approved in November 1918, and it was not until end of the January 1919 after our bill had been presented for payment, that the question of specific gravity and price was raised by the Superintendent, Rifle Factory. We were never asked to replace any of the oil and were, therefore, satisfied that the soluble oil supplied by us must have been approved. As regards the rate, we were asked to tender our rate for the oil by the Deputy Controller, Inspection, the same had been accepted; *vide* your office demand * * *; dated 23rd October 1918. Under the circumstances we see no justification for reducing the value of the oil supplied and delivered by us. We trust you will be pleased to pass our bills for same as these had been considerably overdue. Bank interest is accruing on the amount and we cannot afford to suffer further loss."

In speaking of "the sample approved in November 1918," Spalding & Co. were apparently referring to the Factory's letter of 29th November in which it was said that while the oil supplied was not all of the same quality, it was all soluble. That letter was in the nature of a complaint rather than an approval and what the firm had contracted to do was to supply oil according to the sample in the pint bottle. On the 30th April, Meek, acting under instructions from the Controller, Oils and Paints, Simla, with whom he had been in communication, finally refused to pass Spalding & Co.'s bills, which he returned. At the same

time, he requested them to remove the rejected materials.

This last request was also made under a direction from the Controller, Oils and Paints, to the effect that so much of the oil as had not been used should be returned. A word must be said as to what followed.

According to the Factory, they had used the contents of 26 barrels of Spalding & Co.'s oil, amounting to 1,040 gallons (or an average of 40 gallons per barrel). They proposed to return the balance of 14 barrels. This appears from a letter dated 16th May, addressed by Capt. Kinloch to the Controller of Munitions. Michael had visited the Factory on behalf of Spalding & Co., before the letter was written and Capt. Kinloch begins his letter as follows: "The 14 barrels of oil which it is proposed to return to Spalding & Co. have not been measured, 10 of them were not correct when received and a representative of the firm recently called here and satisfied himself that the quantity was not correct."

Further on Capt. Kinloch says: "The statement of the representative of the firm that the oil was correct to the sample, cannot be admitted. He called here, saw the oil and had to admit that no two barrels were alike except two which contained an oil utterly different to any of the others."

Capt. Kinloch then referred to the analysis which had been made of samples taken from three different barrels.

Further details as to Michael's visit were given in the witness-box by Mr. Fitzpatrick who was in 1919 Head Overseer of Stores of the Rifle Factory. In reference to Capt. Kinloch's letter he corroborated the statements therein made and said that Michael was the representative of Spalding's firm. He also said: "With regard to there being only two barrels alike Michael explained the Spalding's chemist had been carrying out experiments and that probably accounted for the two barrels being utterly different from any other. In my opinion the sample sent to us had been made of oil of the quality in the two barrels which were alike."

On the 5th June a copy of Capt. Kinloch's letter was forwarded by Mr. Meek to Spalding & Co. with the request that they would submit a revised bill for the 1,040 gallons actually used and remove the remainder from the Factory.

Spalding & Co. replied in a letter, dated 8th July, the signature of which "Spalding & Co." is in Billinghurst's handwriting. The firm did not dispute the fact of Michael's visit nor did they challenge the statement that at the time of the visit there were at the Factory 14 barrels of their oil unused. They addressed themselves to the quality of the oil and stated their reasons for refusing to take back the 14 barrels.

Before we deal with the quality of the oil, it may be mentioned that ultimately the Factory sent away 14 barrels. Spalding & Co. refused to take delivery and the oil was sold. There has been some dispute whether 12 of these 14 barrels contained Spalding & Co.'s oil, but the point is really immaterial. There is some confusion and obscurity in the evidence and some mistake may have been made as regards the barrels sent away. We will take it that at one time or another the Factory consumed the contents of 38 of the barrels received from Spalding & Co.

As to the quality of the oil it is common ground that two different kinds of oil were supplied, namely, the oil in the two barrels probably those obtained by Spalding & Co. from Messrs. Heatly & Gresham, and the oil in the 38 barrels, all of which probably come from Messrs. Grandage Moir & Co. We gather from Capt. Kinloch's letter of 16th May that the two barrels contained an oil of identical kind and quality, utterly different from the oil in the 38 barrels. As to the latter oil it was all similar in kind though chemical analysis showed that it might vary somewhat in quality or composition from barrel to barrel. The oil or preparation in the two barrels had mineral oil as a basis while the basis of the preparation in the 38 barrels was a vegetable oil, probably castor oil.

Now we have said that according to the defence the sample in the pint bottle, which was found satisfactory, was a

sample of the oil in the two barrels. The matter is not free from doubt but the contention is supported to some extent by the evidence of Mr. Fitzpatrick to which we have referred. But if the contention be accepted, it is obvious that the oil in the 38 barrels was not in accordance with sample. On the other hand, on the footing that the contract for the supply of the oil was a valid mercantile contract, untainted by fraud, Spalding & Co. might well have said that the Factory had not taken either of the two courses indicated in section 118 of the Contract Act. They had not within a reasonable time rejected the oil altogether as not being up to sample nor had they within a reasonable time given notice that they would accept the oil but intended to claim compensation or damages. If the letter of 29th November was in the nature of a complaint as regards the first consignment, it was hardly a sufficient notice that damages would be claimed in respect of the oil taken into use.

The Factory apparently did not use the oil in the two barrels which Mr. Fitzpatrick considered was according to sample and it is not disputed that these two barrels at any rate were among the 14 ultimately sent away. The explanation probably is that the quantity in the two barrels was insufficient to meet the Factory's needs for any length of time, and that the best had to be made of the bulk of the oil supplied of which at least 26 barrels were used. Referring to the quantity used in his letter of 16th May, Captain Kinloch said : "The reason why this large quantity (1,040 gallons) had to be used was that I had nothing else available and the quality was so poor that large quantities had to be used to make the correct emulsion for use at the machines."

But on the footing that the contract was valid, it was quite unnecessary for Michael to invent imaginary experiments by an imaginary chemist or for Billinghurst to make the statement which follows in the firm's letter of 8th July :— "At the time when the enquiry for the oil was placed with us there was no such oil available in the market, and as this demand was a pressing one, we were asked to manufacture the oil. In this connection, we had to go very much out of our way to prepare this oil in order to meet the demand; in doing so we felt that we were assisting the Munitions Board at a needful time."

Such explanations of the variations in the kind and quality of the oil supplied, were wholly disingenuous and dishonest. The suggestions made in argument before us, that Spalding & Co. wished to conceal the fact that they were mere middlemen, because they were afraid of losing Government custom, cannot be entertained. In July 1919 Spalding & Co. could have had no prospect of receiving any further orders from Government in any of its departments. The desire to conceal the fact that they were middlemen must have been the product of other motives. Doubtless, they were unwilling that discovery should be made of the price at which they had purchased the oil from Messrs. Heatly & Gresham and Messrs. Grandage Moir & Co.

But before we come to the bearing of the quality of the oil or the price charged or the *bona fides* of the transaction, there is another matter to be mentioned. We have said that according to their bills, Spalding & Co. supplied more oil than they obtained from their sources of supply. It has been suggested for the prosecution that in order to make up the excess, some of the oil obtained from Messrs. Grandage, Moir & Co., was in some way diluted or adulterated. We are not satisfied that this is established. In respect of the first consignment the Factory complained in their letter of 29th November that all the barrels were not equally full and in his letter of 16th May Capt. Kinloch stated that 10 of the 14 barrels were not correct in quantity. It may, therefore, be that Messrs. Spalding & Co. charged in their bill for a larger number of gallons than were actually supplied. The posecution, however, have not complained of the bills on this ground and we shall, therefore, assume that if an excess charge of this kind was made, it was due not to design but to some mistake of calculation.

There remains the question whether the order given by Waite for this oil was an honest order. In this case, as in the other cases, it is clear that in forwarding a copy of the order to Simla, Waite represented that it was in fact an honest order and that the price to be paid was a fair market price. If the order was the result of an unlawful arrangement between Waite and Michael and Billinghurst acting on behalf of Spalding & Co. it follows at the least that an attempt was made by those privy to that arrangement to cheat the responsible authorities at Simla. It is scarcely disputed—it cannot be seriously disputed—that the price charged was exorbitant. If Waite had made the most cursory inquiries, inquiries which it might almost be said he was directed to make, he could have purchased, at something under Rs. 3 a gallon, ample supplies of an oil which would not only have served the Factory's purpose but would have gone much further than the oil supplied. The point as to the difference between the Asiatic Company's oil and the oil supplied is well brought out in the Superintendent's letter of 14th January, 1919, from which we have already quoted. But the poor quality of the oil is not really important factor in this case. As the learned Magistrate said, the price was "exorbitant even for good oil." If we assume that neither Waite nor Spalding & Co. were aware that water-soluble oil is mixed with water before use and that some of these oils will mix with a larger proportion of water than others, there still remains the fact that Waite himself made no inquiries of the Asiatic Petroleum Company and did not call in the ordinary way for tenders. From observations already made it is apparent that we cannot accept Waite's statement made in a letter, dated 30th May 1919, written from Ootacamund that he made personal inquiries from certain firms including the Asiatic Petroleum Company. It is no violent presumption to suppose that on the 20th September when Spalding & Co. sent in the sample in the pint bottle (obtained as it is said from Messrs. Heatly & Gresham) and put in writing their agreement with Michael that he should retain any excess over Rs. 8 a gallon, the firm knew that the market price for such oil would not be more than Rs. 4 or 5 a gallon—the prices at which they subsequently purchased. If the bills for the oil had been paid by Government, Spalding & Co. would have received somewhat less than twice the price they themselves paid an additional Rs. 4 per each gallon would have gone, in the first instance at any rate, into Michael's pocket. Indeed, Michael submitted a bill to Spalding & Co. for Rs. 7,200 (equivalent to Rs. 4 a gallon for 1,800 gallons) and was paid Rs. 2,500 on account though Spalding & Co. had not received and in the result did not receive anything from the Government. Waite, it must be remembered, was throughout in close communication with Michael while the latter took a large share in the conduct of Messrs. Spalding & Co.'s business. The price to which Waite agreed was so extravagant that Capt. Kinloch thought it must be a mistake. We are not surprised that he was dismayed when Spalding & Co.'s bill was sent to him or that the transaction attracted attention at Simla and apparently was instrumental in leading the authorities there to depute Mr. R. D. Bell, the Controller of Oils and Paints, to Calcutta for the purpose of examining Waite's office.

Regard being had to all the circumstances we have detailed we can come to no other conclusion than that this transaction was the result of a corrupt and dishonest bargain to which Waite and Michael and Billinghurst were parties.

The above statement of facts relates to the three specific instances relied upon by the prosecution as showing the existence of a general conspiracy between the appellants and Waite.

It was argued on behalf of the appellants that the fact that there were three letters from Spalding & Co. to Michael relating to these three matters, proved that there could not have been one general conspiracy and that a separate agreement was entered into with respect to each of the three transactions, *viz.*, linseed oil, turpentine, and water-soluble oil,

On the other hand, it was argued on behalf of the prosecution that the conspiracy to cheat the Government of India was arrived at some time about the 14th June 1918, and that the subsequent agreements were merely supplemental to the original agreement. The dates of the three letters from Messrs. Spalding & Co. to Michael were 14th June 1918, 3rd September 1918, and 20th September 1918.

It was pointed out on behalf of the prosecution that the letter of 14th June 1918, referred to other oils in which Spalding & Co. might be interested, as well as to linseed oil, to which special reference was made—that letter of 3rd September 1918 expressly referred to the previous letter of the 4th June 1918, and that with regard to the letter of the 20th September 1918, which dealt with water-soluble oil, Michael's bill to Spalding & Co. for Rs. 7,200, in respect of the difference in rate for water-soluble oil, referred not only to the letter of 20th September 1918, but also to the letter of 14th June 1918.

In our judgment the mere fact of there being these three letters in respect of the three articles is not inconsistent with the existence of one general conspiracy. The letters of the 3rd and 20th September 1918 appear to have been supplemental to the letter of the 14th June 1918.

The large order for turpentine had been given by Waite to Michael on 31st August 1918 and it may not unreasonably be concluded that Michael desired to have it definitely stated that the terms with respect thereto should be on the lines of the letter of the 14th June 1918.

The amount of Spalding & Co.'s bill against the Munitions Board in respect of the order for turpentine was Rs. 45,487 and Michael's bill against Spalding & Co. was no less than Rs. 17,495.

It was, therefore, an important matter both for Michael and Spalding & Co.

It is to be noted that Michael received no commission in respect of that transaction but his remuneration was based on the excess rate charged to the Munitions Board, whereas in respect of the linseed oil he received commission as well as the other sums already mentioned.

It is further to be noted that this was not the first transaction in turpentine. It appears that on the 2nd July Spalding & Co. received an order for 20 gallons of turpentine, Java, No. 2. Spalding & Co.'s account against the Munitions Board was Rs. 160, Michael's bill against Spalding & Co. was Rs. 80 in respect of the excess rate.

On the 11th July 1918 Spalding & Co. received a further order for 600 gallons of turpentine, Java, No. 2. Spalding & Co.'s bill against Munitions Board was Rs. 3,900 and Michael's bill against Messrs. Spalding & Co. was no less than Rs. 2,400.

On the 9th August there was a further order for 25 gallons of turpentine, Java, No. 2, which was supplied at the rate Rs. 25 per gallon—a most extortionate charge.

Spalding & Co.'s bill against the Munitions Board was Rs. 625 and Michael's bill against Spalding & Co. was no less a sum than Rs. 500 out of a total of Rs. 625. It is difficult to find any justification for such transactions.

These bills of Michael's against Spalding & Co. were based an the excess rates obtained by him from the Munitions Board over and above the rates quoted to him by Spalding & Co.

These items are to be found entered in Spalding & Co.'s journal at page 21 under the heading of "Michael's Commission Account."

The number of bills, the excess rates and the amounts due to Michael are set out in the entries.

The learned Counsel for Billinghurst said that Billinghurst was unaware of these entries or transactions. We find it difficult to accept such a statement.

It is clear, therefore, that the arrangement set out in the letter of the 3rd September 1918, which related to turpentine, was in force and was being acted upon before the letter of the 3rd September 1918 was written and, in our opinion, that letter came into existence because of the large order which had been obtained on the 31st August 1918, in order that there should be no doubt as to the excess profits which Michael was to put into his pocket in respect thereof.

It was on the 20th September 1918 that in answer to an enquiry from Waite, Spalding & Co., wrote saying they could supply the water-soluble oil and they were sending a sample; on the same day Spalding & Co. wrote the letter confirming their quotations to Michael and agreeing to allow him the difference or excess price obtained by him as remuneration for his services. No commission was payable in respect of this matter; but as already pointed out, Michael's bill in respect of water-soluble oil referred not only to the 20th September letter, but also to the letter of 14th June 1918, showing that it was treated as being part and parcel of the original arrangement, with a variation as to the terms. Having regard to these facts, we are of opinion that the argument based on the three letters to the effect that there could not have been one general conspiracy, fails.

It was further urged on behalf of the appellants that the fact that there were many transactions intervening between the dates of the three matters alleged as overt acts by the prosecution, and that it was not proved that such transactions were fraudulent or dishonest was inconsistent with the existence of one general conspiracy.

We are not prepared to accept that contention. Assuming for the sake of argument that all such other transactions were honest, but that the three which have been investigated were not honest, these facts are not inconsistent with a criminal conspiracy to defraud the Government of India as and when opportunity occurred.

Reference was made to Waite's banking account which showed the payment into his account of various large sums of money, some of them in cash, the result being that there was an accretion of about a *lakh* of rupees in the course of a year over and above his salary.

We are of opinion that no reliance can be placed upon this matter, as showing that Waite was a party to the conspiracy alleged in this prosecution, for no proof has been given that any of such sums were in connection with the transactions now under consideration.

Having regard to the facts which have been proved in this case, we are constrained to come to the conclusion that Michael and Billinghurst entered into a criminal conspiracy, as charged by the prosecution, to cheat the Government of India of sums of money in connection with supplies by Spalding & Co. to the Munitions Board, and that the facts point to there having been one general conspiracy to carry out such cheating as and when opportunity occurred.

We are further of opinion that such cheating could not have been carried out except with the connivance, assistance and knowledge of Waite, and that Waite himself was a party to the criminal conspiracy alleged.

The result of our conclusion, arrived at after a prolonged hearing of the appeal, is that the decision of the learned Magistrate in respect of the first charge must be upheld.

The second charge was as follows:—"That between the 26th August 1918, and the 10th December 1918, in Calcutta, you (1) J. Stoddart, (2) H. P. Balackburn, (3), P. E. Billinghurst, and (4) P. H. Michael cheated the Government of India by dishonestly inducing them to deliver cheque No. 53,258 for the sum of Rs. 59,265, the property of the Government of India, for credit of Messrs. Spalding & Co. in payment of fraudulent bills Nos. 133 to 137 for linseed oil and thereby committed an offence punishable under section 420, Indian Penal Code, and within the cognizance of my Court."

The charge refers to the five bills Nos. 133 to 137, Volume II of the Paper Book, pages 143 to 153. Objection was taken to the form of the charge on the ground that it did not state the person or persons who were deceived by the alleged fraudulent bills Nos. 133 to 137, and who were thereby induced to deliver the cheque for Rs. 59,265.

It was alleged that, although the Government of India might be said to be a person within the meaning of section 420 of the Indian Penal Code, there was no suggestion that the persons constituting the Government of India as defined by section 16 of the Indian Penal Code, were deceived or induced to issue the

cheque and that the defence were entitled to know the person or persons upon whose mind or minds the fraudulent bills were alleged to have operated.

In our judgment, the charge should have contained an allegation of the person or persons who were alleged to have been deceived and induced to issue the cheque.

We are of opinion, however, that the omission should not be regarded as a fatal defect in the charge, inasmuch as the accused were not misled and there was no failure of justice by reason of the omission of the above-named particulars from the charge.

Another objection was taken to the second charge. It was alleged that the five bills, therein referred to, were presented at different dates, and that if any offence was committed by the appellants in respect of the bills, there were five separate offences of cheating and five separate offences could not be included in one charge.

In our judgment this contention cannot be accepted.

The offence charged under section 420, Indian Penal Code, would not be complete until the Government of India, being induced thereto by the alleged fraudulent bills, delivered the cheque for Rs. 59,265. Until the last of the five bills was delivered the inducement was not complete, and until the cheque was issued the offence under section 420, Indian Penal Code, was not complete.

In our judgment, therefore, the charge did not include five separate offences as alleged, but one offence only.

A further objection, however, was raised on the ground that the prosecution have not proved that any person or persons representing the Government of India was or were deceived by the alleged false and fraudulent representations contained in the bills or were induced to issue the cheque by reason thereof.

The material facts in this respect are as follows:—The bills Nos. 133 to 137 were sent by Spalding & Co. to Waite: Waite, on the 10th October 1918, sent them to the Deputy Controller of War Accounts, Calcutta, with a covering letter of that date, addressed to Deputy Controller, War Accounts, Munitions Board, Simla.

The Deputy Controller, War Accounts (Munitions Board), Calcutta, forwarded the bills with Waite's letter to Simla.

He made an endorsement on the letter as follows:—"Not checked: order is prior to August, 1918."

In his evidence S. K. Dutta Gupta, the Deputy Controller, War Accounts, Calcutta, explained that, with regard to bills relating to orders placed before 1st August 1918, he passed them from Calcutta to Delhi or Simla without audit or check which he left to the Delhi or Simla office.

In pursuance of this practice the abovementioned endorsement was made.

The bills in question were dealt with in the audit office at Simla by an Official, N. K. Ayer. The cheque for Rs. 59,265 was signed by another Official, C. P. A. Aiyar. C. P. A. Aiyar, who signed the cheque, said that before issuing a cheque he saw that the bills had been properly signed and passed by the audit officer, *viz.*, Mr. I. P. Dutt in 12 cases and by the other audit officer, N. K. Ayer, as regards the rest of the bills in respect of linseed oil. The bills in question bear endorsement "Passed for Rs.————," the endorsement in each case mentioning the amount of the bill and being initialled by N. K. Ayer.

N. K. Ayer, however, was not called as a witness.

The prosecution allege that the two persons deceived by the alleged fraudulent bills were S. K. Dutta Gupta, the Deputy Controller, War Accounts, at Calcutta, and N. K. Ayer, the audit officer, at Simla; and that C. P. A. Aiyar was the person induced by the alleged fraudulent bills to issue the cheque.

In our judgment, however, it is clear from the evidence that C. P. A. Aiyar relied solely upon the endorsement and initials of the audit officer, N. K. Ayer, which authorized him to pay the bills, and not upon any statements contained in the bills.

N. K. Ayer, the audit officer, should have been called as a witness, as is now admitted by the prosecution.

S. K. Dutta Gupta, the Deputy Controller, War Accounts, Calcutta, said in his evidence that if he had been informed that the proper quantity of linseed oil had not been supplied, he would not have allowed the bills to be forwarded to Simla.

He went on, however, to say that his instructions to his Superintendent were that before forwarding the bills for payment he was to see that they were countersigned by the Deputy Controller, Inspection, *i. e.*, Waite.

It has already been stated that the bills were not checked in the office of the Deputy Controller, War Accounts, Calcutta, and it is clear that all that was done with regard to the bills in question in that office was to see that the bills were countersigned by Waite and the bills were then forwarded to Simla.

As far as the office of the Deputy Controller, War Accounts, Calcutta, was concerned, the officials relied upon the signature of Waite. It was his signature which induced them to forward the bills to Simla.

It has been admitted that unless it can be shown that Waite was a party to the conspiracy alleged in the first charge, the second charge must fail. It is clear that this must be so, for if Waite was not a party to the consipracy, he would be one of the persons deceived by the alleged false and fraudulent representations in the bills and he has not been called as a witness to prove this.

The case, therefore, appears as follows:—

C. P. A. Aiyar issued the cheque relying on the endorsement on the bills initialled by the audit officer, N. K. Ayer, which authorized him to pay them.

N. K. Ayer has not been called to prove what it was which induced him to pass the bills.

The other audit officer, I. P. Dutt, who did not pass the five bills in question was called as a witness and he said that as regards the bills with which he dealt, he was only concerned to see that the bills were duly countersigned by the purchasing officer (in this case Waite) and that they were arithmetically correct.

It is probable that N. K Ayer did no more than I. P. Dutt; but, on the other hand, it is possible that he did more, and that he did not rely solely on the signature of Waite.

In a criminal case, such as this, it is not permissible to speculate on such a question and the audit actually applied by N. K. Ayer to the bills in question should have been proved by the prosecution.

S. K. Dutta Gupta, the Deputy Controller, War Accounts, Calcutta, was little more than a forwarding agent in respect of the bills in question: he did not check them, and all he did was to see that they were countersigned by Waite.

In our judgment, the prosecution have not proved that any official of the Government of India was deceived by the alleged false and fraudulent representations contained in the bills, and they have not proved that any official of the Government of India was induced by the false representations, alleged to have been made by Michael and Billinghurst in the bills, to issue the cheque for Rs. 59, 265.

Assuming that Waite was a party to the conspiracy with the two appellants to cheat the Government, the prosecution, in our judgment, have failed to prove the elements necessary to constitute the charge under section, 420. Indian Penal Code, in respect of the five bills Nos. 133 to 137.

Although the prosecution in our judgment have, for the reasons already stated, failed to prove at least one and perhaps two of the elements necessary to substantiate the offence contained in the second charge, *viz.*, under section, 420, Indian Penal Code, we are of opinion that the evidence produced in support of that charge is sufficient to support a charge of an attempt or attempts on the part of the appellants to commit the offence involved in the second charge.

In our judgment, the appellants presented the bills, referred to in the second charge, knowing that they contained false representations as regards the

number of gallons of linseed oil by Spalding & Co.

The presentation of each of the bills was an application for the payment of money under false pretences. It was done dishonestly and with the object of deceiving the officials of the Government of India and inducing the Government of India to issue a cheque or cheques for the amounts of the bills.

As soon as each of the bills was presented the offence of attempt was committed.

The appellants might have been convicted of the attempt although it was not charged (*see* section 237 of the Criminal Procedure Code).

The Magistrate, however, did not take this course, as in his view the offence charged had been proved. Nor was it suggested in argument that the appellants should now be convicted of the attempt and we do not propose to take that course in appeal. We are of opinion, however, that the evidence in respect of the charge, so far as the appellants are concerned, is material on the question of the conspiracy alleged in the first charge.

It is necessary in this connection to notice an argument which was urged by the learned Counsel on behalf of Billinghurst, *viz.*, that even assuming he knew that the bills presented by Spalding & Co. contained false representations as regards the number of gallons of linseed oil supplied by Messrs. Spalding & Co. his action in presenting the bills could not be regarded as dishonest, as he expected and believed that the bills would be checked by the Government of India officials and that if they did check the bills and passed them, after such checking, Spalding & Co. would legitimately be entitled to receive the amounts of the bills.

We cannot for a moment accept such an argument. If we were to give any sanction to such conduct, as being legitimate, it would entail a serious inroad upon the principles of common honesty and commercial integrity.

The result of our judgment is that the Magistrate's decision as to the first charge must be upheld, and that the conviction under the second charge should be set aside.

We have now to consider the question of sentence. The premises of Messrs. Spalding & Co. were searched on the 23rd December 1919, and at other times between that date and the 22nd August 1920, when the complaint in this case was lodged.

Billinghurst was arrested in September 1920, and released on bail on the 9th September 1920. Extradition proceedings were instituted with regard to Waite, Balckburn and Michael who were in England. Waite was seriously ill and was not extradited but in pursuance of the extradition proceedings Blackburn and Michael were brought before the Court in April 1921 under arrest.

On the 24th May 1921 on the application of Billinghurst the High Court made an order that the trial of the case should proceed, though the presence of Waite could not be obtained, and gave a direction that the proceedings before the learned Magistrate should be continued as far as possible from day to day and completed with all possible despatch.

The trial began on the 7th June 1921 the hearing was not finished until 22nd August 1922, and judgment was delivered on the 28th November 1922.

In our judgment it is necessary to draw attention to these dates and to express our grave concern at the length of time occupied by the trial of this case.

From whatever point of view the matter is approached, it is equally serious. However, guilty an accused person may be, it is most undesirable that he should be subjected to the strain and anxiety of such prolonged proceedings unless it is absolutely unavoidable.

From the other point of view it must be obvious that the costs of proceedings, such as these, must be increased proportionately as the proceedings are prolonged.

From the materials before us it is clear that adjournments were at various times granted on the application of one or other of the accused, sometimes on the ground of illness, and that they were responsi-

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 139 OF 1924.
June 18, 1924
Present :—Mr. Justice Moti Sagar.
JIWAN SINGH AND ANOTHER—ACCUSED—APPELLANTS
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 124A—Sedition—Ingredient of offence—Intention, how determined—Prosecution, whether bound to produce direct evidence—Presumption—Accused, duty of.

The question whether a certain article in a newspaper is or is not seditious within the meaning of section 124A, Penal Code, depends upon whether it was or was not intended to bring the Government into hatred or contempt. [p. 574, col. 2.]

Intention is a state of mind which may be gathered from the surrounding circumstances and may well be presumed from the conduct of the writer or the publisher which would include also the character of the language employed by him. [*ibid.*]

Rex v. *Burdett*, (1820) 4 B. & Ald. 95 at p. 120; 106 E. R. 873; 22 R. R. 539, *Haire* v. *Wilson*, (1829) 9 B. & C. 643; 4 Man. & Ry. 605; 109 E. R. 239; 7 L. J. K. B. 302; 33 R. R. 284, *Queen-Empress* v. *Luxman Narayan Joshi*, 2 Bom. L. R. 286, referred to.

Intention is an essential element in the offence of sedition but it is not necessary for the prosecution to prove the intention directly by evidence. [p. 574, col. 2; p. 575, col. 1.]

The law will presume the intention—whether good or bad—from the language and conduct of the accused, and it will be then for him to show that his words were harmless and his motives innocent. [p. 575, col. 2.]

Appeal from an order of the Magistrate, First Class, with powers to try offences under section 124A, Indian Penal Code, Amritsar, dated the 4th February 1924.

Mr. *B. R. Puri* and Dr. *Nand Lal*, for the Appellants.

Mr. *Des Raj Sawhney*, Public Prosecutor, for the Respondent.

JUDGMENT.—This is an appeal from a conviction under section 124A, Indian Penal Code. The appellants are two in number, namely, Jiwan Singh, the editor, and Sewa Singh, the publisher, of a certain newspaper published in Gurmukhi at Amritsar under the name and style of '*The Kirppan Bahadur*.' The subject-matter of the charges is to be found in an article published in its issue of the 25th February 1923, an English translation of which is set out *in extenso* in the judgment of the Trial Magistrate. The case for the prosecution is that this article is seditious and that it is calculated to bring into hatred and contempt or to excite feelings of disaffection towards the Government established by law in British India. Both the accused have been found guilty, and have been sentenced to one year's rigorous imprisonment and a fine of Rs. 150 each.

The finding of the learned Magistrate has been assailed before me mainly on the ground that the article is not seditious within the meaning of section 124A, Indian Penal Code, and that there is nothing on the record to show that on a perusal of this article any feelings of hatred or contempt were excited among its readers towards the British Government. It is pointed out that only three witnesses were produced on behalf of the prosecution and that there was nothing in their evidence to support the finding of the learned Magistrate that the accused were guilty of the offence with which they had been charged. On the contrary reliance was placed on the evidence of the defence witnesses most of whom are alleged to have deposed to the effect that the article was not seditious and that it was not capable of bearing a sinister interpretation. Now the question whether the article is or is not seditious within the meaning of section 124A, Indian Penal Code, depends upon whether the article was or was not intended to bring the Government into hatred or contempt. It is now well settled that intention is a state of mind which may be gathered from the surrounding circumstances and may well be presumed from the conduct of the writer or the publisher which would of course include also the character of the language employed by him. In the case of *Rex* v. *Burdett* (1) it was held by Mr. Justice Best that if it appeared that the contents of the paper were likely to excite sedition and disaffection, the defendant

(1) (1820) 4 B. & Ald 95 at p. 120; 106 E. R. 873; 22 R. R. 539.

In our judgment this matter is outside the scope of this appeal, and it is not necessary for us to express any opinion with respect thereto.

The appellants must surrender to their bail at once.

With regard to what the two learned Vakils have just urged, namely, for dealing with the accused Billinghurst under the First Offenders Act or for further reduction of the sentence of the accused, we desire to say that we considered this matter fully and carefully before we delivered our judgment and we regret that we can see no reason for altering the decision at which we have arrived.

The application for granting compensation to Mr. Blackburn is rejected.

N. H.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 106 OF 1924.
July 15, 1924.
Present:—Mr. Prideaux, A. J. C.
KISHORE—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 30, 337 (2A)—Pardon to approver by s. 30 Magistrate—Trial of case.

A Magistrate with powers under section 30 of the Criminal Procedure Code who has tendered a pardon to an approver cannot try the case in which the approver is to be examined as a witness, but must commit the accused to Sessions Court or High Court if he is satisfied that there are reasonable grounds for believing that the accused is guilty of the offence.

Appeal against the finding and sentence of the Sub-Divisional Magistrate, Saugor, dated the 10th May 1924, in Criminal Case No. 25 of 1924.

Mr. *P. Lobo*, for the Crown.

JUDGMENT.—This judgment also disposes of Criminal Appeals Nos. 107, 108, 109, 110, 111, 112, 113, 119 and 120 of 1924. The ten appellants are: Kishore, Nanhoo, Lalji, Partab, Nathoo, Malthu, Jhalua, Jamnaprasad, Balua and Halka, respectively. These ten persons have been convicted at one trial of an offence under section 400 of the Indian Penal Code, and all with the exception of Malthu have been sentenced to seven years' rigorous imprisonment. The appellant Malthu has been sentenced to five years' rigorous imprisonment.

The case has been tried by a Sub-Divisional Magistrate with section 30 powers. Under these powers a Sub-Divisional Magistrate has power to try as a Magistrate all offences not punishable with death. On the 28th February 1924 one Gajraj Singh was examined under section 337 of the Criminal Procedure Code and a pardon was tendered to him on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge in connection with this case. That pardon was accepted, and eventually Gajraj was examined as an approver in the case on the 26th March 1924. Now the amended section 337 (2A) of the Criminal Procedure Code runs as follows:—

"In every case where a person has accepted a tender of pardon and has been examined under sub-section (2) the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court as the case may be."

This section clearly governs section 30 of the Code of Criminal Procedure. The Select Committee, referring to the amendment of this section, say :—

".....(*f*) We think all cases in which there is an approver should be committed for trial, and we have deleted the provision which enabled cases to be transferred to section 30 Magistrates."

It seems very clear that the Sub-Divisional Magistrate had not the power to try the present case, because there was an approver's testimony in it. He should have committed the case for trial to the Sessions Court. It is unnecessary to take further evidence, but the Magistrate will write a short order giving his reasons for committing the case. I set aside the convictions and sentences passed on the appellants and direct that the lower Court do now commit the case for trial to the Sessions Court.

G. R. D. *Order accordingly.*

"How can these people be expected to break the Jail Rules who did not lift even one finger, when they were bludgeoned and their long hairs were pulled? Not one hair (on the bodies of those) had been injured who pelted stones on the faces of Sikh prisoners, suspended the latter from trees, threatened to thrust *kuththa (halal)* meat and beef into their mouths and committed on them such other diverse outrages in defiance of the Jail Rules as they liked. But troubles are piled on respectable Sikhs on one pretext or another." Then there is a reflection on the Government's sense of justice which it is insinuated has become altogether wrapped as evidenced by the present happenings. It is stated: "Blessed is British Rule as also its justice, the Rule under which, it is said, the lion and the goat drink at the same *ghat*." Lastly, there is a sentence which says that it is impossible for the Sikh community to forget the treatment which has been meted out to them by those who had been posing as their friends for the last 70 years.

The learned Magistrate has found that the article is seditious and that it is calculated to promote feelings of ill-will and hostility towards the British Government. I have given a very careful consideration to the language of the article with a view to form my own judgment as to its character, and I can come to no other conclusion than that its object and intention was to bring the Government as contemplated by section 124A, Indian Penal Code, into hatred and contempt or to excite feelings of disaffection towards it. The article was written in Gurmukhi at the time when the relations between the Government and the Sikhs were very much strained. The Government was therein charged with having restored to various excesses in order to humiliate the Sikh community. Its policy was designated as a double-faced policy and it was insinuated that in order to gain its ulterior objects the Government had not hesitated to disregard even the religious scruples and prejudices of the Sikh community. There can be no doubt that the article was seditious within the meaning of section 124A, Indian Penal Code, and that it was likely to cause disaffection or produce hatred or contempt towards the Government.

The question of sentence, however, requires consideration. The accused Jiwan Singh belongs to a very respectable faimily; some of its members are holding responsible posts under the Government and the past record of the accused himself has so far been very satisfactory. He has expressed regret for what he has written and has clearly stated before me that his object in writing this article was not to excite disaffection towards the Government. There can also be no doubt that the first portion of the article giving information as to the enhancement of the sentences on some of the Akali leaders was copied from other Akali papers in which the news had already appeared. The second portion was based on certain communiques issued by the Sharomani Gurdwara Parbandhak Committee at Amritsar. These circumstances cannot of course justify the publication of the article in question, but may certainly be taken into consideration in mitigation of the offence with which the accused has been charged. The accused is an old man of about 55 years of age and has probably been led away by his religious zeal. Having regard to his past record and to the circumstances stated above, I consider that the sentence of Rs. 150 fine would be quite sufficient to meet the ends of justice. I accordingly uphold the conviction but reduce the sentence to the extent above indicated.

It follows from what has been stated above that the appellant Sewa Singh, who is admittedly the publisher of the article, is equally guilty. His conviction must, therefore, also be upheld, but the sentence reduced to the same extent as in the case of the other appellant Jiwan Singh. I accordingly uphold the conviction and the sentence of Rs. 150 fine, but set aside the sentence of imprisoment. In default of payment of fine both the accused will undergo two months' rigorous imprisonment each.

K. S. D. *Appeal dismissed; Sentence reduced.*

PATDAYA *v.* SECRETARY OF STATE FOR INDIA.

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 254 OF 1921.

August 2, 1923.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Kemp.

PATDAYA *bin* MUPPAYYA HIREMATH—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS—DEFENDANTS—RESPONDENTS.

Bombay Revenue Jurisdiction Act (X of 1876), ss. 4 (a), 5 (a)—Bombay Titles to Rent-free Estates Act (XI of 1852), Sch. B, s. 8—Suit for declaration that plaintiff is jangam *of* math, *maintainability of—Suit restraining Secretary of State from recovering economic rent, whether barred—Third person in possession of lands appertaining to office of village servant—Collector, power of, to levy economic rent—Order* ultra vires—*Suit to restrain Collector—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 14, applicability of.*

A suit for a declaration that plaintiff is the *jangam* of a *math* is barred under paragraph (2) of section 4 (*a*) of the Bombay Revenue Jurisdiction Act. [p. 578, col. 2.]

A suit against the Secretary of State for India and other defendants for an injunction restraining the former from recovering the full economic rent of certain lands and paying the same to the latter and restraining the latter from receiving the same, even if it falls under paragraphs 1 and 4 of section 4 (*a*) of the Bombay Revenue Jurisdiction Act, is saved from the bar created by section 5 (*a*) of the Act. [p. 580, cols. 1 & 2.]

The Government has power to regulate by rules the question of emoluments relating to service performed to the State under the fifth provision of section 8, Schedule B, Bombay Titles to Rent-free Estates Act but it has no power under that Act to frame any rules with reference to the resumption of lands given as emoluments of any hereditary office, such as *kazis*, village *joshies*, etc. Any such rules must be *ultra vires*. [p. 579, col. 2; p. 580, col. 1.]

The office of *jangam* of a *math* comes under the first paragraph of section 8, Schedule B of Bombay Titles to Rent-free Estates Act. [p. 580, col. 1.]

Apart from some statutory provision or some rule having the force of law, the Collector has no power to disturb the possession of a third party, over lands appertaining to the office of a village servant, who may have acquired rights in respect of such lands under the operation of law, as, for example, by adverse possession. In such a case the Collector has no power either to evict the person in possession or to levy economic rent in respect of the lands. [p. 580, col. 2; p. 581, col. 2.]

A suit for an injunction restraining the Secretary of State for India from enforcing an order which is *ultra vires* is not governed by Art. 14, Schedule I of the Limitation Act. [p. 581, col. 2.]

First appeal against the decision of the District Judge, Dharwar.

Mr. *Nilkant Atmaram*, for the Appellant.

Mr. *S. S. Patkar*, Government Pleader, and Mr. *Y. N. Nadkarni* for Mr. *K. H. Kelkar*, for Respondents.

JUDGMENT.—The facts which have given rise to this appeal are briefly these. The plaintiff is the Swami of the Hiremath at Haveri. He filed this suit on the 25th February 1918 against the Secretary of State for India and two other defendants. These two defendants represent the line of one Chanviraya, who was the father of Baslingaya shown in the genealogy in paragraph 3 of the plaint. The plaintiff's predecessor-in-title as the Swami of the *math* was one Tirmalswami. This Tirmalswami, before he became the Swami of the *math*, in his family was the natural brother of the said Chanviraya. The suit relates to three Survey Nos. 35, 136 and 137 which, roughly speaking, represent two out of the four lands which were originally assigned under the *sanad* of 1868 to Chanviraya for the purpose of remunerating him in connection with the performance of his duties as a *jangam*. The plaintiff's case is that really he and his predecessors, the Swamis of the *math* have been the *jangam* and the lands were really assigned to them. It appears, however, from the statement of the case that two lands are admittedly in the possession of defendants Nos. 2 and 3. These are Survey Nos. 7 and 310 which apparently correspond to the old Nos. 5 and 224. The plaintiff's case is that he is the rightful owner of the three lands mentioned in the suit, and that the defendants have no right whatever to those lands beyond recovering the amount payable to the Government as *judi*. On the application of defendants Nos. 2 and 3 the Collector made an order that "full rent as per Form E was to be recovered for all the three numbers and paid to applicants" on the 24th April 1915. There was an appeal from this to the Commissioner who upheld the order on the 16th September 1915. There was a memorial to the Government; but the Government declined to interfere on the 29th September

1916. As a result of this order, the full economic rent in respect of these two lands was levied for three years as stated in paragraph 9 of the plaint amounting in all to Rs. 481-5-6. The present suit is filed by the plaintiff on the footing of the cause of action having arisen in virtue of the interference by the Revenue Authorities with his rights by charging economic rent, and he has claimed the following reliefs :—

(*a*) that the plaintiff should be declared as the *jangam* of the Hiremath of Haveri and not the defendants Nos. 2 and 3 ;.

(*b*) that a permanent injunction be issued restraining defendant No. 1 from recovering the full rent of the lands mentioned in paragraph 1, and from paying the same to defendants Nos. 2 and 3, and again restraining defendants Nos. 2 and 3 from receiving the same ;

(*c*) that the sum of Rs. 481-5-6 mentioned in paragraph 9 of his plaint should be ordered to be re-paid to the plaintiff ;

(*d*) in case the Court holds that defendants Nos. 2 and 3 are *jangams* of the said Hiremath and they are entitled to recover the *jangam* grant from plaintiff, that it should be declared that they are entitled to recover the royal share of the revenue only of the lands mentioned in paragraph 1, *i. e.*, the assessment levied on them and not the full rent of same.

Defendant No. 1 denied the claim of the plaintiff both as the *jangam* and as the owner of these lands. He also denied that the plaintiff or his predecessors had been in possession for a long time past as alleged by the plaintiff. His case was that these lands were assigned for the *jangam* service useful to the community at Haveri and that defendants Nos. 2 and 3 were the *jangams*, and were entitled to the lands. It was also deined that the service was remunerated merely by the royal share of the revenue of the lands. By a supplemental statement the objections were raised that the claim was barred under section 4 (*a*) of the Bombay Revenue Jurisdiction Act X of 1876, and that it was barred by Art. 14 of the Indian Limitation Act. Defendants Nos. 2 and 3 asserted their own right both to the office as *jangam* and to the lands in question, and in other respects they raised the same objections which defendant No. 1 had raised to the suit.

On this several issues were raised. It is not necessary to refer to those issues and to the findings in detail here but in the result the plaintiff's suit was dismissed.

The plaintiff has appealed from this decree, and in support of the appeal several questions have been argued. It will be convenient to take the points with reference to the prayers in the plaint, and to deal with them as they have been raised in the appeal. The first prayer relates to the declaration that the plaintiff is the *jangam* and not defendants No. 2 and 3. This office is useful to the village community, and the lands assigned to the office-holder are assigned in respect of the services which he has to render. In the present case the Government continued the lands for the office of the *jangam* under the *sanad* of 1868, which was issued to Chanviraya, who would represent Baslingaya's branch as shown in the plaint.

As regards the first prayer it is clear that the claim is barred under section 4 (*a*), 2nd paragraph of Act X of 1876. It provides that "subject to the exceptions hereinafter appearing, no Civil Court shall exercise jurisdiction as to any of the following matters:.....claims to perform the duties of any such officer or servant," such officer or servant having been specified in the first paraghaph which would include any other village officer or servant. It was rightly conceded in the course of the argument by Mr. Nilkant, that the jurisdiction of the Courts as to the first prayer would be barred under this clause, and it is not necessary to labour this point.

But it has been argued in this appeal that though the question as to who is the *jangam* is excluded from the jurisdiction of the Civil Courts the Courts could determine the question whether the lands were assigned to the ancestors of defendants Nos. 2 and 3 or to the plaintiff's ancestors. The evidence bearing on the question as to whether the grant was originally to the Swami of the Hiremath at Haveri or to Chanviraya,

the original ancestor of the present defendants Nos. 2 and 3, has been discussed at some length. It is common ground, however, between the parties, or at any rate the contrary has not been suggested on behalf of the appellant, that the lands are given as remuneration for the services to be rendered as *jangam*; and if the Court cannot determine whether the plaintiff is the *jangam* and if it must accept the fact that defendants Nos. 2 and 3 are the *jangams* as the representatives of the *jangam* whom the Government accepted as the office-holder, it must also be accepted that the lands were assigned to them as remuneration for the services to be performed by them as *jangams* In this view of the matter, it is needless to discuss the evidence as to the grant. But we may mention briefly that even if it was open to us to consider the evidence bearing on the question whether the grant was originally to the Swami of the *math* or to Chanviraya, the evidence points to the conclusion that the lands were given originally by the former Government to Chanviraya. Exhibits 240, 242, and 244 show that so far back as 1820 the lands stood in the name of Chanviraya, and it is conceded that the lands have all along stood in the name of Chanviraya. When an inquiry was made before the *Inam* Commission, it appears that Baslingaya, the son of Chanviraya, made a statement in 1845, Exhibit 210, which is relied upon by the appellant as proving his case. As against this, however, we have the fact that in 1854 in Suit No. 201 between the predeceesors-in-title of the plaintiff and defendants Nos. 2 and 3 there was a compromise decree, which is Exhibit 218, and according to that the lands continued to be in the name of the defendants' ancestors; and above all we have the fact that in 1868 Government granted the *sanad* to Chanviraya. The decision of the *Inam* Commission, if there was any, has not been put in. Under these circumstances in spite of the statement of Baslingaya, which is not altogether unequivocal, but which we are willing to take for the purpose of the present argument as telling in favour of the plaintiff's case, the conclusion must be accepted that the lands were appurtenant to the office and were assigned to the ancestors of the present defendants Nos. 2 and 3.

As regards the second prayer which relates to the injunction against defendant No. 1 restraining him from recovering the full rent of the lands, and from paying the same to defendants Nos. 2 and 3, and against defendants Nos. 2 and 3 restraining them from receiving the same, the question stands on a different footing. It is urged on behalf of defendant No. 1 that the suit is barred under section 4 (*a*), paragraphs 1 and 4 of the Bombay Revenue Jurisdiction Act. It is important to remember that the Collector has apparently acted under the Rules framed by the Government in 1908 for the resumption of lands. These rules purport to have been framed under the powers conferred by Act XI of 1852, Schedule B, sections 8 and 10, and by Bombay Act VII of 1863, section 2, clause 3 and all other powers in this behalf. Under rule 4, the Collector has the power in respect of lands which do not fall under rules 2 and 3 at his discretion to resume these lands if he finds that the lands are in possession of third parties; and under rule 6 he can summarily evict any person wrogfully in possession of the land, or levy any rent due by any person in the manner that may be prescribed for the time being in force for the levy of a revenue demand. In the present case the Collector ordered the economic rent to be levied; and the only possible basis for this order is afforded by these rules. No other statutory power is referred to as justifying the order. The plaintiff's case is that these rules are *ultra vires* of the Government so far as the territories to which Act XI of 1852 applies are concerned, as regards those lands which are held by servants of the class mentioned in paragraph 1 of section 8 of Schedule B of Act XI of 1852. The Government has power to regulate by rules the question of emoluments relating to service performed to the State under the 5th provision of section 8. But the Government has

no power under that Act to frame any rules with reference to the resumption of lands given as emoluments of any hereditary office, such of *kazis*, village *joshis*, etc. It is common ground that the office of a *jangam* comes under the first paragraph of section 8. Therefore, by the very preamble of these rules it is clear that they could not have been intended to apply to lands held by such village servants in the territories to which Act XI of 1852 applies. It may be mentioned that there is no provision in Bombay Act II of 1863, like the provision in section 2, clause (3), sub-clause (3) in Bombay Act VII of 1863. The case for the plaintiff is that the order of the Collector is *ultra vires* so far as it purports to levy rent in excess of the full assessment authorised by Government. The claim, so far as it relates to this excess amount over the assessment authorised by law, would be saved under section 5 (*a*) of the Bombay Revenue Jurisdiction Act. Under that section it is open to the plaintiff to file a suit against Government contesting the amount claimed, or paid under protest, on the ground that such amount is in excess of the amount authorised in that behelf by Government. Assuming, therefore, that the claim as to this rent would fall under clause (*a*) of section 4, paragraphs 1 and 4, it is saved from the bar of the Revenue Jurisdiction Act to the extent which I have stated.

It has been urged on behalf of the appellant that the suit would be saved also under clauses (*i*) and (*k*) of section 4 of the Bombay Revenue Jurisdiction Act. It is clear that no decision under Act XI of 1852 has been put in, and no exemption is claimed on the basis of such a decision. Therefore, clause (*k*) would not apply. The *sanad* in question does not purport to have been issued under Bombay Act II of 1863, and it seems to us that it could not have been issued under that Act as it does not apply to "lands held for service" as provided in section 1, clause (2), sub-clause (3). We are unable to accept Mr. Nilkant's argument that "service" there means service to the State and not service to the village community. It would not be possible to accept this contention without reading words in the clause which are not there: and the construction would be opposed to the observation in *Jamal Saheb* v. *Murgaya Swami* (1). Therefore, clause (*i*) also would not apply. But we think that the suit is saved under section 5 of the Bombay Revenue Jurisdiction Act. This point was not decided in the two decisions which have been referred to in the course of the argument, *viz.*, *Mohamadsaheb* v. *The Secretary of State for India* (2) and *Fakirudinsab* v. *The Secretary of State for India* (3).

The lower Court has taken the view that even though the order may not be justified under any statutory provision, it must be deemed to be valid on the ground that the Government have the inherent power of authorising the Collector to resume the lands summarily where they appertain to the office of a village servant of the description mentioned in Act XI of 1852, Schedule B, rule 8, paragraph 1 and where the office is found to be dissociated from the lands which would be contrary to the purpose of the grant of the lands as remuneration for services to be rendered to the village community. We are, however, unable to accept this view. We do not think that unless the powers could be referred to any statutory provision, or any rule which has the force of law, it could be assumed that the Collector would have the power of disturbing the possession of any third parties who may have acquired rights in respect of such lands under the operation of law, as for example, by adverse possession. Where a third party is found in possession of such lands, either the party interested must sue him for possession; or if the Government feel interested in the restoration of the lands, they may be able to sue the third party for such restoration. We do not express any opinion on this last point. But we think that

(1) 10 B. 34; 5 Ind. Dec. (N. S.) 406.
(2) 54 Ind. Cas. 98; 44 B. 120; 21 Bom. L. R. 1159.
(3) 54 Ind. Cas. 105; 44 B. 130; 21 Bom. L. R. 1166.

if these rules are not *intra vires* of the Government as regards such lands as we are concerned with in this case, and if the Collector has no power to disturb the possession of a third party by summarily evicting him or by levying economic rent, the plaintiff is entitled to maintain a suit for the purpose of restraining the Collector from enforcing the order in question.

This of course does not affect the question as to who has the title to these lands, nor does it affect the question whether the Collector or the Government has the right to sue the plaintiff for the purpose of restoring the lands to the office-holder. But if the order made by the Collector and upheld by the Commissioner is *ultra vires*, the plaintiff is entitled to prevent the Revenue Authorities from recovering the full rent. It appears in this case that in 1868 when a *sanad* was granted, the full assessment in respect of all the lands was Rs. 90, and that was the amount which was to be paid to the Government under the *sanad*. Therefore, at that time the lands were continued on payment of *judi*, amounting to full assessment. It appears, however, that at the next Revision Survey in 1876-77 the assessments were raised in respect of these lands and the total assessment under that Revision Survey was Rs. 129 in respect of all the five lands. The Government was entitled to Rs. 90 under the *sanad*, and the difference between the two items represented the benefit to the *sanad*-holder. It further appears that in 1909-10 this amount of assessment was further enhanced to Rs. 145-8-0, and according to that the *sanad*-holder would be entitled to the difference between Rs. 145-8-0 and Rs. 90. The plaintiff's present claim must be confined to the excess over the full assesment in respect of the three lands in suit which is recovered by the Collector under the order in question, and to that extent, as we have said, the suit is maintainable. On the merits, in spite of the argument of the learned Government Pleader to the contrary, we are unable to hold that the order of the Collector levying economic rent can be justified. As regards the lands held by village servants useful to the village community under Act XI of 1852, Schedule B, section 8, paragraph (1), the Government have accepted the view that these rules have no validity. Our conclusion, however, is based upon the view that we take of the powers of Government to frame such rules quite independently of that Resolution. In our opinion, the plaintiff is entitled to an injunction restraining defendant No. 1 from levying the economic rent under the order made by the Collector in April 1915 so far as it is in excess of the full assessment leviable in respect of these three lands.

It is conceded, and it is indisputable, that the Collector is entitled to levy the full assessment from the plaintiff in respect of these lands, and to pay to defendants Nos. 2 and 3 the difference between the full assessment and the *judi* payable to the Government under the *sanad*. The relief by way of injunction is confined only to the excess over that full assessment.

It will be convenient to deal here with the further question which has been raised on behalf of defendant No. 1 that the suit is time-barred, because the suit to set aside such orders must be brought under Art. 14 of the Indian Limitation Act within a year from the date of the order. It is needless, however, to refer to the many decisions bearing on this point. It is clear that if the order is *ultra vires*, it need not be set aside, and this is not a suit to set aside the order. It is a suit to seek relief on the footing that the order is *ultra vires*. That is a recognised distinction so far as the application of Art. 14 is concerned, and we do not think that Art. 14 can apply to the claim for injunction.

* * * * *

In the result, the plaintiff's claim must be disallowed except with reference to the injunction. We would, therefore, allow the appeal to that extent and vary the decree of the lower Court by granting an injunction against defendant No. 1 restraining him from recovering any rent in excess of the full

assessment in respect of the lands in suit under the order of the Collector dated 24th April 1915.

The plaintiff has sought to put in two documents relating to a period prior to 1820 with a view to show that the original *inamdar* was not Chanviraya but the *Swami* of the *math*. It was perfectly open to the plaintiff to produce these documents at the trial of the suit and no adequate reason is shown, in our opinion, why he should be allowed to make good the omission now. The reason as stated in the petition is that he thought that the statement of Baslingaya, Exhibit 210, was quite sufficient to prove his case, and that, therefore, he did not care to put them in. That is hardly a ground for allowing this application. Secondly, as we have already mentioned in the judgment, the question whether the plaintiff is the *jangam* or defendants No. 2 and 3 are the *jangams* is a matter which cannot be determined by a Civil Court, and, as it is not disputed in this case that the lands are appurtenant to the office, the question as to the title to these lands is also practically concluded by the fact that the *sanad* has been granted by the Government to an ancestor of defendants Nos. 2 and 3. Even if these documents were admitted they could not affect the result. Therefore, the application for additional evidence must be rejected.

As regards costs, we think that under the circumstances each party should bear his own costs througout.

Z. K. *Appeal partly accepted.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1260 OF 1922.
February 1, 1924.
Present:—Mr. Justice Kanhaya Lal.
RAGHUNATH—DEFENDANT—APPELLANT
versus
BINDESHWARI NANDAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), ss. 11 (2), 13 (b)—Ownership of house, dispute as to—Direct evidence not available—Old documents mentioning name of builder, whether admissible.

In the case of a house said to have been built over half a century ago direct evidence as to who constructed it may not be easily available, and old documents mentioning by whom it was built are admissible in evidence. [p. 583, col. 1.]

Second appeal against a decree of the Subordinate Judge, Mirzapur, dated the 25th April 1922.

Mr. *G. Agarwala*, for the Appellant.
Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—The dispute in this appeal relates to a shop and a house situate in Bindhyachal. The question for consideration was whether the defendant-appellant occupied the house in question as a *parjawatdar* or as a tenant on behalf of the plaintiffs. The plaintiffs are admittedly the owners of the land occupied by the house. Their allegation was that the defendant occupied the said house as a tenant and was liable to ejectment. The defendant appellant, however, said that he was only a *parjawatdar*, holding the land occupied by the house in dispute on rent and that he was not liable to ejectment. He asserted that the shop and the house in dispute were built by his predecessor-in-title. He produced among other papers a deed of gift purporting to have been executed by *Musammat* Badam in favour of *Musammat* Chingani on the 18th of May 1862, wherein it was stated that the ancestors of the donor had obtained the land from Bhawani and Sital and built a house which she was conveying to her daughter. The lower Appellate Court treated this document as an admission by the defendant-appellant in his own favour and as such no proof of his title to the house. An admission may, however, be proved on behalf of the person making it under section 21, clause (3) of the Evidence Act (I of 1872), if it is relevant otherwise than an admission. In the case of a house said to have been built over half a century ago, direct evidence as to who constructed it may not be easily available; and old documents mentioning by whom it was built may be admissible in evidence under section 11, clause (2) and section 13, clause (b) of the Indian Evidence Act for what

they may be worth. The lower Appellate Court refers to a mortgage-deed purporting to have been executed by Bhusi Pande in favour of Badam Panda on the 11th of August 1862, but that document is inconclusive on the point. It refers to Bhawani and Sital as having held three shops, but in what capacity they held the same is not clear. The lower Appellate Court has evidently made no serious attempt to discuss the documentary evidence adduced in the case and to find whether the plaintiffs were the owners only of the land or also of the shops and the house standing thereon. Before it could be said that there was no evidence to show that the ancestors of the defendant-appellant had built the same, the history of the title to the house as distinct from the land required to be examined in the light of the documentary and other evidence available. Let the lower Appellate Court be, therefore, directed to determine after taking such additional evidence as may be produced whether the shop and the house in dispute were built by the predecessor-in-title of the plaintiffs or the defendant. Two month's time will be allowed for the return of the finding and ten days will be allowed after the return of the finding for filing objections.

K. S. D. *Case remanded.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 163 OF 1923.
July 21, 1924.
Present:—Mr. Pullan, A. J. C.
JAGMOHAN SINGH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
SHEO MANGAL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Will, construction of—Property bequeathed to widow and on her death to cousin—Cousin predeceasing widow—Heirs of cousin, whether entitled—Vested and contingent interest.

It is a settled principle of law that during the lifetime of a Hindu widow, no other person acquires a vested interest in the property held by her. [p. 584, col. 1.]

Therefore, where a Hindu testator directs in a Will that the property on his death would devolve on his widow in full ownership and upon the latter's death on his cousin, it conveys no more than a mere contingent interest to the cousin and, in the event of the cousin predeceasing the widow, his heirs have no right to inherit as against the reversioners of the testator. [*ibid.*]

Appeal against a decree of the District Judge, Rae Bareli, dated the 16th March 1923, in an appeal preferred against the decree of the Subordinate Judge, Rae Bareli, dated the 6th August 1922.

Mr. *A. P. Sen*, for the Appellants.
Mr. *Bisheshwar Nath*, for the Respondents.

JUDGMENT.—This second appeal raises an interestidg point of law. One Kalka Singh died in 1887 leaving a Will in accordance with which his wife, *Musammat* Shivraja inherited the estate. According to the terms of the Will one Naipal Singh should have inherited the estate on the death of *Musammat* Shivaraja. Naipal Singh, however, was the first to die in 1913. The question is whether the property on the death of Shivaraja devolves upon the heirs of Naipal Singh or upon the next reversioners of Kalka Singh under the Hindu Law. In all cases depending upon a Will it is necessary to consider carefully the wording of the document. In the present case the Will recited that the testator had no male heirs, that Naipal Singh, his cousin, had rendered him services and it was hoped that he would do so to his widow after the testator's death. This is the gist of the preamble and the operative clauses are to the effect (1) that the widow will as owner have proprietary possession *dakhl malikana* over the entire estate and the legal representative (meaning thereby Naipal Singh) shall continue to discharge services as a son during her lifetime, (2) after her death Naipal Singh will become proprietor with possession; the third clause is one of perhaps doubtful validity forbidding the widow to alienate any property at the instigation of any co-sharer. The important parts of the Will are: (1) The

widow is made *malik* or owner with full rights; (2) Naipal Singh is to become owner after the widow's death. It is argued on behalf of the reversioners, that while the widow was exercising the full rights of ownership it was impossible that Naipal Singh could also be owner in any sense of the term, and this is borne out by the second effective clause which states clearly that Naipal Singh is only to become owner on the widow's death. Even if the word '*malik*' is not pressed to mean absolute owner it must at least be conceded that *Musammat* Shivaraja obtained under the Will the full rights of a Hindu widow, and it is a settled principle of law that during the lifetime of a Hindu widow no other person acquires a vested interest in the property. If Naipal Singh did not obtain a vested interest in the property on the death of the testator his own death prior to the death of *Musammat* Shivaraja deprives his heirs of any right of inheritance. In reply stress has been laid on the wording of section 19 of the Transfer of Property Act but this Act does not directly apply to Wills and moreover it is difficult to say that even under that section Naipal Singh would obtain a vested interest in the property. It is not as though there was a transfer in favour of Naipal Singh postponed until the death of the widow. Rather there is an absolute transfer in favour of the widow for her lifetime with a promise that Naipal Singh shall become owner after her death, that is after her ownership ceases. Owing to the fact that the widow died first, Naipal Singh never acquired ownership with possession as laid down in the second effective clause of the Will, and in my opinion the proper oonclusion to be drawn is that Naipal Singh had no more than a contingent interest, and that his heirs have no claim to inherit as against the nearer reversioners. I, therefore, reverse the findings of the two lower Courts. I allow the appeal with costs. A decree will be passed in favour of the plaintiffs for possession and for mesne profits as assessed by the Court of first instance together with proportionate costs and pending and future interest at 6 per cent per annum.

G. H. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1370 OF 1921.
March 27, 1924.
Present :—Mr. Justise Phillips.
NALLUR CHAKRAVARTHI RAJAGOPALACHARIAR—PLAINTIFF —APPELLANT
versus
BASHYACHARIAR AND OTHERS—DEFENDANTS Nos. 1 TO 11—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VIII, r. 5—Plaint alleging death of person on specified day—Defendant's denial—No counter-allegation—Admission—Erasive denial, what is.

In a suit by a reversioner for recovery of properties after the death of the widow, the plaintiff alleged that the widow died on a specified day, thus bringing the suit in time. The defendant in his written statement pleaded that the plaintiff should prove that the widow died on the date alleged and that he did not admit that date as the date of her death :

Held, that there was a clear denial of the plaint allegation of the widow's time of death, and the fact that there was no counter-allegation as to what that date exactly was could not be deemed to amount to an admission within the meaning of O. VIII, r. 5, Civil Procedure Code. [p. 585, col. 2.]

Thorp v. *Holdsworth*, (1876) 3 Ch. D. 637; 45 L. J. Ch. 406, *Tildesley* v. *Harper*, (1878) 7 Ch. D. 403; 47 L. J. Ch. 263; 38 L. T. 60; 26 W. R. 263, *Rutter* v. *Tregent*, (1879) 12 Ch. D. 758; 48 L. J. Ch. 791; 41 L. T. 16; 27 W. R. 902, distinguished.

Second appeal against the decree of the District Court, South Arcot, in Appeal Suits Nos. 18 and 35 of 1920, preferred against the decree of the Court of the District Munsif, Tirukoilur, in Original Suit No. 907 of 1918.

Messrs. *T. R. Ramchandra Iyer* and *S. Ramasami Iyer*, for the Appellant.

Messrs. *S. Varadacharier* and *K. S. Krishnaswami Iyenger*, for the Respondents.

JUDGMENT.—The plaintiff brings this suit as a reversioner to recover properties which were in the possession of the widow of the last male holder. He brought the suit on the 7th of September

1918 and alleged in his plaint that the widow had died on the 28th of September 1906 thus bringing his suit within time. The defendants in their written statement pleaded as follows :—" The plaintiff should prove that the said Seshammal died on 26th September 1906 and these defendants do not admit that date as the date of her death ". Later on in the written statement they say " The plaintiff's suit is barred by limitation also ". The fifth defendant in a separate written statement also took the plea that the suit was barred by limitation. Issues were accordingly framed, the sixth issue being " Whether the suit is barred by limitation ?" and subsequently an additional issue was framed "When did the widow Seshammal die?" The District Judge has found that Seshammal did not die on the date alleged by the plaintiff and that, consequently the suit was barred by limitation, and now in second appeal it is urged that this finding although a finding of fact cannot be accepted because there was an admission in the defendants' pleadings of the allegation by the plaintiff. The provision of the Civil Procedure Code relating to this is O. VIII, r. 5 which states that " Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability". In the present case the defendants distinctly stated that they did not admit the plaintiff's allegation as to the date of Seshammal's death. It is argued that inasmuch as they did not make a counter-allegation as to what that date exactly was, it must be deemed to be an admission within the meaning of r. 5, and reliance is placed on serveral English cases *i. e.*, *Thorp* v. *Holdsworth* (1), *Tildesley* v. *Harper* (2) and *Rutter* v. *Tregent* (3). These cases, however, appear to me to be based not on the corresponding provision to r. 5 but to the provision corresponding to r. 4 of O. VIII which says that " Where a defendant denies an allegation of fact in the plaint, he must not do so evasively." In these cases there were several circumstances set out in the plaint as constituting the details of certains transactions and, instead of denying those several circumstances specifically the defendants denied them as a whole and as pointed out in one of the judgments, such denial would be perfectly justified, provided any one of those circumstances was not strictly accurate, but that it did not amount to a denial of each and every one of those allegations. In the present case there is no question of evasive denial for there is only one fact alleged and that has been stated to be not admitted. Whether the defendants actually knew the date of Seshammal's death or not at the time they made this pleading does not seem to be material. It was understood by all the parties that this plea of limitation was taken and that the ground of the plea was that the suit was not brought within twelve years of Seshammal's death. There is no question of the plaintiff being taken by surprise and consequently there being no admission as to the date, the finding of the District Judge must be accepted. In that view, the second appeal fails and is dismissed with costs, two sets.

V. N. V. *Appeal dismissed.*

(1) (1876) 3 Ch. D. 637; 45 L. J. Ch. 406.
(2) (1878) 7 Ch D. 403; 47 L. Ch. 263; 38 L. T. 60; 26 W. R. 263.
(3) (1879) 12 Ch. D. 758; 48 L. J. Ch. 791; 41 L. T. 16; 27 W. R. 902.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 69 OF 1924.
July 21, 1924.

Present:—Mr. Wazir Hasan, J. C.

S. BURGE AND OTHERS—PLAINTIFFS—APPLICANTS

versus

Maulvi MOHAMMAD INAM ULLAH KHAN—DEFENDANT—OPPOSITE PARTY.

Landlord and tenant—Notice for enhancement of house rent—Option to vacate on non-acceptance of proposal—Tenant continuing in occupation—Implied agreement.

A landlord served the tenant with a notice that he would charge a certain amount of

SUNDER *v.* BHOPAT.

enhanced rent from a given date. The tenant was allowed the option to vacate the house in case he did not accept the proposed enhancement of rent. The tenant continued in occupation of the house:

Held, that the tenant's conduct in not vacating the house amounted to an implied acceptance of the proposal and consequently he was liable to pay the enhanced rent.

Bhagwandas v. *Mithana*, 6 O. C. 190, relied upon.

Application for revision against a decree of the Additional Small Cause Court Judge, Lucknow, dated the 24th March 1924.

Mr. *P. D. Rustogi*, for the Applicant.

Mr. *Niamat Ullah* holding brief of Mr. *M. Wasim*, for the Opposite Party.

JUDGMENT.—This is an application under section 25 of the Provincial Small Cause Courts Act. The applicants sued the opposite party for the recovery of rent of a certain house. They claimed rent at the rate of Rs. 45 per month for two months and at the rate of Rs. 60 for the third month. The lower Court has allowed the plaintiffs' claim at the uniform rate of Rs. 45 for all the three months. This application challenges the propriety of the decree of the Court below in the matter of rent for the last month. The applicants claim that they were entitled to Rs. 60 rent for that month and not Rs. 45 only. The subject-matter of the application is, therefore, the sum of Rs. 15 only.

I am of opinion that the application must be allowed. The plaintiffs served the defendant with a notice that they would charge Rs. 60 rent per month for the house from the 4th June 1923 and if the defendant did not accept the proposed enhancement of rent he was free to vacate by that date. The defendant did not vacate it, but has continued in occupation of the house. This clearly implies that he agreed to abide by the proposal made in the notice. This principle of the decision in the case of *Bhagwandas* v. *Mithana* (1) is clearly applicable and there is no room for distinction as the learned Judge tries to make out. The application is, therefore, allowed, the decree passed by the Court below will be modified by adding to it Rs. 15 more. The applicants will get their costs throughout in proportion to their success.

G. H. *Application allowed.*

(1) 6 O. C. 190.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 245 OF 1923.

February 1, 1924.

Present:—Mr. Kinkhede, A. J. C.

Musammat SUNDER—DEFENDANT—APPELLANT

versus

BHOPAT—PLAINTIFF—RESPONDENT.

Hindu widow—Debt of husband—Discharge by third person at her request—Liability of widow—Assets of deceased—Contract Act (IX of 1872), s. 70.

It is the duty of a Hindu widow to pay up the debts of her husband out of the assets inherited by her and if instead of paying them herself out of the assets, she requests a relation of hers to obtain a discharge for her from the liability to pay the same, she is liable to compensate her relative out of the assets in her hand under section 70 of the Contract Act, as she enriches the assets to that extent or strictly speaking confers benefit upon the estate by getting the debt paid up. [p. 537, col. 1.]

Application for revision of an order of the Court of the Small Causes, Multai, dated the 7th September 1923.

Mr. *A. C Roy*, for the Applicant.

Mr. *S. B. Gokhale*, for the Non-Applicant.

ORDER.—The facts must be briefly stated in order to understand how the plaintiff makes out his request to sue.

One Teju died indebted to (1) Gabia (2) Gangu and Sawandas. He left behind some assets and a widow who inherited them. He also left a minor daughter. Shortly after her husband's death Zandoo went with her daughter (applicant) to live with the plaintiff and had taken her moveable property also with her. The plaintiff looked after the estate and was the *de facto* guardian of the applicant. While he was thus in charge of the assets of the deceased Teju or at any rate managed them, he at the request of Zandoo paid off the debts due to the aforesaid creditors of Teju between 28th January 1922 and 10th October 1922 aggregating to Rs. 68-8-0. He now sues to recover the amount by which he is out of pocket, from the assets of the deceased Teju in the hands of the defendant-applicant. The plaintiff established the payment of debt to the extent of Rs. 60-8 and got a decree for that sum. He could not succeed in proving payment of Rs. 8 to Gangoo. So his claim was

dismissed to that extent. There is no further claim before me for it. The daughter against whom the claim was decreed has applied in revision for the setting aside of the decree on the ground that the right by Zandoo for payment of the debts not being proved, the payment if any should be regarded as voluntary payment and could not be recovered out of the assests, that at the most the debt was a personal debt of the widow, and that she, daughter, could not be made liable for it. That no personal decree could be passed against the minor and that the payments were made out of moneys paid to plaintiff by the defendants. I must say that the last plea has been decided against the defendant as her evidence on that point does not appear to have commended itself to the Trial Court. Next thing that the debts were not authorised to be paid by Zandoo is also not open to challenge. The evidence of defendant's own witness No. 3 bears out the construction that Zandoo at any rate acquiesced or consented to the payment by the plaintiff of the debts due by Teju. I am not prepared to dissent from the view taken by the Court below as regards this point. The plaintiff admits that the Court was wrong in passing a personal decree against the minor and that he is satisfied with a decree against the assets in defendant's hands. The only question now left for decision is whether the payment by the plaintiff was under circumstances which show that it was an officious interference with the affairs of Zandoo, so as to dissentitle him from claiming to be reimbursed with the money paid by him as he calls it for the protection of the estate of the deceased.

That for the time-being *Musammat* Zandoo as a widow represented the estate is beyond doubt. It was her duty to pay up the debts of her husband out of the assets inherited by her. If instead of paying them herself out of the assets she requested a relation of hers to obtain a discharge for her from the liability to pay the same, she has enriched the assets to that extent or at any rate saved so much of the assets or strictly speaking conferred benefit upon the estate by getting plaintiff to pay it up. There is no contract to repay pleaded or proved by plaintiff. This case, therefore, is one based not on a contract but relates to a liability or obligation resembling those created by contract, on the part of the person taking the assets of the deceased Teju to repay the person who satisfied the liabilities which were outstanding against them at the request of a person who for the time being represented the whole estate. This being the position of the plaintiff towards the defendant I think the provisions of section 70 of the Contract Act clearly apply and plaintiff is entitled to be compensated by the defendant out of the assets that have come to her hands to the extent to which the assets have derived benefit by the payment. No question of the defendant having enough time to accept the benefit conferred arises because I have held that the payment was made with the implied consent and acquiesence of Zandoo who represented the estate and she had sufficient time to make her election to accept the benefit or not before her civil death consequent on re-marriage opened out succession in favour of the defendant. The defendant cannot, therefore, escape the liability which fastens itself upon the assets. I think the liability has been rightly decreed against the defendant. The decree is, therefore, confirmed with the addition of the words "to be paid out of the assets of deceased Teju in her hands" after the figures Rs. 60-8-0.

The application is rejected. In the circumstance of the case I direct that each party bear the costs incurred by him.

N. H. *Application rejected.*

LAHORE HIGH COURT.

CIVIL REVISION PETITION No. 27 OF 1924.
May 1, 1924.
Present:—Mr. Justice Martineau.
ABDULLAH—PLAINTIFF—PETITIONER
versus
SECRETARY OF STATE FOR INDIA—RESPONDENT.

Jurisdiction of Courts—Appeal, dismissal of—Court-fee, deficient, levy of.

After a Court has dismissed an appeal, it is *functus officio* and has no power to order the appellant to make up a deficiency discovered in the Court-fee.

Revision against an order of the District Judge, Jullunder, dated the 18th August 1923, confirming that of the Senior Sub-Judge, Jullunder, dated the 31st May 1923.

Sheikh *Muhammed Monier*, for the Petitioner.

JUDGMENT.—The District Judge after dismissing the plaintiff's appeals proceeded to order him to make up a deficiency which he discovered in the Court fees on the appeals. This he had no power to do. Having dismissed the appeals he was *functus officio*. See *Jatra Mohan Sen* v. *Secretary of State* (1), *Shanghai Life Insurance Co.* v. *Helen Constance Brown* (2) and *Radhika Roman Prasad Singh* v. *Janki Kuer* (3). I accept this application for revision and set aside the order requiring the petitioner to make up the deficiency in the Court-fees on the appeals.

N. H. *Application accepted.*

(1) 52 Ind. Cas. 435; 46 C. 520.
(2) 32 Ind. Cas. 534; 9 Bur. L. T. 43.
(3) 51 Ind. Cas. 756; (1919) Pat. 276; 4 P. L. J. 472 (F. B.).

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 105 OF 1922.
April 22, 1924.
Present:—Mr. Justice Wallace.
PICHCHAKKUTTIYA PILLAI AND OTHERS—PLAINTIFFS—PETITIONERS—APPELLANTS
versus
DORASWAMI MOOPANAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2, O. XXXII, r. 6—Satisfaction of decree—Recognition by Court—Certificate and recording, whether necessary — Payment to decree-holder for himself and minor brothers—Leave of Court, absence of—Decree, whether legally satisfied—Joint decree-holders—Payment to one—Discharge of his share.

Under O. XXI, r. 2, Civil Procedure Code, in order that a payment to a decree-holder should be recognised by the Court executing the decree, it is not necessary that the payment should be both certified and recorded. A certificate on the warrant of arrest by the plaintiff's authorised Pleader that the decree was satisfied complies with the requirements of the rule. [p. 590, col. 2.]

Where a manager of a Hindu joint family is himself on the record as the next-friend or guardian of a minor party to suit, his powers are controlled by O. XXXII, r. 6, Civil Procedure Code, and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court. [p. 591, col. 2.]

A payment, therefore, to a decree-holder as guardian although made and certified cannot be recognised by the Court executing the decree when leave of Court was not previously obtained under O. XXXII, r. 6, Civil Procedure Code. [*ibid.*]

Ganesha Rao v. *Tuljaram Rao*, 19 Ind. Cas. 515; 36 M. 295; 17 C. W. N. 765; 11 A. L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150; 40 I. A. 132 (P. C.), *Krishna Ayyar* v. *Chakrapani*, 29 Ind. Cas. 475, relied on.

A payment to one of several joint decree-holders will not be satisfaction of the decree even in part unless the payee is an agent of the others entitled in law to receive the whole amount on their behalf, or the distinct shares of each joint decree-holder are determined and known. [p. 592, col. 1.]

Mahomed Silar Sahib & Co. v. *Nabi Khan*, 35 Ind. Cas. 157; 31 M. L. J. 93; (1916) M. W. N. 471; 3 L. W. 579; 20 M. L. T. 381, *Thimma Reddi* v. *Subba Reddiar*, 49 Ind. Cas. 141; (1918) M. W. N. 507, *Periasami* v. *Krishna Ayyan*, 25 M. 431; 12 M. L. J. 166, relied on.

Jamna Bai v. *Vasanta Rao*, 34 Ind. Cas. 213; 39 M. 409; 14 A. L. J. 534; 18 Bom. L. R. 432; 31 M. L. J. 18; 3 L. W. 540; 24 C. L. J. 74; 20 M. L. T. 31; (1916) 1 M. W. N. 462; 43 I. A. 99 (P. C.), distinguished.

Sultan Moideen v. *Savalayammal*, 15 M. 343 at p. 344; 2 M. L. J. 50; 5 Ind. Dec. (N. S.) 591, not followed.

Where in execution of a decree by the plaintiff for himself and as guardian of his minor brothers, plaintiffs Nos. 2 and 3, the judgment-debtor was arrested and taken to Court and the plaintiff's Vakil endorsed on the warrant that the decree had been fully satisfied and that the judgment-debtor may be released, but the Executing Court refused to record satisfaction on the ground that two of the plaintiffs were minors, and no further steps were taken by either party thereon, and some time later the plaintiff for

himself and as guardian of the minor plaintiffs again applied to execute the decree :

Held, that the previous leave of Court to the payment to the guardian not having been obtained, such payment was inoperative and was not binding either on the minors or even on the guardian himself and the decree not having been legally satisfied to any extent a fresh execution application was maintainable. [p. 591, cols. 1 & 2.]

Appeal against a decree of the Court of the Subordinate Judge, Tanjore, in A. S. No. 56 of 1922 (A. S. No. 353 of 1920, District Court, Tanjore) preferred against a decree of the Court of the District Munsif, Tiruvadi, in E. P. No. 45 of 1920, in O. S. No. 173 of 1919.

Mr. *A. Srirangachariar* (with him Mr. *V. N. Venkatavardachariar*), for the Appellants.—The lower Courts were wrong in going behind the order on the former occasion refusing to record satisfaction. The order has become final and that finding operates as *res judicata* in the present proceedings. The rule of constructive *res judicata* has been applied to execution proceedings. *Raja Rajeswara Dorai* v. *Sundara Pandiyasami Tevar* (1). There is no order either recording satisfaction. Order XXI, r. 6, Civil Procedure Code, is, therefore, a bar to the plea of satisfaction. *Abhoy Naidu* v. *Ramachandra Naidu* (2).

The respondent could have applied to enter up satisfaction. The time having now elapsed he is now debarred from raising the plea.

Secondly, even if the question of satisfaction of the decree can now be re-opened, payment to the first plaintiff who is guardian *ad litem* of the minor plaintiffs Nos. 2 and 3 cannot operate as a valid payment in the absence of a certificate of Court under O. XXXII, r. 6, Civil Procedure Code the provisions of which are mandatory. The mere fact he is the manager of the joint family does not tender the rule inapplicable. *Ganesha Rao* v. *Tuljaram Rao* (3).

The case in *Harihar Pershad Singh* v. *Mathura Lal* (4) relied on by the lower Court proceeds on the ground that the processual law as provided by O. XXXII, r 6, cannot deprive the manager of a joint family of his substantive rights under the general Hindu Law. And the cases in *Duraiswami Sastrial* v. *Venkatarama Iyer* (5) and *Kristna Hande* v. *Padmanabha Hande* (6) merely follow *Harihar Pershad Singh* v. *Mathura Lal* (4) without assigning reasons. These cases must be deemed to have been overruled since the Privy Council decision in *Ganesha Rao* v. *Tuljaram Rao* (3). This being a rule of procedure it is only the law of the *forum* that would apply and not the personal law. *Vide* 1899 *Chatard's Settlement, In re* (7).

Order XXXII, r. 6 has been held to apply to cases of managers of joint Hindu family. *Krishna Ayyar* v. *Chekrapani* (8), *Abhoy Naidu* v. *Ramachandra Naidu* (2).

It has also been held that the guardian *ad litem* cannot transfer a decree in favour of the minor without leave of Court. *Kancherla Kanakayya* v. *Mulpuru Kotayya* (9). The plaintiffs are, therefore, entited to execute the decree.

Mr. *K. Bhashyam Iyengar* (with him Mr. *N. Kunjithapathan*), for the Respondents.—In the very warrant for arrest of the respondent there is an endorsement by the plaintiff's Pleader that the decree is satisfied. That can be relied on by the Executing Court in deciding whether there has been satisfaction or not. The respondents could not have set aside the order refusing to enter the satisfaction as the execution petition has been finally dismissed.

The first plaintiff being a manager is entitled to receive payment of debts due to joint family. The mere fact that he comes to Court cannot place him in a worse

(1) 49 Ind. Cas. 704; 42 M. 581; 17 A. L. J. 153; 36 M. L. J. 164; 23 C. W. N. 549; 29 C. L. J. 551; 25 M. L. T. 400; 21 Bom. L. R. 885; (1919) M. W. N. 511; 10 L. W. 322 (P. C.).

(2) 76 Ind. Cas. 905; (1923) M. W. N. 925; (1924) A. I. R. (M.) 279; 19 L. W. 686.

(3) 19 Ind. Cas. 515; 36 M. 295; 17 C. W. N. 765; 11 A. L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150; 40 I. A. 132 (P. C.).

(4) 35 C. 561; 8 C. L. J. 256; 12 C. W. N. 598.

(5) 12 Ind. Cas. 503; 21 M. L. J. 1088; 10 M. L. T. 370; (1911) 2 M. W. N. 420.

(6) 21 Ind. Cas. 177; 25 M. L. J. 442; 14 M. L. T. 233; (1913) M. W. N. 802.

(7) (1899) 1 Ch. 712; 68 L. J. Ch. 350; 80 L. T. 645; 47 W. R. 515.

(8) 29 Ind. Cas. 475.

(9) 63 Ind. Cas. 285; 41 M. L. J. 75; 13 L. W. 637; (1921) M. W. N. 437.

position. The Privy Council decision in *Ganesha Rao* v. *Tuljaram Rao* (3) does not apply to the present case.

The first plaintiff is now estopped from executing the decree. The first plaintiff being joint decree holder, along with the other minor plaintiffs, the payment to him will operate as a valid discharge of the whole decree. *Hurrish Chunder Chowdhury* v. *Kali Sunderi Debi* (10); *Sultan Moideen* v. *Savalayammal* (11).

At any rate it will be a valid payment to the extent of the guardian's share.

Mr. *S Srirangachari* in reply—Payment to one of several joint decree-holders cannot operate as a discharge even to the extent of the share of the person to whom payment is made. The matter is concluded by the decisions of the Court. *Mahomed Silar Sahib & Co.* v. *Nabi Khan* (12); *Thimma Reddi* v. *Subha Reddiar* (13).

A joint decree-holder can execute the whole decree only with the permission of the Court (O. XXI, r. 15.)

JUDGMENT.—This case arises out of an execution petition. The appellants, who were the plaintiffs, obtained a money-decree against the respondents in 1919. The first plaintiff for himself and as guardian of his minor brothers, plaintiffs Nos. 2 and 3, put in an execution petition on 1st September 1919 to recover the money. The first defendant was arrested and brought to Court under a warrant. On the warrant the appellants' Vakil endorsed on 4th September 1919 "Judgment-debtor may be released. Decree fully satisfied". The Executing Court, however, then refused to record satisfaction on the ground that two of the applicants in the execution petition were minors. Neither party took any further steps to have the satisfaction of the decree recorded. On 22nd January 1920 the first plaintiff for himself and as guardian of minor plaintiffs Nos. 2 and 3 again applied for execution. The judgment-debtor pleaded that the decree had already been fully satisfied. The Executing Court originally proceeded on the question of law only and held that the payment endorsed on the warrant, even if true, was not a payment in law since under O. XXXII, r. 6, Civil Procedure Code, the first plaintiff was not entitled to receive any money towards the decree on behalf of minors unless and until he had obtained leave of the Court. On appeal the Appellate Court called for a finding whether the judgment-debtors had actually paid up as certified on the warrant by the plaintiffs' Vakil, and, if that payment had been made to the first plaintiff, whether he received it as manager of the joint family or not. On this the Original Court found that the payment had been made to the first plaintiff in his capacity as manager and these findings were accepted by the lower Court. The Subordinate Judge then considered whether the first plaintiff could receive the money without leave of the Court under O. XXXII, r. 6, Civil Procedure Code, and he held that, as managing member he could, and he, therefore, dismissed the execution petition on the ground that the decree was already fully satisfied. The plaintiffs now appeal.

It appears to me that the remand of the case by the lower Appellate Court for a decision whether or not the payment was actually made, was unnecessary. There is a certificate on the warrant by the plaintiffs' authorised Pleader that the decree was fully satisfied. Therefore, the payment was certified. It is true that the lower Court refused to record it, but O. XXI, r. 2, Civil Procedure Code, does not say that in order that a payment shall be recognised by the Court executing the decree that payment shall be both certified and recorded. The words used are "certified or recorded." There was nothing, therefore, to prevent the Executing Court from at once recognizing the payment and the decree as fully satisfied, unless O. XXXII, r. 6 barred the way, while of course the Court was not bound to recognize the payment if that rule stood in the way. What the Executing Court had before it was a certificate by the Pleader appearing for

(10) 9 C. 482 at p. 494; 10 I. A. 4; 12 C. L. R 511; 7 Ind. Jur. 161; 4 Sar. P. C. J. 406; 4 Ind. Dec. (N. s.) 970.

(11) 15 M. 343 at p. 344; 2 M. L. J. 50; 5 Ind. Dec. (N. s.) 591.

(12) 35 Ind. Cas. 157; 31 M. L. J. 93; (1916) 1 M. W. N. 471; 3 L. W. 579; 20 M. L. T. 381.

(13) 49 Ind. Cas. 141; (1918) M. W. N. 507.

all the three plaintiffs that the decree was fully satisfied. The execution petition and the order would also bring to its notice that two of the execution petitioners were minors, represented by the first plaintiff as guardian and next friend. In such a case I think the Executing Court was bound to conclude *prima facie* that the payment in full satisfaction would have been made to the first plaintiff for himself and on behalf of the minors, and there is nothing to rebut that presumption here. In fact, the concurrent finding of fact on the evidence after remand is to the same effect.

In such circumstances, had the first plaintiff not been manager of the joint family of himself and plaintiffs Nos. 2 and 3, there can be no doubt that he would have had to obtain leave of the Court before receiving the money on behalf of the minors under O. XXXII, r. 6, Civil Procedure Code. The short question then is, does the fact that he was the manager absolve him from the necessity of conforming to this rule?

It cannot be denied that if the execution petition had been put in by the first plaintiff alone as manager he would have been entitled to receive the whole payment in his capacity as manager without leave of the Court, and plaintiffs Nos. 2 and 3 could not have challenged the payment. But where he has chosen to join the minors with him and to bring them before the Court as minors and thus bring himself also before the Court in the capacity of guardian *ad lit m*, can it be pleaded by himself as well as by the minors that the payment to him without leave of the Court is a nullity?

The plaintiffs rely chiefly on the Privy Council case in *Ganesha Rao* v. *Tuljaram Rao* (3). That was a case in which a compromise of a partition suit had been made by the father and manager of a joint family. He was the third defendant in the case, and he appeared on the record also as the guardian of his minor son, the sixth defendant. He compromised the suit without the leave of the Court. This High Court held interpreting section 462 of the Code of of 1882 that it was not necessary for the father to have obtained the leave of the Court before compromising the suit. The Privy Council, however, reversed this laying down generally that where a manager of the joint family is himself on the record as the next friend or guardian of a minor member, his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court. The lower Appellate Court has held that this ruling passed under section 462 of the Code of 1882 should not, on the authority of *Krishna Hande* v. *Padmanabha Hande* (6), be applied to old section 461, the present O. XXXII, r. 6, when it is a question of money due under a decree, but I do not think that it has rightly understood that case. It does not appear that in that case there was any minor on the record and, therefore, the managing member was not before the Court in the capacity of next friend or guardian. The Privy Council ruling has been applied to the provisions of O. XXXII, r. 6 by a Single Judge of this Court in a case reported as *Krishna Ayyar* v. *Chakrapani* (8).

After full consideration I am of opinion although with considerable reluctance, that the Privy Council case concludes the matter and that the payment, although made and certified, cannot be recognised by the Court executing the decree, since the leave of the Court was not obtained under O. XXXII, r. 6. I have come to this conclusion with reluctance because the first plaintiff at least thus secures at present a double payment of the decree amount by means of his own laches. No doubt, the judgment-debtors were careless in not seeing that the satisfaction was recorded and in not insisting on the leave of the Court being obtained, but the first plaintiff is the real party in default and now profits by his own default.

A further point has, however, been argued whether the payment by the first defendant to the first plaintiff will effect a discharge of the decree.

debt so far as the first plaintiff is concerned. The District Munsif has held that it will not. The lower Appellate Court in the view it took naturally did not deal separately with that point. The law on the subject is, I think, clear that the payment to one of several joint decree-holders will not be satisfaction of the decree even in part unless (1) the payee is an agent of the others entitled in law to receive the whole amount on their behalf, or (2) the distinct shares of each joint decree-holder were determined and known. *Vide Mahomed Silar Sahib & Co.*, v. *Nabi Khan* (12). In *Thimma Reddiar* v. *Subba Reddiar* (13) this ruling was extended to certificates of satisfaction given by one of several and joint decree-holders unless as a matter of fact the payment certified had been made to all the joint decree-holders. Both these cases rest on the judgment of Bhashyam Iyengar, J., in *Periasami* v. *Krishna Ayyan* (14). As against this, the appellant cited *Jamna Bai* v. *Vasanta Roa* (15) a Privy Council case in which it was held that, where a joint bond was executed by two persons, one being a minor by his guardian and the bond so far as the minor was concerned was void because no leave of the Court was obtained, the other party to the bond could not plead that voidability as rendering nugatory his obligation under the bond. The Privy Council held that in any case the major promisor under the bond was liable and could not plead the minority and consequent immunity of the other promisor as a bar to his liability. I do not think that this case really assists the decision of the present case where the question is not of the liability of the decree-holders to the judgment-debtor but of the liability of the judgment-debtor to the joint decree-holders. In *Sultan Moideen* v. *Savalayammal* (11) it was held that where payment has been made to one of the two joint decree-holders that payment was valid to the extent of the share to which the payee was entitled, and, therefore, an enquiry was ordered as to the extent of that share. This ruling is certainly not in conformity with the later cases quoted above. I consider that I must follow the later cases and hold that the payment is not valid against even the first plaintiff. The decree had to be executed as a joint decree or not at all. Valid discharge of any portion of the debt could only be given by one who could give it for all joint decree-holders, and the first plaintiff could not do that because the discharge so far as the minor plaintiffs were concerned was not valid in law at all. Hence I must hold that the decree has not been at all satisfied. I, therefore, hold that the decision of the District Munsif was correct and this appeal must be allowed, but in the circumstances, appellants are refused costs here and in the lower Appellate Court.

V. N. V. *Appeal allowed.*

(14) 25 M. 431; 12 M. L. J. 166.

(15) 34 Ind. Cas. 213; 39 M. 409; 14 A. L. J. 534; 18 Bom. L. R. 432; 31 M. L. J. 18; 3 L. W. 540; 24 C. L. J. 74; 20 M. L. T. 31; (1916) 1 M. W. N. 462; 43 I. A. 99 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1274 OF 1921.

January 16, 1923.

Present:—Mr. Justice Daniels.

FATTEH DIN—PLAINTIFF—APPELLANT

versus

UMRAO AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Legitimacy—Child born 11 months after father's death—Unchastity of mother—Presumption.

Assuming that the presumption under the Muhammadan Law that a child born within two years of the conclusion of a valid marriage is to be considered a legitimate child of its mother's husband is binding on the Indian Courts, the presumption is a rebuttable one.

Where, therefore, a Mohammadan is born 331 days or full eleven months after his alleged father's death and it is found that his mother had illicit connection with another man, it is sufficient to rebut the presumption of his legitimacy and to justify the Court in finding that he is not the son of his alleged father.

Second appeal against a decree of the Additional District Judge, Meerut, dated the 2nd July 1921.

Mr. *N. C. Vaish*, for the Appellant.

Mr. *N. P. Asthana*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit by the plaintiff for a

declaration that he was the son of one Shera and for possession of his legal share in the property of the latter on the assumption that he was Shera's son. Both the Courts below have dismissed his suit. The finding of the lower Appellate Court is that the plaintiff was born 331 days or eleven full months after his alleged father's death and that his mother has been living for the last few years in illicit connection with one Imam-ud-Din. The appellant relies on the rule of Muhammadan Law that a child born within two years of the conclusion of a valid marriage is presumed to be the legitimate son of his mother's husband. The commentators have all expressed doubts as to how far this is a substantive rule of law binding on the Courts in this country and how far it is to be considered as replaced by the provisions of section 112 of the Evidence Act. If this were the sole question in the appeal I should have been disposed to refer it to a Bench but none of the text-books go further than saying that rebuttable presumption arises under these circumstances, and if the presumption is rebuttable there was certainly ample evidence in the present case to rebut it and to justify the Courts below in finding that the plaintiff-appellant was not the son of Shera. I, therefore, dismiss the appeal with costs including fees on the higher scale.

M. A. A. & N. H. *Appeal dismissed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 1313 OF 1922.
February 14, 1923.
Present :—Mr. Jutice Mulla.
J. P. FERNANDEZ—PLAINTIFF
versus
P. D RODRIGUES—DEFENDANT.

Civil Procedure Code (Act V of 1908), s. 151, O. XXVI, r. 16, O. XLVII, r. 1—Commissioner for taking accounts—Review, power of—Enquiry, when can be re-opened—Party aggrieved, remedy of—Practice.

A Commissioner appointed by the Court to take accounts of the dealings and transactions between the parties has no power to "review" in the technical sense, either under section 151 or under O. XLVII, r. 1 of the Civil Procedure Code. [p. 594, col. 1.]

The Commissioner, however, may, in his discretion, record his finding on each item of the account objected to during the progress of the reference or he may record his findings after he has heard evidence on all objections and surcharges. He is not bound to record his finding on any one objection before he proceeds to deal with the next. But if he does so his finding on any of the objections is not final. He may, on proper grounds, re-open the inquiry into any one or more of the items before his report is made. Until then he decides nothing that is final and conclusive. [p. 594, cols. 1 & 2.]

But where every opportunity is given to a party to prove his objection to a particular item, and the Commissioner has after hearing the parties recorded his finding, it is highly undesirable that he should re-open the enquiry merely because he is invited to do so by the party. [p. 594, col. 2.]

If the Commissioner does re-open the enquiry, it must be on grounds similar to those mentioned in O. XLVII, r. 1, Civil Procedure Code, not because the provisions of O. XLVII, r. 1, apply to proceedings before him but because that rule affords the best guide in a matter of this kind. If he re-opens the inquiry on grounds which are not proper, the party aggrieved can object only by way of exceptions to his report. [*ibid.*]

FACTS.—In a suit for recovery of Rs. 4,818-14 on account of the aggregate of sums alleged to have been advanced to the defendant or paid on his behalf from time to time, the defendant made a counter-claim for Rs. 9,725. The matter was referred to the Commissioner for taking accounts. The plaintiff filed his accounts and the defendant put in objections. One of these objections was overruled, but on the application of the defendant the Commissioner issued a warrant to review his finding thereon. The plaintiff then took out a summons applying for the following reliefs:

"(*a*) That the decision of the learned Commissioner for taking accounts granting review of the finding on objection No. 7 herein is *ultra vires* inasmuch as the learned Commissioner has no power to grant a review.

(*b*) That the aforesaid decision of the learned Commissioner is wrong being in contravention of the provisions of

O. XLVII, r. 4, inasmuch as the application was granted without a previous notice to the plaintiff.

(c) That the aforesaid decision of the learned Commissioner is wrong inasmuch as there was neither any discovery of any new matter or evidence by the defendant which was not within the knowledge of the defendant or which could not be adduced by him when the objection was heard nor was there any other sufficient ground for the granting of the review."

Sir *Thomas Strangman*, for the Plaintiff.

Mr. *Framroz Mehta* of Messrs. *Mansukhlal Hiralal and Mehta*, for the Defendant.

JUDGMENT.—[His Lordship after stating the facts observed:—]

It was contended on his (plaintiff's) behalf that a review can only be granted under section 151 of the Code of Civil Proceedure or under O. XLVII, r. 1, of the Code, that section 151 did not apply to proceedings before the Commissioner, and that O. XLVII, r. 1, did not apply as a review under that Order can only be granted from a decree or order of the Court. On the other hand, it was contended for the defendant on the authority of the ruling in *Laxmibai* v. *Hussainbhai* (1) that once a reference has been made to the Commissioner the Court has no control over the proceedings until the Commissioner has made his report except in certain cases, and that the present case was not one of them.

It seems to me that the summons is misconceived. The expression "review" in the warrant is not used in its technical sense. The Commissioner has no power to "review" either under section 151 or under O. XLVII, r. 1. It must, however, be remembered that the Commissioner may, in his discretion, record his finding on each item of the account objected to during the progress of the reference or he may record his findings after he has heard evidence on all objections and surcharges. He is not bound to record his finding on any one objection before he proceeds to deal with the next. But if he does so it is erroneous to suppose that his finding on any of the objections is final. He may, on proper grounds, re-open the inquiry into any one or more of the items before his report is made. Until then he decides nothing that is final and conclusive. But where every opportunity is given to a party to prove his objection to a particular item, and the Commissioner has after hearing the parties recorded his finding, it is highly undesirable that he should re-open the enquiry merely because he is invited to do so by the party. There must be a finality to the enquiry, and if he does re-open the enquiry, it must be on grounds similar to those mentioned in O. XLVII, r. 1, not because the provisions of O. XLVII, r. 1, apply to proceedings before him but because that rule affords the best guide in a matter of this kind. If he re-opens the inquiry on grounds which are not proper, the party aggrieved can object only by way of exceptions to his report. The Commissioner in issuing the present warrant has acted in accordance with the long-standing practice of his office. I see no reason to put a stop to the practice. The balance of convenience also is on the side of the existing practice. I think greater hardship will arise and more costs will be incurred by discontinuing the practice than by leaving matters as they are. It was assumed at the argument of the summons that High Court Rule No. 484 applies to the case. I doubt very much whether it does. The summons is discharged, costs to be costs in the cause. Counsel certified.

N. H. *Summons discharged.*

(1) 36 Ind. Cas. 618; 41 B. 719; 18 Bom. L. R. 708.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 1524 AND 1525 OF 1922.

March 14, 1924.

Present:—Mr. Justice Mukerji.

CHOB SINGH—PLAINTIFF—APPELLANT

versus

DARYAI SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 5—Appeal filed

CHOB SINGH *v.* DARYAI SINGH.

in wrong Court—Bona fide *mistake—Presumption —Extension of time—Landlord and tenant—Ejectment suit—Lease for fixed term—Burden of proof.*

Where an appeal is filed in the wrong Court and prosecuted there without objection on the part of the Court or any of the parties, the mistake must be taken to be a *bona fide* one, until the contrary is shown, and the appellant must be given the benefit of section 5 of the Limitation Act. [p. 595, col. 2.]

The burden of proof is on the tenant when he is sued by his landlord for ejectment, to show that he has a right to stay on the land and cannot be ejected by the proprietor. The mere fact that the landlord describes the defendant in the plaint as a lessee does not imply that he says or means that the latter is holding for a term, as a lease may be from year to year. [p. 596, cols. 1 & 2.]

Second appeal from a decree of the District Judge, Mainpuri, dated the 14th of July 1922.

Messrs. *N. P. Asthana*, *Gulzari Lal* and *M. L. Agarwala*, for the Appellant.

Dr. *N. G. Vaish* and Mr. *S. K. Dar*, for the Respondents.

JUDGMENT.—These two connected Appeals Nos. 1524 and 1525 of 1922 may be disposed of by the same judgment.

Two different plaintiffs brought two different suits out of which these two appeals have arisen for the ejectment of the same set of tenants from lands in two different *mahals*, except for this difference, the case is the same in both the appeals.

Two points require to be decided. One is whether the appeals, when lodged before the learned District Judge of Mainpuri, ought to have been admitted as within time and should not have been dismissed as barred by limitation. The second is whether, in the circumstances, the defendants-respondents are liable to be ejected.

On the first point it appears that the plaintiffs' suit for ejectment failed in the Court of the Assistant Collector. The suits were suits for ejectment of a tenant under section 58 of the Tenancy Act. The defendants pleaded, *inter alia*, that they were under-proprietors and could not be ejected. The suits having been dismissed the plaintiffs appealed to the Commissioner. No question as to the jurisdiction was raised before the Commissioner. After certain remands the learned Officer decreed the appeal and decreed the suits.

The defendants went to the Board of Revenue and the Board held that the appeals were wrongly laid before the Commissioner and directed the Commissioner to return the memoranda for presentation to the proper Court. The memoranda were returned on the 11th of April 1922, and were filed the very next day in the Court of the District Judge of Mainpuri. The learned District Judge found that the appeals before the Commissioner were lodged after the expiry of the 30 days allowed for filing appeals before the District Judge and that, therefore, the appellants could not succeed, unless they proved that before filing their appeals before the Commissioner, they had obtained legal advice as to the *forum* before which the appeal lay. Not being satisfied that any such advice had been taken, he held that the appeals were barred by time. As a matter of fact, the appeals would appear to have been admitted, entered into the register and numbered.

As I have already pointed out, the question as to the Court to which the appeals lay was not even raised before the Commissioner. A responsible officer like the Commissioner never thought that the appeals were not entertainable by him. Under the circumstances, if the appellants thought that, they had a right of appeal to the Commissioner, the mistake must be taken to be a *bona fide* mistake until the contrary is shown. In my opinion the learned District Judge should not have dismissed the appeals as barred by time and ought to have given the appellants the benefit of section 5 of the Limitation Act.

On the merits the cases appear to be rather peculiar. It has been found that the defendants have been in actual occupancy of the land in suit for about 90 years. How they came into possession no body could explain. The question as to the status of the defendants arose twice in the course of the last Settlement of the District and two judgments were given; one on the 12th of September 1904 and again on the 13th of March 1905. The former judgment was given, as the defendants themselves or their predecessors applied to the Settlement Officer for

the purpose of their being recorded in the *khewat* as proprietors. In an elaborate judgment the learned Officer (probably the Assistant Settlement Officer) decided that the defendants were nothing but *thekedars* within the meaning of section 4 (6) of the Tenancy Act. The second judgment was given because a *Patwari* asked for instructions as to how he was to record the defendants in his papers. The same conclusion was arrived at by the learned Assistant Settlement Officer. It is no longer disputed before me that, the defendants have been holding on payment of rent to the plaintiffs, the land-holders, that no attempt whatsoever has ever been made to enhance the rent, that the defendants have sued tenants and realised rents and further that, tenants holding under the defendants have been allowed to acquire occupancy rights in the lands held by them. On these facts the learned Assistant Collector and the learned District Judge held that the defendants could not be ejected, they being only *thekedars* within the meaning of section 4 (6) of the Tenancy Act.

It has been argued before me that a *thekedar* is a tenant all the same and is, therefore, as much liable to be ejected as any other tenant. Dr. Vaish, the learned Counsel appearing for the defendants-respondents, has argued that the appellants themselves have stated in the plaint that the defendants were lessees and that, therefore, unless they proved that, the terms of the lease had expired they could not successfully maintain the suit for ejectment.

I think this argument on behalf of the respondents is a little fallacious. A lease may be for a term. It may be permanent and it may be from year to year. The mere fact that the plaintiffs called the defendants lessees does not imply that they said or meant that the defendants were holding for a term. If the status of the defendants be that of a tenant I see no reason why the suit should not be brought within clause (*a*) of section 58 of the Tenancy Act. It has not been actually contended before me that, the defendants are permanent lessees though some argument on this point was advanced at the Bar. The burden of proof is on the tenant when he is sued by his landlord for his ejectment, to show that he has a permanent right to stay on the land and cannot be ejected by the proprietor. This was held so lately as in the case of *Nainapillai Marakayar* v. *Ramanathan Chettiar* (1) by their Lordships of the Privy Council. Their Lordships referred to the case of the *Secretary of State for India in Council* v. *Luchmeswar Singh* (2), in which the fact that the tenants held the land on a low and uniform rent for 75 years was not held to be sufficient to prove a permanent title to the land. It follows, therefore, that there is no bar to the ejectment of the defendants. In spite of their long possession they have no higher title than tenants from year to year.

The result is that the appeals succeed and are allowed and both the suits of the plaintiffs are decreed with costs throughout the costs including fees in this Court on the higher scale.

N. H. *Appeals allowed.*

(1) 82 Ind. Cas. 226; 22 A. L. J. 130; (1924) A. I. R. (P. C.) 65; 19 L. W. 259; 34 M. L. T. 10; (1924) M. W. N. 293; 46 M. L. J. 546; 10 O. & A. L. R. 464; 47 M. 337; 28 C. W. N. 809 (P. C.).

(2) 16 C. 223; 16 I. A. 6; 13 Ind. Jur. 10; 5 Sar. P. C. J. 275; 8 Ind. Dec. (N. S.) 147 (P. C.).

LAHORE HIGH COURT.

FIRST CIVIL APPEAL No. 2749 OF 1920.

January 16, 1924.

Present :—Mr. Justice Le Rossignol and Mr. Justice Harrison.

NARAIN SINGH—PLAINTIFF—APPELLANT

versus

MUL SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS

Punjab Pre-emption Act (I of 1913), s. 5 (a)—Property sold consisting of house and shop—Separate units—Pre-emptor, how far can succeed.

Where in a suit for pre-emption the property sold consists of two units, a house and a shop, and both these buildings were regarded as separate by the Municipal Committee as well as the vendor who received separate prices for

both in the sale-deed, the suit of the plaintiff to pre-empt can succeed only in respect of the house and not in respect of the shop.

First appeal from an order of the District Judge, Amritsar.

Lala *Jagan Nath*, for the Appellant.

Lala *Ram Chand*, for Lala *Sarda Ram*, for the Respondents.

JUDGMENT.—The appellant in this appeal is the vendee of two properties situate in Amritsar City by sale-deed dated the 11th July 1917. The sale price was Rs. 2,700 and the matter for decision in this case is whether the property sold consisted of two units, *i. e.*, a shop and a house, or of one unit comprising both the shop and the house. The sale-deed covered both properties but the properties are regarded as separate by the Municipal Committee who have given separate numbers to the two properties. They were also regarded as separate properties by the vendor inasmuch as a separate price was fixed in the deed for each property. There is a door of communication between the shop and the house but each property has a separate entrance. The entrance of the shop is in the main Bazar; the entrance of the house is in the side lane. There is a common staircase leading to the roof of both properties and a common latrine is situated on the roof of the shop.

The learned Judge in the Court below has found that the house and the shop in the present case appear to "constitute one building." He does not state clearly that the house and the shop are one and his conclusions are based on the fact that "the house and the shop appear to have been used hitherto by the same person and some inconvenience would undoubtedly result by partitioning the two portions of the building."

In our opinion this conclusion based upon the mere agrument of inconvenience and part is not maintainable. It appears to us to be in conflict with the undoubted fact that there are two separate buildings which have been recognised as separate by the Municipal Authorities and by the vendor himself. We hold that the two buildings are separate and that the suit of the plaintiff to pre-empt can succeed only in respect of the house and not in respect of the shop.

We accordingly accept the appeal and modify the decree of the Court below by decreeing possession of only the house to the plaintiff on payment of Rs. 1,200, appellant shall have one-half of his costs throughout against the plaintiff to whom any sum in excess of Rs. 1,200, plus the plaintiff's half costs, which he may have paid into Court in satisfaction of the decree shall be refunded. The sum of Rs. 1,200 shall be paid to the vendee's mortgagees.

K. S. D. *Appeal accepted.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 180 OF 1921.
February 19, 1924.
Present:—Mr. Justice Krishnan.
PALANI NAYAKKAN AND OTHERS—DEFENDANTS Nos. 1 TO 3—APPELLANTS
versus
PARVATI AMMAL AND OTHERS—PLAINTIFFS Nos. 1 TO 4 AND DEFENDANTS Nos. 5 AND 6—RESPONDENTS.

Madras Estates Land Act (I of 1908), s. 6—Yearly tenancy—Waram, *payment of—Tenants, whether can convert themselves into occupancy* ryots—Kamatam *land—Rights of occupancy, whether can be acquired.*

Tenants paying *waram* under a yearly tenancy cannot convert themselves into permanent occupancy *ryots* by a mere assertion that they hold the land under such a right. [p. 598, col. 1.]

Nainapillai Marakayar v. *Ramanathan Chettiar*, 82 Ind. Cas. 226; 19 L. W. 259; (1924) A. I. R. (P. C.) 65; 22 A. L. J. 130; 34 M. L. T. 10; (1924) M. W. N. 293; 46 M. L J. 546 (P. C.); 10 O. & A. L. R. 464; 47 M. 337; 28 C. W. N. 809 (P. C.), relied on.

No rights of occupancy can be acquired in *kamatam* land by virtue of section 6 of the Madras Estates Land Act. [p. 598, col. 2.]

Ponnuswamy Padayachi v. *Karupudayan*, 24 Ind. Cas. 217; 26 M. L. J. 285; 1 L. W. 218; 15 M. L. T. 299; 38 M. 843, relied on.

Quære.—Whether a tenant can acquire by adverse possession a title to permanent occupancy right by denying the landlord's title and by not paying rent to him.

Singaravelu Mudaliar v. *Chokka Mudaliar*, 70 Ind. Cas. 994; 43 M. L. J. 737; 16 L. W. 514; 31 M. L. T. 298; (1922) M. W. N. 676; (1923) A. I. R. (M.) 88; 46 M. 525, referred to.

NAWAB SINGH v. GURBACHAN SINGH.

Second appeal against the decree of the Court of the Additional Subordinate Judge, Trichinopoly, in A. S. No. 216 of 1920 (A. S. No. 257 of 1918, District Court, Trichinopoly), preferred against the decree of the Court of the District Munsif, Srirangam, in O. S. No. 108 of 1916.

Mr. *K. Aravamuda Iyer*, for the Appellants.

Mr. *M. S. Venkatrama Iyer*, for the Respondents.

JUDGMENT.—Two points are taken before me in this second appeal. The first point is that the defendants have acquired a title to permanent occupancy right by adverse possession since 1903 by denying the landlord's title and by not paying rent to him; and, secondly, that the land is *ryoti* land and by the passing of the Estates Land Act in 1908, the defendants have acquired occupancy right in the land by virtue of section 6 of the Act. Both these points have been found against the defendants. On the first point, the learned District Judge has held that the decision in the previous suit between the parties for a declaration that the defendants had no occupancy right in the land, put an end to any claims that they might have had by reason of their possession. He holds that even assuming that that possession was adverse, the previous possession during the course of that litigation which ended in 1906 could not be added on to their subsequent possession to acquire a title by 12 years' possession. It is unnecessary to go into that question. The recent Madras case in *Singaravelu Mudaliar* v. *Chokka Mudaliar* (1) has taken a different view on the point but I do not propose to express any opinion on it because it is found by the lower Appellate Court that the defendants were tenants who were paying *waram* from 1893 and this is a question of fact which I must accept in second appeal. As tenants paying *waram*, they could not convert themselves into permanent occupancy *ryots* by a mere assertion that they held the land under such a right. See for this position *Nainapillai Marakayar* v. *Ramanathan Chettiar* (2). It is unnecessary to refer to any other authority. Even if the defendants are entitled to tack on their previous possession during the time the previous litigation was going on to their possession after the date of that suit, that will not be sufficient to support the plea of adverse possession so far as the occupancy right is concerned.

As regards the question of their having acquired occupancy right under the Act, what the lower Courts have found is that the land is *kamatam* land and not *ryoti* land at all. That is a finding of fact arrived at on the evidence which I must accept. If the land is *kamatam* land and not *ryoti* land, no rights can be obtained under section 6 of the Estates Land Act. See for this position the authority in *Ponnuswamy Padayachi* v. *Karupudayan* (3). It is contended that though the land might have been *kamatam* land, it had been converted into *ryoti* land before the passing of the Act. There is no foundation for this at all. That is not a question raised in the issues in the Trial Court. The second appeal, therefore, fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

(1) 70 Ind. Cas. 994; 43 M. L. J. 737; 16 L. W. 514; 31 M. L. T. 298; (1922) M. W. N. 676; (1923) A. I. R. (M.) 88; 46 M. 525.

(2) 82 Ind. Cas. 226; 19 L. W. 259; (1924) A. I. R. (P. C.) 65; 22 A. L. J. 130; 34 M. L. T. 10; (1924) M. W. N. 293; 46 M. L. J. 546 (P. C.); 10 O. & A. L. R. 464; 47 M. 337; 28 C. W. N. 809 (P. C.).

(3) 24 Ind. Cas. 217; 26 M. L. J. 285; 1 L. W. 218; 15 M. L. T. 299; 38 M. 843.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 350 of 1924.

June 7, 1924.

Present :—Sir Scott-Smith, KT., Acting Chief Justice.

NAWAB SINGH—DEFENDANT—APPELLANT

versus

GURBACHAN SINGH—PLAINTIFF—RESPONDENT.

Guardian and minor—Ex parte *decree against*

NAWAB SINGH *v.* GURBACHAN SINGH.

minor—Guardian ad litem, *failure of, to defend suit or to file appeal—Suit to set aside* ex parte *decree—Failure of guardian, whether sufficient ground.*

The mere failure on the part of a guardian *ad litem* to defend a suit or to appeal from an *ex parte* decree passed against a minor is not of itself a sufficient ground for holding that there was gross negligence and for setting aside the decree. It would be gross negligence, however, if a valid defence was available to the minor. [p. 599, col. 2.]

Ahmad Ali v. *Amir Shah*, 35 P. R. 1898, distinguished.

Ismail v. *Sultan Bibi*, 43 Ind. Cas. 354; 103 P. R. 1917; 155 P. W. R. 1917; 6 P. L. R. 1918 and *Chunduru Ponniyya* v. *Rajam Viranna*, 70 Ind. Cas. 668; 45 M. 425; 15 L. W. 427; (1922) M. W. N. 213; (1922) A. I. R. (M.) 273; 42 M. L. J. 429, referred to.

Second appeal from a decree of the District Judge, Amritsar, dated the 24th October 1923, confirming that of the Sub-Judge, Fourth Class, Amritsar, dated the 30th August 1923.

Dr. *Nand Lal*, for the Appellant.

Mr. *Rustomji*, for the Respondent.

JUDGMENT.—Mubarik Singh, father of Gurbachan Singh, plaintiff-respondent had dealings with Nawab Singh defendant-appellant. After Mubarik Singh's death, Nawab Singh sued Gurbachan Singh and his mother *Musammat* Gurdevi for recovery of Rs. 500 as representatives of the deceased. *Musammad* Jawali, Gurbachan Singh's grandmother, was appointed by the Court his guardian *ad litem*. She did not appear to defend the suit and on the 31st January 1919 an *ex parte* decree was passed against the defendants recoverable from the estate of Mubarik Singh. The plaintiff brought the suit out of which the present second appeal arises through *Sardar* Shankar Singh, his next friend, for cancellation of the *ex parte* decree on the ground that his guardian *ad litem* had not properly represented him and had acted with gross negligence and had colluded with the defendant.

The Trial Court held that the plaintiff was never properly represented in the suit because the guardian never appeared and neglected his interests. It stated that parties produced evidence as to whether the defendant's suit was false or true but went on to say that it was unnecessary to discuss the evidence as for the purposes of this suit the Court had only to see whether the plaintiff was properly represented or not. The lower Appellate Court dismissed this appeal holding that the entire failure of the guardian to make any attempt to appear in Court or to have the *ex parte* decree set aside amounted to deliberate negligence which gave the minor a claim to relief.

In second appeal to this Court it was urged that it was legally wrong to set aside the decree against *Musammat* Gurdevi as well as Gurbachan Singh, and that the proof of negligence even was not a sufficient ground for setting it aside against the minor. I am unable to agree with the lower Appellate Court that mere failure on the part of the guardian *ad litem* to defend a suit or to appeal from the decree passed against a minor is of itself a sufficient ground for holding that there was gross negligence. If the plaintiff has a good case against a minor, there is no reason that I can see why the latter's guardian *ad litem* should incur addition of expense in defending the suit. In *Ahmad Ali* v. *Amir Shah* (1) it was held that the omission by the guardian *ad litem* to appeal on a minor's behalf, notwithstanding that there were excellent grounds, both on law and in the facts, for an appeal, amounted to gross negligence on her part, and that under such circumstances it would be contrary to law and equity to hold the plaintiff bound by the decree. In *Ismail* v. *Sultan Bibi* (2) a Division Bench of the Chief Court held that it could not be said that the plaintiff's mother had been guilty of negligence in not appealing from a decision of 1896, as at the time the status of an after-born son to challenge an alienation by the father prior to his birth was not recognised and it was only fully declared by *Jawala* v. *Hira Singh* (3). In *Chunduru Ponniyya* v. *Rajam Viranna* (4) it was

(1) 35 P. R. 1898.

(2) 43 Ind. Cas. 354; 103 P. R. 1917; 155 P. W. R. 1917; 6 P. L. R. 1918.

(3) 55 P. R. 1903; 117 P. L. R. 1903 (F. B.).

(4) 70 Ind. Cas. 668; 45 M. 425; 15 L. W. 427; (1922) M. W. N. 213; (1922) A. I. R. (M.) 273; 42 M. L. J. 429.

held that a person, who had been impleaded as a minor defendant represented by a guardian *ad litem* in a suit in which a decree was passed *ex parte* against him, can institute a suit to set aside the decree on the ground of gross negligence of the guardian *ad litem* in not defending the suit properly on his behalf. It was, however, also held that mere omission of the guardian to appear at the trial would not amount to gross negligence if there was no good ground of defence to put forward on the minor's behalf; but that it would be gross negligence not to defend the suit if there was a valid defence available. It cannot, therefore, be said in the present case that there was any gross negligence on the part of the guardian *ad litem* unless there was a good defence to the suit brought by Nawab Singh. It was, therefore, necessary to recount all the facts and to see whether Nawab Singh's case was a true one or not.

It was also argued by Counsel for the appellant that a decree against the estate of the minor's deceased father could not be set aside merely on the ground that the minor's guardian *ad litem* was guilty of negligence. In my opinion, however, it makes no difference whether the decree was against the minor personally or against the estate of his father to which he has succeeded, because in either case his interests would be injuriously affected by the decree, and I consider that he would be entitled to relief if it were found that his guardian had been guilty of gross negligence.

I, therefore, accept the appeal and, setting aside the decrees of both the lower Courts, remand the case to the Court of first instance for re-decision with reference to the above remarks. Stamp in this Court and in the lower Appellate Court will be refunded, and other costs will be costs in the case.

Case remanded; Appeal accepted.

K. S. D.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 73 TO 94 OF 1922.

July 3, 1924.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

PADARATH MAHTON—PLAINTIFF—APPELLANT

versus

HITAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 20, 33—Appellate Court, whether can bring parties on record—Limitation—Court of Second Appeal, powers of.

There is no period of limitation provided for bringing the parties to a suit upon the record in an appeal from a decision in that suit. [p. 602, col. 1.]

Girish Chander Lahiri v. *Sasi Sekhareshwar Roy*, 33 C. 329, followed.

The ordinary rules of limitation relating to appeals ought not to apply where in the course of an appeal the Court finds that in order to do justice between the parties it is necessary to bring one of them who was a party to the suit upon the record in the appeal. [*ibid.*]

The Court in second appeal has power under O. XLI, r. 20, Civil Procedure Code, to bring parties upon the record in order to carry out the powers granted to the Court under r. 33 of that Order. [*ibid.*]

Yoosof Osman Bros. & Co. v. *Win Ne Ya*, 59 Ind. Cas. 798; 10 L. B. R. 191 and *Durga Charan Bose* v. *Lakhi Narain Bera*, 47 Ind. Cas. 917, followed.

Second appeals from a decision of the Subordinate Judge, Third Court, Gaya, dated the 16th June 1921, modifying that of the Munsif, Aurangabad, dated the 31st May 1920.

Messrs. *S. Dayal, A. N. Lal* and *K. Sahay*, for the Appellant.

Messrs. *L. N. Singh* and *S. N. Rai*, for the Respondents.

JUDGMENT.

Miller, C. J.—These are appeals on behalf of the plaintiff from a decision of the Subordinate Judge of Gaya. The plaintiff and the defendant second party were the 16-annas proprietors in *Mauza* Bharkur Sohagia in the Gaya District at the time when this suit was instituted, the plaintiff being interested in an 8-annas share and the defendant second party in the remaining 8-annas share. The plaintiff instituted a suit

for rent against a large number of tenants claiming the total rent for the year 1323 *F.* or in the alternative his proportionate rent if it should turn out that his co-sharer landlord, the defendant second party, had been paid the proportionate rent due to him. There was a further claim against the co-sharer landlord in the event of the whole rent having been paid to him by the tenants.

The landlord defendant by his written statement set up the case that the whole of the rents had been paid by division of the produce to him and to the plaintiff and that was also the case of some of the tenants who were the principal defendants in this suit. Others of the tenants contended that they had paid the whole of the rent to the defendants second party.

When the case came before the Munsif he dismissed the suit as against the tenants but gave judgment as against the co-sharer defendant accepting some of the evidence given by two of the tenants and considering that there was an admission by the co-sharer defendant to the effect that he had received the whole of the rents payable for that year. It would appear that the learned Munsif had not properly appreciated what the case was set out in the written statement of the co-proprietor defendant. There was in fact no admission that he himself had received the whole of the rents of the year in question. His allegation was that all the tenants had divided and paid the landlords' share of the grain for 1323 *F.* to that defendant and the plaintiff on a division.

From that decision the co-sharer landlord appealed to the Subordinate Judge making the plaintiff-respondent but not adding the tenant defendants as respondents in the appeal. The learned Subordinate Judge after considering the evidence at some length arrived at the conclusion that the evidence as to payment to the co-sharer landlord was very meagre and altogether unsatisfactory and he disbelieved it and in the result he allowed the appeal. It seems fairly clear from the course which the case took that the plaintiff was entitled to the rent either from the tenants or from the co-sharer landlord, the defendant second party, because both the Trial Court and the Subordinate Judge on appeal had decided that he at all events had not received the rent and the only question for decision was whether he was entitled to receive it from the tenants or entitled to receive it from his co-sharer landlord on the ground that the tenants had paid him and not the plaintiff. In these circumstances it seems to me that in order to do justice between the parties when the matter came on appeal to the Subordinate Judge it was necessary to have before the Court not only the plaintiff and the co-sharer landlord but also the tenant defendants, because if the Court of Appeal should find that the plaintiff's proportion of rent had not been paid to his co-sharer and had not in fact been paid to him then it was clear that he would be entitled to a decree against the tenants, but the result of not having the tenants upon the record was that although the Judge was apparently under the impression that the tenants had not paid this rent at all he was bound in the circumstances to dismiss the suit altogether because the tenants were not before him as parties to the appeal and he could not pass a decree against any party who was not before him. If the tenants had been before him in that appeal even though there was no appeal by the plaintiff against that part of the decree which dismissed the suit as against them the Court could under the provisions of O. XLI, r. 33 of the Civil Procedure Code, if it should come to the conclusion that the tenants had not paid the plaintiff's proportion of the rent, nevertheless have passed a decree against them in order that justice might be done between the parties. The question then arose as to whether the Subordinate Judge could bring them upon the record as parties to the appeal and the conclusion at which he arrived was that they could not be made parties at that time as the question of limitation would arise. In that respect I think he was entirely wrong. It would appear that had the learned Judge been of

opinion that the tenant defendants could be brought upon the record without contravening the law relating to limitation he would have made them parties. The question whether the rules of limitation apply to the powers of the Court to bring parties on the record in the appeal under the provisions of O. XLI, r. 20 has been one of some controversy but the better opinion appears to be that there is no period of limitation provided for bringing parties to the suit upon the record in an appeal from a decision in that suit and one of the latest cases on the subject is that of *Girish Chunder Lahiri* v. *Sasi Sekhareshwar Roy* (1). It seems to be clear that in a case of this description the ordinary rules of limitation relating to appeals ought not to apply where in the course of an appeal the Court finds that in order to do justice between the parties it is necessary to bring one of them who was a party to the suit upon the record in the appeal and I entirely agree with the decision come to in the case just cited. The question which we have to determine is whether in second appeal to this Court we have power to add a party who was not a party to the appeal in the lower Court. This question again has been considered and in the most recent cases the High Court at Calcutta and the Lower Burma Chief Court have both held that the Court in second appeal has power under O. XLI, r. 20 to bring parties upon the record in order to carry out the powers granted to the Court under rule 33 of that Order. The decision of the Lower Burma Chief Court was that in *Yoosof Osman Bros. & Co.* v. *Win Ne Ya* (2). The head-note is "An Appellate Court has power in second appeal to add as respondents to the appeal persons who were parties to the suit in the original Court but were not impleaded as respondents in the lower Appellate Court although the time within which an appeal might have been preferred as against them has expired." That case was decided in the year 1920. The decision of the Calcutta High Court is that of *Durga Charan Bose* v. *Lakhi Narain Bera* (3). In that case it was held that although no provisions of the Civil Procedure Code dealt with such a case yet the Appellate Court should restore the appeal and re-hear it in the presence of the co-defendant after adding him as a party. The learned Judges who decided that case were of opinion that two courses were open. They might either remand the case for re-hearing in the presence of the party whom they added, or they might themselves pass a final decree such as in their opinion ought to have been passed by the Courts below. As they entertained no manner of doubt as to what the decree should be they adopted the latter course. In the present case it seems to me that it would be a miscarriage of justice if the case should be left where it now stands. The plaintiff was not appellant in this case. He was merely respondent and he had a decree in his favour. He could not foretell the result of the appeal to the Subordinate Judge but it was open to the Court if it were going to decide the appeal in favour of the appellant in circumstances which would indicate that it was not the appellant but the other defendants who were liable for the sum claimed, to add them as parties and pass judgment. This course was not adopted and I think it was only because the learned Subordinate Judge considered that he had no power by reason of the Limitation Act to add these parties that he refrained from doing so. In this Court although the tenant defendants have been made respondents we are not in possession of all the facts to enable us to decide as between the parties who are now before us. I think the proper course is to set aside the decision of the Subordinate Judge and to remand the whole case to him for re-hearing of the appeal in the presence of all the parties. I hardly think that the appellants can be altogether exonerated from blame for the situation that has arisen and although it would be unjust to deprive them of

(1) 33 C. 329.
(2) 59 Ind. Cas. 798; 10 L. B. R. 191.
(3) 17 Ind. Cas. 917.

their right to a decree against the unsuccessful defendants I think so far as the costs of this appeal are concerned that justice will be done if we order each party to bear their own costs.

This judgment will govern Appeals Nos. 73 to 94 of 1922.

Foster, J.—I agree.

K. S. D. *Order set aside; Case remanded.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1401 OF 1923.
July 15, 1924.

Present:—Mr. Justice Moti Sagar.

AHMAD KHAN—PLAINTIFF—APPELLANT
versus
ALLAH DAD KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Benami *transaction*—Benami *transaction to avoid statutory prohibition—Suit by* benamidar—*Court, whether can refuse relief—Second appeal—New question of law.*

A Civil Court has no power to decline to enforce a contract which is legal and binding in every respect and on the face of it as between the parties, on a mere assumption that in reality it is intended for the benefit of a third person against whom a statutory prohibition to enter into such contract exists. [p. 604, col. 1.]

Jahan Khan v. *Dalla Ram*, 142 P. R. 1907; 48 P. L. R. 1908; 86 P. W. R. 1907, followed.

A point of law can be raised for the first time in second appeal, if it does not necessitate the taking of further evidence. [p. 603, col. 2.]

Second appeal from an order of the District Judge, Rawalpindi, dated the 1st March 1923, confirming that of the Munsif, Gujar Khan, dated the 10th August 1922.

Mr. *Shamair Chand*, for the Appellant.

Lala *Faqir Chand*, for the Respondent.

JUDGMENT.—On the 2nd November 1916 one Allah Dad executed a deed of sale in respect of 26 *kanals* 5 *marlas* of land in *Mauza* Tota in the Kahuta *Tahsil* of the Rawalpindi District in favour of one Ahmad Khan for a sum of Rs. 500. In May 1920 Ahmad Khan brought this suit for possession impleading Allah Dad, the vendor, and his brother Fazal Dad, who was joint owner in that *khata*, as defendants. Allah Dad did not put in an appearance and *ex parte* proceedings were taken against him. Fazal Dad appeared and pleaded that the sale was without consideration and legal necessity, and that it was void inasmuch as the plaintiff had purchased the land, not for himself, but for Ishar Singh and Surjan Singh who were prohibited from purchasing the same under the provisions of the Alienation of Land Act. The following issues were framed:—

1. Whether the sale was effected for consideration ?
2. Was the sale in suit invalid inasmuch as it had been effected by an agriculturist in favour of a person who was a non-agriculturist ?
3. Was the property ancestral *qua* defendant, Fazal Dad?
4. Was the sale effected for valid necessity and how did this fact affect the suit ?

The Trial Court found in favour of the defendant and dismissed the suit holding that the plaintiff was a mere *benamidar*, the real purchasers being Ishar Singh and Surjan Singh who were non-agriculturists. The Appellate Court agreed with this view, and affirmed the decree of the Trial Court.

Against this decision the plaintiff has filed a second appeal in this Court and the only contention put forward on his behalf is that Fazal Dad was not a necessary party and consequently not entitled to contest the suit. Mr. Faqir Chand, on behalf of the respondent, contends that this objection was not raised in any of the Courts below, and that plaintiff is not, therefore, entitled to raise it for the first time in second appeal. He further contends that the finding that the plaintiff was a mere *benamidar* and not the real purchaser is a finding of fact and must be accepted as final for the purposes of this case. After carefully considering the matter I am of opinion that the contention of the appellant is well-founded and must prevail. There is no doubt that this point had not been raised in any of the Courts below, but the point is one of law, and can be raised in second appeal if it does not necessitate the taking of

further evidence. It is clear from the statement of Fazal Dad that he is not a necessary party, and that he is not, in any way, interested in the result of the suit. The land sold to the plaintiff was exclusively owned by the first defendant Allah Dad and the only question which arose for the determination of the Court was whether the sale-deed had or had not been duly executed by the latter in favour of the plaintiff. Evidence was produced by the plaintiff to prove the sale, and no question as to the necessity or the validity of the sale could, under these circumstances, legitimately arise for the determination of the Court. Fazal Dad need not have been joined as a defendant, and the suit could very well have proceeded in his absence. In my opinion the defendant, Fazal Dad, had no interest in the subject-matter of the suit and was not, therefore, entitled to contest it.

As to the contention that the sale was in contravention of the provisions of the Alienation of Land Act, reference need only be made to the case reported as *Jahan Khan* v. *Dalla Ram* (1), in which it has been laid down that "a Civil Court has no power to decline to enforce a contract which is legal and binding in every respect on the face of it as between the parties on a mere assumption that in reality it is intended for the benefit of a third person against whom a statutory prohibition to enter into such contract exists." If Ishar Singh and Surjan Singh are the real purchasers Land Alienation Act can be properly invoked should they ever attempt to assert any right to the possession of the land by virtue of the sale now in question. The sale-deed is in favour of Ahmad Khan and he asks for possession under this deed. He is entitled to possession and there is nothing in the Land Alienation Act or any other Act which could justify a Court of Justice in refusing him the relief to which he is, no doubt, in law entitled.

I accept the appeal, set aside the judgment and decree of the learned District Judge and decree the plaintiff's suit for possession. I make no order as to costs as this objection was not raised by the plaintiff in any of the Courts below.

N. H. *Appeal accepted.*

(1) 142 P. R. 1907; 48 P. L. R. 1908; 86 P. W. R. 1907.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL NO. 1667 OF 1923.

June 24, 1924.

Present :—Mr. Justice Daniels.

PEARE LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JHABBA LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 2, 47 (3)—Decree, execution of—Dispute as to applicant being representative of party to decree - Determination of question, whether decree—Appeal—Succession Certificate Act (VII of 1889), s. 16—Succession certificate, effect of.

The determination of a question arising between a decree-holder or a person claiming to represent the decree-holder and a judgment-debtor, as to whether any person is or is not the representative of a party, amounts to a decree and is appealable as such.

Where a succession certificate has been obtained by several persons in respect of a decree, and execution of the decree is sought, it is not open to the judgment-debtor to raise the objection that some of the applicants are not entitled to join in executing the decree.

Second appeal against a decree of the District Judge, Bulandshahr, dated the 16th May 1923.

Mr. *K. N. Laghate*, for the Appellants.

Mr. *Panna Lal*, for the Respondents.

JUDGMENT.—This is an appeal in execution proceedings. A decree for the recovery of a maintenance by the sale of immoveable property on which the maintenance was charged was held by *Musammat* Chandan Kuar against the judgment-debtors respondents. *Musammat* Chandan Kuar died on the 11th October 1921. A succession certificate in respect of the decree was obtained jointly by the appellants who are her sons and *Musammat* Saraswati who was her daughter. On the strength of this succession certificate these parties applied jointly to execute the decree.

In their first application they treated the decree as a preliminary decree and asked for the preparation of a final decree, but in the alternative they also asked for execution of the decree as it stood in case no final decree should by necessary. The application was at first dismissed, but on a fresh application execution was allowed. The judgment-debtors appealed to the District Judge on the ground among others that *Musammat* Saraswati alone was the heir of her mother *Musammat* Chandan Kuar and that the appellants were, therefore, not entitled to join in executing the decree. The learned District Judge has given effect to this contention and the appellants have filed the present second appeal to this Court objecting to the execution application being dismissed against them.

A preliminary objection is taken that no appeal lies and the appellant relies on the ruling in *Sheoraj Singh* v. *Aminuddin Khan* (1). That ruling was passed under the old Code of Civil Procedure and Mr. Agarwala remarks in his Commentary (Indian Practice, 3rd Edition, page 189) that it requires re-consideration as it ignores sub-section (3) of section 47 and a number of rulings to the contrary which are cited in the commentary. Sub-section (3) of section 47 of the present Code in express terms includes a question arising between the parties as to whether any person is or is not the representative of a party, and in view of section 2 of the Code the determination of such a question as between the decree-holder or a person claiming to represent the decree-holder and the judgment-debtor amounts to a decree and is appealable as such. The preliminary objection, therefore, fails.

On the merits the order of the learned District Judge cannot be upheld. The learned District Judge has not taken into account section 16 of the Succession Certificate Act which declares that a succession certificate duly granted by the District Court is conclusive against debtors of the deceased person. The section is so clear that it is really superfluous to cite any ruling in support of it, but *Rupan Bibi* v. *Bhagelu Lal* (2) may instance a case in which effect has been given to the provisions of the section. It may be noted here that there is no contest between *Musammat* Saraswati and her brothers. The judgment-debtors alone challenged the right of the appellants to join in executing the decree. In view of section 16 of the Succession Certificate Act it is not open to the judgment-debtors to raise this objection.

The respondents have in this Court attacked the right of the appellants to execute the decree on the ground that the appellants did not apply to be substituted for the deceased within three months of her death. Even if this was a case in which the preparation of a final decree was necessary this objection would be untenable. It is clear, however, from a perusal of the decree, which has been read to me, that the decree was not a preliminary decree but one which could be put in execution by applying for sale of the property. It is, therefore, governed by O. XXII, r. 12 and the three months' period prescribed by rules 3 and 11 of the Order does not apply to it. I dismiss the cross-objections with costs. For reasons already given I allow the appeal and restore the order of the Munsif with costs in this Court and in the Court below.

K. S. D. *Appeal allowed;*
Cross-objections dismissed.

(1) 20 A. 539; A. W. N. (1898) 145; 9 Ind. Dec. (N. S.) 706.

(2) 25 Ind. Cas. 320; 36 A. 423; 12 A. L. J. 524.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 977 OF 1920.
February 1, 1923.
Present:—Mr. Justice Abdul Raoof.
PIARA RAM—PLAINTIFF—APPELLANT
versus
KESHO NATH REPRESENTATIVE OF BUDH RAM (DECEASED) AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. II,

MAUNG PAUNG *v.* MA ON.

rr. 3, 4, 5, 6—Different sales in favour of same vendee by different owners—Single suit for pre-emption, whether competent—Joinder of all vendors and vendee, whether bad—Decree—Appellate Court, whether can interfere.

Plaintiff brought a suit for pre-emption against the vendee of four different plots, sold to him by different owners at different times. The objection as to misjoinder of causes of action and parties was overruled by the Trial Court and the suit was decreed in respect of all the four plots. The Appellate Court, however, directed the institution and trial of four separate suits. Against this order of remand, the vendor preferred a second appeal to the High Court :

Held, (1) that the suit was properly instituted ;

(2) that the lower Appellate Court should not have interfered with the discretion of the Trial Court in the matter.

Miscellaneous second appeal from an order of the District Judge, Layallpore, dated the 31st March 1920, reversing that of the Munsif, First Class, Jhang, dated the 18th February 1919.

Messrs. *M. Sleem* and *Devi Dayal*, for the Appellant.

Dr. *Nand Lal*, for the Respondents.

JUDGMENT.—This is an appeal from an order of remand in a pre-emption suit made under the following circumstances:—

The vendee purchased four plots of land from different owners at different dates and for different prices. The plaintiff-pre-emptor brought a single suit in respect of all the sales impleading the vendee and also the various vendors of the four sales. An objection was raised in the Trial Court on the ground of misjoinder of causes of action and parties. It was overruled and the suit of the plaintiff was decreed in respect of all the four plots. The vendee appealed to the lower Appellate Court and again put forward the objection as to the misjoinder. The lower Appellate Court without deciding whether the suit was bad on account of misjoinder of parties or causes of action has thought it proper to act under O. II, r. 6, Civil Procedure Code, and has directed the institution and trial of four separate cases regarding the sales and has made an order of remand under O. XLI, r. 23, Civil Procedure Code.

Against this order of remand the present appeal has been preferred. Order II, r. 3 (1) provides that "save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit." Rules 4 and 5 of the same Order provide that in certain cases this cannot be done. The suit for pre-emption was really against the vendee. The different vendors under the different four sale-deeds were not necessary parties. They were simply impleaded as *pro forma* defendents. The suit was, therefore, properly instituted. The Trial Court did not think fit to act under rule 6, tried the case and passed a decree. In my opinion it was not proper for the Appellate Court to have interfered with the discretion of the Trial Court in this matter. Evidence has been taken, the suit has been tried and a decree has been passed. It is highly inconvenient, if not improper, that the entire proceedings taken in the Court below should be set aside and four separate suits should be instituted and the trial should begin over again. This will result in loss of time and money to the parties.

I accordingly accept this appeal and set aside the order of remand with costs.

K. S. D. *Appeal accepted.*

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No. 174 OF 1922.

April 6, 1923.

Present :—Mr. Justice Heald.

MAUNG PAUNG AND ANOTHER—APPELLANTS

versus

MA ON AND OTHERS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17—Construction of document—Sale-deed—Agreement to reconvey—Mortgage or option of re-purchase—Registration, whether necessary.

MAUNG PAUNG *v.* MA ON.

The parties to a registered sale-deed executed an agreement contemporaneous with the sale-deed, whereby the vendee agreed that if the vendor re-paid to him the purchase-money with interest at a certain rate within two years he would re-convey the property to the vendor :

Held, that the agreement was a mere option of re-purchase and did not amount to a mortgage and was, therefore, not compulsorily registrable.

Bhagwan Sahai v. *Bhagwan Din*, 12 A. 387; 17 I. A. 98; 5 Sar. P. C. J. 557; 6 Ind Dec. (N. S.) 992 (P. C.), followed.

O Chaing Kywan v. *Ma Oo*, 72 Ind. Cas. 34; 11 L. B. R. 456; (1923) A. I. R. (R.) 52, distinguished.

Mr. *Sen*, for the Appellants.

Mr. *Thein Maung*, for the Respondents.

JUDGMENT.—Appellants' case was that on the 14th of August 1919 they executed a registered conveyance of their house and its site by sale in favour of the first respondent Ma On and her husband Kyaw Zan, that on the same date Kyaw Zan acting for himself and Ma On executed a written agreement to re-convey the house and site to appellants on receipt of the amount of the price mentioned in the sale-deed together with interest thereon at 2 per cent. per mensem, that they had repaid Rs. 180 out of the price, and that they were entitled to a re-conveyance of the property to them on payment of the outstanding balance of Rs. 20 together with Rs. 76-6-4 as interest. They joined the children of Kyaw Zan and Ma On together with Ma On as heirs and legal representatives of Kyaw Zan.

One of the children was served by substituted service and did not appear to contest the appellants' claim.

The rest of the defendants filed a joint written statement in which they put appellants to proof of Kyaw Zan's execution of the agreement, and pleaded that even if Kyaw Zan did execute the agreement it could not be proved because the document was compulsorily registrable and was not registered, and that Ma On had no knowledge of the agreement and was not bound by it. They denied receipt of any payment on account of the agreement.

The Trial Court held that the document did not require registration and that appellants succeeded in proving the making of the agreement and the payment which they alleged, and gave them a decree for the re-conveyance of the property to appellants on their paying Rs. 94-6-4 to respondents.

Respondents appealed and the District Court came to the conclusion that the document required registration and that because it was not registered no evidence of the transaction could be given. Appellants' suit was accordingly dismissed with costs.

Appellants come to this Court in second appeal on the grounds that the District Court was wrong in law in holding that the document embodying the agreement required registration, and was also wrong in finding that Kyaw Zan did not execute the document.

The deed of sale was an outright conveyance in the ordinary form.

The terms of the agreement under which appellants claim are as follows :—

"I, Kyaw Zan, have this day, the 14th of August 1919 bought for Rs. 200 from Maung Paung and Ma E Bya by registered deed in the names of myself and my wife, their house and site and I hereby agree that if the said Maung Paung and Ma E Bya shall within two years pay to me the said principal with interest at the rate of Rs. 2 per cent. per mensem. I will re-convey to them by registered deed the said house and site and if I fail to do so I will pay them whatever damages they suffer and the costs of any litigation which may result."

The two documents were executed on the same day as a result of the same negotiations and if on proper construction of the two documents read together the relationship of mortgagor and mortgagee existed between the parties as a result of the transaction as a whole, it would appear that both documents were compulsorily registrable.

But it seems to me that on a proper construction of the documents it is not at all necessary to hold that any such relationship subsisted.

The reason for the execution of the two documents may have been that mortgages without possession are uncommon and little understood among Burman

villagers, but it does not follow that the transaction was for that reason a mortgage. The inference would seem to be rather the other way, since, if the parties did not know that the transaction could be put into the form of a mortgage, they can hardly have intended it to be a mortgage. It is clear that appellants owed Kyaw Zan and Ma On money and Kyaw Zan was pressing for payment. Appellants agreed to convey their house and its site to him in satisfaction of the debts on condition that they were allowed to continue to live in the house and that he agreed to let them buy it back on payment of the amount of the debts for which it was taken, together with interest thereon at Rs. 4 a month. Ma On herself says definitely that the transaction was a sale and not a mortgage and that Kyaw Zan told her on his return that he had agreed to allow appellants to remain in occupation of the property at a rental of Rs. 4 a month, which it will be noted is exactly the amount of the interest fixed by the agreement, the whole of the respondents' case is in fact based on an allegation that the transaction was an outright sale. They deny the agreement for re-sale. They do not plead that there was any mortgage, and although they do allege that if there was a written agreement for re-sale the document would need registration. They do not say that it would need registration because the transaction was a mortgage.

I am of opinion that, as a matter of fact, it was not a mortgage but was what the documents *prima facie* show it to have been, namely, a sale with a right of re-purchase within two years. This opinion seems to me to be in accordance with the decision of the Privy Council in the case of *Bhagwan Sahai* v. *Bhagwan Din* (1), and although it does not follow the ruling of a Single Judge of the Chief Court of Lower Burma in the case of *Chaing Kywan* v. *Ma Oo* (2) which has been brought to my notice, the documents in the two cases are so dissimilar that similar considerations do not apply to them.

I hold, therefore, that the agreement on which appellants fixed did not require registration.

The next question which arises is whether or not appellants succeeded in proving the agreement.

The Trial Court found that they did prove it and respondents did not appeal against that finding. The grounds of appeal were that the agreement could not be proved because the document was not registered and that it was not binding on Ma On. After reading the record I have no hesitation in holding that appellants did prove the agreement, and in finding on Ma On's own admission that the agreement was binding on her. She admitted that her husband managed all the business of the family and that she was not present at the transaction at all, and it is clear that her name was inserted in the conveyance at her husband's request and without her knowledge. Under these circumstances if her husband at one part of the transaction had power to take the conveyance in her name he obviously had power in another part of the same transaction to bind her in respect of the property conveyed.

I, therefore, find that appellants prove the agreement and that it was binding on Ma On personally and all the respondents in their representative capacity.

The only other question to be decided is whether or not appellants proved the payment which they alleged. The Trial Court found that they did prove it and gave reasons for its findings. All that the lower Appellate Court said was that the evidence about the payment was conflicting.

[His Lordship here discussed the evidence and then proceeded:—]

The Trial Court accepted the evidence of appellants' witnesses and discredited respondents'. The learned Judge came to the conclusion, not without reason, that Aung Hla was entirely unreliable. It is clear that Ma On's own evidence was untrustworthy, and that the Head-

(1) 12 A. 387; 17 I. A. 98; 5 Sar. P. C. J. 557; 6 Ind. Dec. (N. S.) 992 (P. C.).

(2) 72 Ind. Cas. 34; 11 L. B. R. 156; (1923) A. I. R. (R.) 52.

man was more likely to be telling the truth than Maung Tu.

For these reasons I accept the finding of the Trial Court that Rs. 180 was paid in respect of the agreement in suit, and as I have held that agreement was established and was valid, I set aside the judgment and decree of the lower Appellate Court and restore the decree of the Trial Court with costs for appellants throughout ; Advocate's fee in this Court to be three gold *mohurs*.

Z. K. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 158 OF 1924.
June 5, 1924.
Present:—Mr. Justice Zafar Ali.
KHAN MOHAMMAD KHAN AND ANOTHER—DEFENDANTS—APPELLANTS
versus
Musammat NUR JAHAN BEGAM—PLAINTIFF—RESPONDENT.

Custom or Muhammadan Law—Pathans of Kutel, District Karnal—Government Notification that tribe is agricultural, value of—Rule of custom, applicability of—Limitation Act (IX of 1908), s 5—Appeal — Incomplete judgment filed—Extension of time.

Pathans of the village Kutel in the Tahsil and District of Karnal are governed by Muhammadan Law in matters of succession. [p. 610, col. 1.]

A Notification by Government that a tribe is an agricultural tribe does not raise the presumption that it is governed by custom. [p. 610, col. 2.]

Jowahir Singh v. *Yaqub Shah*, 5 P. R. 1906; 59 P. L. R. 1906; 26 P. W. R. 1906 and *Faquir Muhammad* v. *Fazal Muhammad*, 16 P. R. 1906; 66 P. L. R. 1906; 32 P. W. R. 1906, followed.

The appellant filed with the appeal a copy only of the final judgment under appeal but did not file a copy of the order referred to therein as forming part thereof until he was called upon to do so by the office which was after the expiry of the period of limitation :

Held, (1) that the appellant ought to have filed a copy of the previous order along with the appeal and the judgment as filed was incomplete ; [p. 609, col. 2.]

(2) that under the circumstances of the case, time could be extended under section 5 of the Limitation Act. [*ibid.*]

Second appeal from an order of the District Judge, Karnal, dated the 18th August 1923, reversing that of the Sub-Judge, Third Class, Karnal, dated the 28th February 1923.

Lala *Mool Chand*, R. S., for Mr. *Ghulam Rasul*, for the Appellants.

Mr. *Shamair Chand*, for the Respondent.

JUDGMENT.—Counsel for the respondent raises a preliminary objection that the appeal is barred by time, in that, copy of a portion of the judgment of Trial Court was supplied after the expiration of the period of limitation. The judgment of that Court opens thus:—

"This order should be read as being in continuation of my previous order in English, dated the 29th January 1923."

The appellant filed with the appeal copy of the final judgment in which the above sentence occurs but not of the order of 29th January 1923 until called upon by the office to do so. There can be no doubt that the judgment was incomplete unless read with the previous order and, therefore, the appellant ought to have filed copy thereof with the appeal. But if he did not do so the case falls within the purview of section 5 of the Limitation Act and I extend time under that section because, strictly speaking the last order constituted the final judgment of the Court and the appellants under that impression presumably did not file with the appeal copy of the previous order also.

As regards the merits, the only controversial question in the case was whether in matters of inheritance the parties were governed by custom or Muhammadan Law. The suit was by a sister against her two brothers for her share in the landed property left by their mother as well as by the son of their mother's sister. When the inheritance fell out the plaintiff was a minor and so her brothers ignored her and succeeded to the entire estate of their mother as well as of their cousin. The Trial Court found that the parties were governed by custom, but the learned District Judge arrived at the conclusion that they followed Muhammadan Law and decreed plaintiff's suit

MAUNG WALA *v.* MG. SHWE GUN.

There can be no doubt that the decision of the learned District Judge is correct.

(1) The parties are Pathans of the village Kutel in the Tahsil and District of Karnal. According to the *riwaj-i-am* of that District "Pathans invariably follow the *Shara* and admit no custom"; and it appears that the *Shara* has invariably been the rule of succession in the family of the parties themselves. In the first place on the death of Mohammad Ali Khan his estate devolved upon his daughter *Musammat* Karim-ul-Nisa. (See the pedigree table given in the judgment of the District Judge). The record does not show whether Mohammad Ali Khan had any male collaterals or not. *Musammat* Karim-ul-Nisa was married to Muhammad Khan Pathan who came from Panipat, and bore him three daughters. On her death her husband as well as three daughters (1) *Musammat* Naziran, (2) *Musammat* Najiban and (3) *Musammat* Bashiran succeeded to her estate according to Muhammadan Law. No. 1 was the mother of the parties and No. (2) was the mother of their cousin Mohammad Yasin deceased. The Courts below missed the point that the land had descended from two ladies and the last owner in one case was a female. The rule of custom set up by the defendants applied to the ancestral landed property of the father and not to that of the mother or to that derived from a male proprietor. (See Art. 23 of Rattigan's Digest of Customary Law). No authority was cited to show that the same rule applied to the ancestral landed property of female. It is noteworthy that Pathans of Panipat, to which place Mohammad Khan belonged are admittedly governed by Muhammadan Law.

(2) The four points on the strength of which the Trial Court found that the parties were governed by custom were quite insufficient to prove that. The first point was that the village was founded by Pathans; but the learned Counsel for the appellants could not show from the record that this was so. On the other hand, it was in evidence that there was only one family of Pathans in the village, *i. e.*, the family of the parties to the suit. The second point that the members of the family cultivated land themselves showed that they were agriculturists, but Pathan agriculturists in the District follow Muhammadan Law. The third point also that Pathans are a notified agricultural tribe of the District possesses no force—because it has been held in several cases that came up to this Court that a Notification by Government that a tribe is an agricultural tribe does not raise the presumption that it is governed by custom [*Jowhir Singh* v. *Yaqub Shah*, (1), and *Faquir Muhammad* v. *Fazal Muhammad* (2)]. The fourth and the last point was that two of plaintiff's own witnesses deposed that daughters did not succeed in the presence of sons, but in the absence of any instance this evidence is no better than the personal opinion of the witnesses and could carry no weight. All that has been stated above supports the conclusion that the parties follow Muhammadan Law and not custom, and I, therefore, dismiss the appeal with costs.

K. S. D. *Appeal dismissed.*

(1) 5 P. R. 1906; 59 P. L. R. 1906; 26 P. W. R. 1906.

(2) 16 P. R. 1906; 66 P. L. R. 1906; 32 P. W. R. 1906.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 234 OF 1922.

June 2, 1923.

Present:—Mr. Justice May Oung and Mr. Justice Duckworth.

MAUNG WALA—PLAINTIFF—APPELLANT

versus

MG. SHWE GUN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17—Agreement to re-purchase, whether requires registration—Time, whether of esssence of contract—Tender—Avoidance by vendee, effect of—Extension of time.

A mere option to re-purchase which has not the effect of reducing the original conveyance to a mortgage and does not give rise to a right of redemption, does not require registration. [p. 613, col. 1.]

MAUNG WALA *v.* MG. SHWE GUN.

Ma Thin v. *H. M. Yasin*, 32 Ind. Cas. 694; 9 Bur. L. T. 67, *Ma Shwe U* v. *Mg Po Lu*, 37 Ind. Cas. 91; 9 Bur. L. T. 177, *U Kyo* v. *Mg Pan Ya*, 74 Ind. Cas. 154; 1 Bur. L. J. 193; (1923) A. I. R. (R.) 102, *C. Chaing Kywan* v. *Ma Oo*, 72 Ind. Cas. 34; 11 L. B. R. 456; 1 Bur. L. J. 223; (1923) A. I. R. (R.) 52, *Maung Paung* v. *Ma On*, 82 Ind. Cas. 606; 2 Bur. L. J. 89; (1923) A. I. R. (R.) 242 and *Bhagwan Sahai* v. *Bhagwan Din*, 12 A. 387; 17 I. A. 98; 5 Sar. P. C. J. 557; 6 Ind. Dec. (N. S.) 992 (P. C.), referred to.

In the case of an agreement to re-purchase time is of the essence of the contract, and the doctrine that time may not be of the essence of the contract which arises on the construction of contracts of sale of immoveable property, is not applicable; for the right to re-purchase, being *an option*, must be exercised according to the strict terms of the power. [p. 613, col. 2.]

Mg Po Kin v. *Mg Shwe Kin*, 70 Ind. Cas. 126; 11 L. B. R. 441 and *Samarapuri Chettiar* v. *A. Sudarsana Chariar* 52 Ind. Cas. 590; 42 M. 802; 37 M. L. J. 109; (1919) M. W. N. 598; 10 L W. 376; 26 M. L. T. 269, relied on.

But although time is of the essence of the contract in the case of an agreement to re-purchase, a default by the payee such as renders proper tender by the purchaser by due date impracticable, would be interpreted by the Courts as extending time, when it is clear that the purchaser was prepared with a ready and willing tender. [p. 614, cols. 1 & 2.]

Appeal against a decree of the District Court, Hanthawaddy, in Civil Suit No. 12 of 1922.

Mr. *Thein Maung*, for the Appellant.

Mr. *Villa*, for the Respondent.

JUDGMENT.—The plaintiff-appellant Mg Wala, on the 8th March 1919, by a registered conveyance sold his paddy land measuring 50·19 acres to the defendant-respondent Mg Shwe Gun and his wife Ma La for Rs. 5.600. On the same date, there was an unregistered agreement drawn up, and, as plaintiff alleged, executed by the parties, the purport of which was as follows:—

"That the defendants would re-convey the said land to Mg Wala if the latter, within three years, personally took back the same, on payment of the said sale price of Rs. 5,600, which money must belong to him and no other; that, in case the money turned out not to be Mg Wala's money, after he had taken back the land, he would have to pay double the sum of Rs. 5,600 as compensation, and in case the respondent failed to re-convey the land on Mg Wala's request, they would have to pay twice Rs. 5,600 as compensation; that, if respondents within the said three years, wished to sell the land, through adverse circumstances, they were to give Mg Wala a right of first refusal; and that if Mg Wala did re-purchase the land, he is to rent it out yearly at the current rate to respondents."

This period of three years of course expired on 8th March 1922.

The plaintiff-appellant filed the suit, which is the subject of this appeal on 14th March 1922, for specific performance of this agreement to convey the land to him or for damages on the grounds that although from October 1921 to 8th March 1922 he had made real efforts, with the money ready, to purchase back the land, the defendants had avoided him, and so rendered his compliance with his part of the contract, and his tender of the money, impossible.

The respondents did not explicitly admit this agreement to re-convey in their pleadings, but contended that the agreement was invalid for want of registration, and was inadmissible in evidence, besides being void for want of consideration. It was also set up that the agreement gave them an option to refuse to re-convey the land, and that, therefore, the plaintiff's remedy, if any, was by way of damages. It was denied that there was any valid tender of the purchase-money within the time specified, and it was urged that time was the essence of the contract. They denied that they had avoided the plaintiff, but stated that on the contrary plaintiff had not kept an appointment made through his lawyer on March 4th 1922 at their lawyers's office in Rangoon for the purpose of making the re-conveyance. Finally they contended that they had spent money on improvements and that they were in any case entitled to recover that amount in addition to the sum of Rs. 5,600. After framing suitable issues, the District Court dismissed the suit, on the ground that time was of the essence of the contract, and that the plaintiff-appellant made no proper tender within the allotted time, the fault being due to the plaintiff himself. On the matter of registration the learned Judge held against the respondents. The matter of consideration was not pressed, it being obvious that there was adequate consideration.

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Mg Wala now appeals to this Court on the grounds that the District Court was in error in holding that time was of the essence of the contract, and that the payment by Mg Wala of the Rs. 5,600 was a condition precedent. Further objections are taken to the learned Judge's findings that there was no legal or proper tender and that the party to blame was the appellant himself.

Cross-objections were filed by the respondents setting up that the District Court should have found that the agreement was invalid and inadmissible for want of registration, and that it erred in holding that appellant had any money with him in order to make a valid tender. The question of registration, since it goes to the root of the whole case must first be decided. It was argued by Mr. Thein Maung for the appellant that inasmuch as the agreement was admitted by the respondents, the registration or non-registration of the agreement was immaterial, but, though the said agreement was admitted in *evidence*, it was never explicitly admitted in the *pleadings*, and it is clear that the terms of the agreement had to be looked to during the hearing of the case. It is manifest, therefore, that the point is material and must be decided. The case of *Mg Mat* v. *Mg So* (1) to which reference was made is, therefore, not applicable to the facts of the present case, for in that case the whole agreement was explicitly admitted in the pleadings. The cases in Burma show that there is a difference of opinion as to whether such an agreement as this is compulsorily registrable. The original transaction under which Mg Wala transferred the land to respondents was clearly an outright sale. Evidence of the intentions of the parties and of their conduct was not admissible for the purpose of proving that this original transaction was in effect, a mortgage. The cases of *Bal Kishen Das* v. *Legge* (2) and *Mg Bin* v. *Ma Hlaing* (3) show conclusively that this is correct, and nothing more need be said, except that the said transaction left behind it no relationship of debtor and creditor as between the parties, and that it must be dealt with as an outright conveyance [*Ma Hnin* v. *Osman Gani* (4)]. The agreement in suit was nothing more than an option of re-purchase with certain explanations and conditions, and a promise to rent the land to respondents as yearly tenants in case of re-purchase. The first Burma case to which attention has been directed is *Ma Thin* v. *H. M. Yasin* (5), where Parlett, J., held that such an agreement requires registration, since the effect of it is to create a right of *redemption*. However in the case of *Ma Shwe U* v. *Mg Po Lu* (6), a Bench of the late Chief Court, consisting of Ormond and Twomey, JJ., held that such an agreement was merely an option of re-purchase, and that registration was not compulsory.

The case of *U Kyo* v. *Mg Pan Yo* (7), is not very clearly stated in the report but it appears that, after first mortgaging the land, it was made over to the mortgagee by the mortgagor by a *Pyatpaing*, the mortgagee agreeing orally to allow redemption at any time. It was held by Maung Kin, J., that this agreement required to be in writing and registered.

In *C. Chaing Kywan* v. *Ma Oo* (8), it was held by Maung Kin, J., that on facts similar to the present it was shown that the intention of the parties was that the transaction should be an usufructuary mortgage and that the agreement was, therefore, compulsorily registrable. It does not appear that the learned Judge's attention was called to the Bench case of *Ma Shwe U* v. *Mg Po Lu* (6), referred to above. Moreover the case is distinguishable inasmuch as there the agreement included terms which had been omitted from the original conveyance.

(1) 2 U. B. R. (1891) 379.
(2) 22 A. 149; 4 C. W. N. 153; 2 Bom. L. R. 523; 27 I. A. 58; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. S.) 1130 (P. C.).
(3) 3 L. B. R. 100.
(4) 15 Ind. Cas. 423; 5 Bur. L. T. 99.
(5) 32 Ind. Cas. 694; 9 Bur. L. T. 67.
(6) 37 Ind. Cas. 91; 9 Bur. L. T. 177.
(7) 74 Ind. Cas. 154; 1 Bur. L. J. 193 (1923) A. I. R. (R.) 102.
(8) 72 Ind. Cas. 34; 11 L. B. R. 456; 1 Bur. L. J. 223; (1923) A. I. R. (R.) 52.

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In *Maung Paung* v. *Ma On* (9) Heald, J., did not follow the case of *C. Chaing Kywan* v. *Ma Oo* (8) and decided that an agreement for re-conveyance was admissible in evidence without registration, which it did not require.

There can be no doubt that this later view is correct. It is in accordance with the Bench decision of the Chief Court and it seems paradoxical to hold that, when an agreement to sell does not require registration since it creates no interest in the land, an agreement to re-purchase must be registered since it creates a right of redemption. It does *not* create any right of redemption, when there has been an outright sale, and it does not rescind or modify the terms of that sale, so as to alter it into a mortgage. This is clear from what is stated by their Lordships of the Privy Council in the case of *Bhagwan Sahai* v. *Bhagwan Din* (10).

The agreement, therefore, did not require registration and so was admissible in evidence and, if proved, valid and binding. It has been admitted in evidence by the respondents, so it can now be regarded as proved. It is quite clear from what Mg Gyee and the headman say that appellant had the money with him, when he saw Mg Gyee in his office on 4th March 1922 and that he had the money with him when he complained to the local headman Mg Po Htu on the same date that he could not meet respondents, in order to tender the money. The cross-objections, therefore, fall to the ground, and the argument that the notes were not counted holds no water, and is clearly an after thought on Mr. Villa's part. Naturally no one would have counted the notes, except the payee, and Mg Gyee and Co., most strangely, have contended that, though they were all this time lawyers for the respondents, they had no authority to receive the Rs. 5,600 from Mg Wala.

It has been held in the case of *Mg Po Kin* v. *Mg Shwe Kin* (11) in which the case of *Samarapuri Chettiar* v. *A. Sudarsana Chariar* (12) was followed, that in the case of these agreements to re-purchase; time is of the essence of the contract and that the doctrine that time may not be of the essence of the contract, which arises on the construction of contracts of sale of immoveable property, is not applicable; for the right to re-purchase, being *an option*, must be exercised according to the strict terms of the power.

The lower Court was, therefore, correct in holding that time was of the essence of the contract. However the plaintiff-appellant was not bound to hand over the money to anybody except the respondents, or their authorized agents, and he was certainly not bound, in the circumstances, to tender the money to Mg Gyee & Co., since they pleaded non-authorization, or to deposit the money into Court. This is in reply to suggestions made in argument by respondent's learned Counsel. The fact that appellant was possessed of the money and was ready and willing to tender it would be sufficient. That he had the money ready, and was ready and willing to tender it, is quite obvious from the correspondence filed in the case, and the evidence, for the appellant on the record. His one noteable failure was that, although the respondents were invited to attend at their lawyer Mg Gyee & Co.'s office at 10 A. M. on March 4th 1922, by a notice from appellant's lawyer, which it appears that appellant himself delivered to respondents, and the respondents duly attended, the appellant did not arrive there till 3-15 P. M. or after the respondents had gone away. Otherwise, once the appellant had waived his uncalled-for claim to take over the crops on the land, it appears that he acted with exemplary diligence, in his effort to comply with the terms of the agreement. Moreover, even as regards the 4th of March, it is clear that the appellant, on his way from his village of Mingalern to Rangoon, called in

(9) 82 Ind. Cas. 606; 2 Bur. L. J. 89; (1923) A. I. R. (R.) 242.

(10) 12 A. 387; 17 I. A. 98; 5 Sar. P. C. J. 557; 6 Ind. Dec. (N. S.) 992 (P. C.).

(11) 70 Ind. Cas. 126; 11 L. B. R. 441.

(12) 52 Ind. Cas. 590; 42 M. 802; 37 M. L. J. 109; (1919) M. W. N. 598; 10 L. W. 376; 26 M. L. T. 269.

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first at respondents' field *hut* at Kyagan, in case the respondents had *not* gone to Rangoon and made efforts to find and pay them the money there. It is clear that neither they, nor their lawyers had ever intimated whether respondents intended to come to Rangoon at all, and there was some excuse for appellant being late at Mg Gyee & Co's. office. Moreover he did arrive there within business hours. The fact however remains that he was *late*, and his excuse that he did not know the time appointed cannot in the circumstances be accepted. However, after March 4th, the appellant manifestly made further efforts not only to procure acceptance of the tender by Mg Gyee & Co. but to find the respondents. There is no reason to doubt Mg Shwe Nigon's evidence about the events of March 8th when he and appellant visited respondent's *hut* and failed to find them. This evidence was apparently overlooked by the District Court. Moreover it appears that the respondents had no house in any village, but resided at times in one field *hut* and at times in another far distant from the first, and that they were not in fact easy to find. It seems clear that *after* the event of March 4th, the respondents must have determined to avoid any meeting with the appellant, if that were possible. The facts being such, the question is whether, in spite of the time limit being exceeded, the appellant is entitled to performance of the contract by the respondents. Equitably he clearly is so. Due note must be taken of the fact that respondents' lawyers repudiated authorization to accept appellant's tender. It is not easy to believe that this was correct, and it is at any rate most unusual. The ultimate fault clearly lay with respondents, their conduct in not intimating that they would come to Rangoon on March 4th and after that date, rendering timely performance by appellant practically impossible. The equitable principle is clear that, though time is of the essence of the contract, a default by the payees such as renders proper tender by the purchaser by due date impracticable, would be interpreted by the Courts as extending time, when it is clear that the purchaser was prepared with a ready and willing tender.

No evidence having been tendered as to any improvements by respondents, though the matter was expressly in issue, this claim is disallowed.

The decree of the District Court dismissing the suit is set aside, and the appellant is given a decree that the respondents shall within one month from the date of decree re-convey the suit land to the appellant on payment of Rs. 5,600. The respondents will pay appellant's costs.

Z. K. *Appeal allowed.*

LAHORE HIGH COURT.
FULL BENCH.

FIRST CIVIL APPEAL NO. 829 OF 1921.
July 19, 1924.
Present:—Mr. Justice Martineau, Mr. Justice Zafar Ali and Mr. Justice Moti Sagar.

SUNDAR DAS—PLAINTIFF—APPELLANT
versus
Musammat UMDA JAN AND OTHERS DEFENDANTS—RESPONDENTS.

Suits Valuation Act (VII of 1887), ss. 4, 11—Suit for possession of land—Market value less than plaintiff's valuation—Appeal, valuation for purposes of—Proper forum, how determined.

For the purpose of determining the course of appeal, the value of a suit for possession of a house is the market value of the house as ascertained by the Court and not the value as stated by the plaintiff in his plaint. [p. 616, col. 1.]

Mohammad Khan v. *Ashak Mohammad*, 106 P. R. 1895 (F. B.), followed.

First appeal from the decree of the Subordinate Judge, First Class, Lahore, dated the 10th February 1921.

Lalas *Durga Das* and *Nawal Kishore*, for the Appellant.

Mr. *Sagar Chand* and Sheikh *Niaz Mohammad*, for the Respondents.

There being conflict of authority on the point the Judges made the following

ORDER OF REFERENCE TO A FULL BENCH.

In 1914 the plaintiff bought 2 *kanals* 3 *marlas* of land from defendants Nos. 1 and 2 for Rs. 4,300. He obtained possession of 1 *kanal* 12 *marlas* and paid Rs. 3,800 out of the price and

he has brought a suit for possession of the remaining 11 *marals* on payment of Rs. 500. The suit has been dismissed and he has appealed to this Court.

The plaintiff valued his suit for purposes of Court fees and jurisdiction at Rs. 5,500. The defendants in their pleas objected to that valuation and said that the correct value was only Rs. 1,100. The question of the market value of the property was put in issue and the lower Court's finding on the point is in the defendants' favour. The latter take the objection that the appeal lay to the District Court and not to this Court, but for the appellant it is contended that even if he over-valued the property he was at liberty to do so and that for the purposes of determining the course of appeal the value of the suit is to be taken to be the value which he put on it and not the actual value of the property.

The appellant's contention appears to be supported by *Mohammad Khan* v. *Ashak Mohammad* (1) in which the plaintiff had sued for redemption, alleging that the amount due on the mortgage was Rs. 2,000 but the Court decreed redemption on payment of Rs. 7,558. It was held by a Full Bench of the Chief Court that the appeal lay to the Divisional Judge, there being nothing in the plaint to show that the value exceeded Rs. 5,000, and the question of jurisdiction having to be determined with reference to the claim made and not to the decision upon the claim. That ruling was followed in *Chuni Lal* v. *Beli Ram* (2).

A case that is directly in point is *Trakanta Das* v. *Kali Prasad Das* (3), in which the plaintiffs sued in the Court of the Subordinate Judge for a declaration of their right to land valuing the suit at Rs. 5,100. The defendants urged that the true value was not more than Rs. 1,000. The Subordinate Judge found that the value of the property was Rs. 1,385 and he returned the plaint for presentation in the Court of a Munsif empowered to try suits up to Rs. 2,000 in value. The plaintiffs appealed, and it was held that as they still maintained that the valuation exceeded Rs. 5,000, the appeal lay to the High Court notwithstanding the Subordinate Judge's adjudication.

On the other hand in *Abdur Rahman* v. *Charag Din* (4), where the plaintiff had valued the suit, which was for possession of a house, at Rs. 90, but the Munsif gave a decree for possession on payment of Rs. 634-7-0 the value of the improvements made to the house by the defendant, it was held that the value of the suit for purposes of appeal was the market value of the house as ascertained by the Court. Lal Chand, J., observed that the test of the value for purposes of appeal ought to be *prima facie* the value as determined by the Court rather than as alleged by the plaintiff, and that it would be anomalous to hold that in a case dependent on valuation of the subject-matter for purposes of jurisdiction the plaintiff could arbitrarily choose his own Court by an arbitrary valuation of the property. *Daya Ram* v. *Gordhandas* (5) also supports the respondents' contention that the value of the suit is the value determined by the Court and not the value which the plaintiff has chosen to put upon it.

In view of the conflict of authority we refer to a Full Bench the question whether for the purpose of determining the course of appeal in the present case the value of the suit is to be taken to be the value placed by the plaint on the property which he claims or the actual value of the property as determined by the Court.

JUDGMENT.—The facts have been stated in the referring order. It is contended on behalf of the plaintiff-appellant that the value of the subject-matter of the suit should be taken to be the value stated by him in his plaint, and not the value as determined by the Court, and a large number of rulings have been cited in support of this con-

(1) 106 P. R. 1895 (F. B.).
(2) 20 Ind. Cas. 473; 229 P. L. R. 1913; 196 P. W. R. 1913.
(3) 53 Ind. Cas. 1001; 23 C. W. N. 942.
(4) 19 P. R. 1908; 129 P. L. R. 1908; 38 P. W. R. 1908.
(5) 31 B. 73; 8 Bom. L. R. 885.

tention. It appears to us unnecessary to discuss any of these as the whole matter was fully considered by a Full Bench of the Chief Court in *Abdur Rahman* v. *Charag Din* (4) in which it was held that the value, for purposes of appeal, of a suit for possession of a house was the market value of the house as ascertained by the Court, and not the value as stated by the plaintiff in his plaint. We entirely agree with that decision. It is pointed out that in that case the value put by the plaintiff on the property was less, while in the present case is greater, than the amount found by the Court to be the value, but this difference is immaterial, for whether the plaintiff has under-valued or over-valued the suit the test for determining the value for purposes of jurisdiction remains the same.

We would hold on the question referred that for the purpose of determining the course of appeal in the present case, the value of the suit is to be taken to be the actual value of the property as determined by the Court.

K. S. D. *Reference answered.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 327 B OF 1921.
October 10, 1922.
Present:—Mr. Prideaux, A. J. C.
DAULAT—PLAINTIFF—APPELLANT
versus
SARDAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 109—Lessor transferring property leased—Rights and liabilities of transferee—Terminatin of lease—Lessee, whether can dispute title of transferee.

When a lessor transfers his ownership in the property leased, under section 109 of the Transfer of Property Act, the transferee, in the absence of a contract to the contrary, possesses the rights and, if the lessee so elects, is subject to all the liabilities of the lessor. In such a case when the lease has terminated, it is open to the man in possession to dispute the lessor's title to the land on the ground that ownership of it has passed either by a transfer or operation of law to another. [p. 617, cols. 1 & 2.]

Appeal from the decree of the First Additional District Judge, Akola, dated the 25th June 1921, in Civil Appeal No. 118 of 1921.

Mr. *G. G. Hatwalne*, for the Appellant.
Mr. *M. B. Niyogi*, for the Respondents.

JUDGMENT.—Yado the father of the plaintiff in this case owned a half share in field Survey Nos. 59 of Palsod; at present it is put as pot *hissa* No. 2 of that survey number. The father leased the share to Tejsingh the father of the first two defendants in 1899 for 21 years. The lessee was given possession. Yado's father had executed a mortgage-deed in favour of one Girdharilal Deokaran. The mortgagee sued on this which affected a quarter share of the field getting a foreclosure decree in 1903. Yado during the pendency of that suit died and the present plaintiff and his brother were brought on record as his legal representatives and the property was foreclosed against them. The lease expired before the bringing of this suit and Tejsingh is dead. Defendants Nos. 1 and 2 continued in possession of half the field after Tejsingh's death. Plaintiff sues to recover possession of half the field and Rs. 200 as damages for allowing the field to get overgrown with weeds. Plaintiff's brother was no party to the suit but plaintiff says as defendants are trespassers and he is a co-parcener he has a right to bring the suit for the whole half share. The third defendant is holding the land under defendants Nos 1 and 2.

Various pleas were raised defendants contending that plaintiff in no case can recover possession of the one-fourth share foreclosed. If they are liable for damages those damages do not exceed Rs. 12. They further pleaded that they had purchased the interest of Girdharilal Deokaran in the field in 1909, that is, as regards the fourth share. Plaintiff in turn contended that he was entitled to recover the half field on the ground that that half had not been divided and defendant cannot retain possession of any part of it until any portion to which they may be entitled is separated by metes and bounds.

The First Court found that plaintiff could not recover the one-fourth share covered by the foreclosure decree but he could recover the remaining quarter though his share therein amounted to one-eighth; that defendants are trespassers and plaintiff and his brother are undivided. Plaintiff was also found to be entitled to recover Rs. 75 as damages.

The plaintiff appealed. It was admitted in the lower Appellate Court that plaintiff and his brother had lost the fourth share of the field covered by the forsclosure decree and that they are now legally entitled to only a half share in the pot *hissa*; but that share being undivided and the one-fourth share lost by them not having been separated by metes and bounds, it was contended that they are entitled to the entire pot *hissa* and they could not be deprived of any part of it until the fourth portion of the foreclosure decree was separated by partition. This argument has been abandoned here and the plaintiff-appellant takes his stand on the fact that as the defendants' father was the lessee of the plaintiff's father and had not returned the whole land covered by the lease at the expiry of the lease they could not deny the plaintiff's title to the whole land.

The learned Judge of the lower Appetlate Court writes in paragraph 5 of his judgment as followes:

"Plaintiff accepts the position that he and his brother have lost one-fourth of the share of the field by virtue of the decree and that they are legally entitled to only half share in the pot *hissa*",

It is here contended that this being a question of law the appellant is not bound by the admissions made in the lower Appellate Court. It is obvious that when a lessor transfers his ownership in the property leased, under section 109 of the Transfer of Property Act, the transferee in the absence of a contract to the contrary possesses the right and if the lessee so elects is subject to all the liabilities of the lessor. In a case of this nature when the lease has terminated it is open to the man in possession to dispute the lessor's title to the land on the ground that ownership of it has passed either by a transfer or operation of law to another.

In the present case what in effect the defendants pleaded is that as regards a one-fourth share of the field the foreclosure decree and execution thereunder have deprived the plaintiff of the ownership of a fourth of the field. It has to be remembered that the plaintiff was a party to the foreclosure decree and it seems to me that the decision that he and his brother are no longer owners of a fourth share of the field can be justly urged by the defendants as depriving plaintiff of the right to this particular one-fourth share.

The case seems to me to have been properly decided. I dismiss this appeal with costs. The appellant to pay the respondents' costs.

G. R. D. *Appeal dismissed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 513 OF 1924.
June 26, 1924.

Present:—Sir Scott-Smith, KT., Acting Chief Justice.

VIR SINGH—DEFENDANT—APPELLANT
versus
BHOLA SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VIII, r. 5—Defendant specifically denying allegation—Subsequent admission by alleged mukhtar—*Court, whether can put matter in issue.*

The admission of a fact by a *mukhtar* of the defendant in a suit prior to the framing of issues does not debar the Court from putting the matter in issue when the defendant himself in his written statement specifically denies the same fact.

Second appeal from an order of the District Judge, Ferozepur, dated the 23rd November 1923, confirming that of the Sub-Judge, Ferozepur, dated the 30th August 1923.

Lala *Durga Das*, for the Appellant.

Dr. *Nand Lal*, for the Respondents.

JUDGMENT.—The plaintiff-respondent sued for a declaration that an alienation of land effected by Sawan Singh for a consideration of Rs. 700 in favour of Vir Singh on the 2nd August, 1919, should not affect his reversionary rights. The First Court held that the land was ancestral and that the alienation was valid to the extent of Rs. 530-6-0 and passed a decree in accordance therewith. The vendee filed an appeal in the Court of the District Judge who refused to allow the question, whether the land was ancestral or not, to be raised. He said, "The allegation in the plaint that it was ancestral was never specifically denied by the defendant who merely pleaded ignorance on the point. This, in my opinion, constitutes no such denial as would warrant the framing of an issue." On the merits he dismissed the appeal.

In second appeal it is contended that the District Judge was wrong in not allowing the question of the ancestral nature of the land to be raised. In his written pleas the vendee said "I do not know whether the land is ancestral. I do not admit that it is ancestral." Order VIII, r. 5, Civil Procedure Code, says "every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted..... provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission." Now in the plaint it was alleged that the land was ancestral and the defendant in his pleadings clearly stated that he did not admit this allegation. The allegation, therefore, could not be taken to be admitted and the plaintiff was bound to prove it. It is, however, contended on behalf of the respondent that the defendant's *mukhtar* prior to the framing of the issues did admit that the land was ancestral. Now in the first place the vernacular record of his statement might according to the appellant's Counsel be read as "*zamin jaddi nahin.*" The plaintiff's Counsel reads it as "*zamin jaddi thi.*" Considering that the defendant in his written pleas stated that he did not admit that the land was ancestral, I think the Court was perfectly justified in framing an issue on the point because in accordance with the proviso to rule 5 the Court may require any fact so admitted to be proved otherwise than by such admission. The name of the *mukhtar* who is said to have made this admission is not given on the record and there is no power-of-attonery on the record of the Trial Court appointing any one as a *mukhtar* of the vendee defendant. In my opinion this at least is open to doubt whether the so-called *mukhtar* of the defendants made the alleged admission. But even if he did the Court was right to put the matter in issue. Evidence was produced upon it and the Trial Court gave a considered finding thereon. Under all the circumstances of the case I consider the vendee was entitled to raise the point in his grounds of appeal in the lower Appellate Court and the District Judge was wrong in refusing to decide the point.

I, therefore, accept the appeal and under O. XLI, r. 23, Civil Procedure Code, remand the case to the lower Appellate Court for re-decision of the appeal. Stamp in this Court will be refunded and other costs will be costs in the case.

K. S. D. *Appeal accepted.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 14 OF 1921.
July 17, 1922.

Present:—Sir Lallubhai Shah, KT., Acting Chief Justice, and Mr. Justice Crump.

SHIVBASAPPA *bin* LAGMAPPA MANOLI—PLAINTIFF—APPELLANT
versus
NILAVA *Kom* SATAPA MANOLI AND OTHERS—DEFENDANTS Nos. 1 TO 4—RESPONDENTS.

Hindu Law—Joint family—Widow of pre-deceased co-parcener, adoption by—Estate vested in widow of another co-parcener—Adoption, effect of—Precedents, value of.

SHIVBASAPPA v. NILAVA.

After the death of the last surviving co-parcener in a Hindu joint family, when the estate has vested in the widow of that co-parcener, the widow of a pre-deceased co-parcener cannot adopt validly, and the adoption, if effected, cannot have the effect of divesting the estate vested in the widow of the last surviving co-parcener. [p. 620, col. 1.]

Assuming that the widow of a pre-deceased co-parcener can adopt without the consent of the surviving co-parceners, even in the absence of any specific authority from her husband, during the lifetime of the co-parcener, it does not necessarily follow that even after the death of the last surviving co-parcener, when the joint family has ceased and the property has devolved upon the heirs of the last surviving co-parcener, she can make a valid adoption, so as to divest the estate already vested in the heirs of the last male owner. [p. 620, col. 2.]

A decision is an authority for what it decides, and it is not an authority for what may seem to be a logical consequence of that decision. [*ibid.*]

Appeal from the decision of the First Class Subordinate Judge at Belgaum.

FACTS.—Two brothers Lagmappa and Basvanta formed a Hindu joint family. Lagmappa had a wife named Satava and Basvanta had two wives named Lagmava and Baslingava and a son called Satu. Satu, Lagmappa and Basvanta died one after the other when Satava adopted the plaintiff without the consent of Lagmava or Baslingava.

Mr. *Nilkanth Atmaram*, for the Appellant.

Mr. *Coyajee*, (with him Mr. *D. R. Manerikar*), for the Respondents.

JUDGMENT.

Shah, Ag. C.J.—[His Lordship after discussing the evidence and coming to a finding that Basvanta had in fact died after Lagmappa and that the adoption of the plaintiff had taken place proceeded:—]

In the lower Court no question was raised as to the effect of the finding that Basvanta and Lagmappa were members of a joint family of whom Lagmappa died first and Basvanta afterwards. It was accepted that the result of that finding would be to negative the plaintiff's claim; and in the memorandum of appeal before us no such point as has been raised in the course of the argument has been taken. After the filing of the appeal, however, the decision in *Yadao* v. *Namdeo* (1) has rendered it possible for the appellant to raise the contention that the adoption would have the effect of divesting the estate vested in defendants Nos. 2 and 3 on the death of Basvanta. It is urged that, though, according to the decisions of this Court the plaintiff would have no case, in view of the observations of their Lordships of the Privy Council in *Yadao* v. *Namdeo* (1) relating to the Full Bench ruling of this Court in *Ramji* v. *Ghaman* (2), those decisions are no longer good law, and that as a logical consequence of the observations relating to the decision in *Ramji* v. *Ghaman* (2), it follows that the adoption would be good even after the death of the last surviving co-parcener of the joint family so as to have the effect of divesting the estate vested in the widow or widows of the last co-parcener.

On behalf of the respondents it is urged that, whatever the effect of the observations in *Yadao* v. *Namdeo* (1) may be as regards the power of the widow during the continuance of the joint family, the current of decisions of this Court with regard to the inability of a widow to adopt so as to divest the estate vested in a third party is not touched in any way, and that that current of decisions cannot be treated as having been overruled by the observations which are directly made with reference to the decision in *Ramji* v. *Ghaman* (2). The current of decisions referred to begins from the year 1871 when *Rupchand Hindumal* v. *Rakhmabai* (3) was decided; then we have the decision in *Chandra* v. *Gojarabai* (4), which is strongly relied upon by the respondents. They also rely upon the observations in *Vasudeo Vishnu Manohar*

(1) 64 Ind. Cas. 536; 48 I. A. 513; 17 N. L. R. 145; 30 M. L. T. 53; 26 C. W. N. 393; 42 M. L. J. 219; 15 L. W. 565; 20 A. L. J. 481; 24 Bom. L. R. 609; 49 C. 1; (1922) A. I. R. (P. C.) 216.

(2) 6 B. 498; 6 Ind. Jur. 587; 3 Ind. Dec. (N. S. 787 (F. B.).

(3) 8 Bom. H. C. R. A. C. J. 117.

(4) 14 B. 463; 7 Ind. Dec. (N. S.) 770.

v. *Ramchandra Vinayak Madok* (5) and *Payapa Akkapa Patil* v. *Appanna* (6).

The question that arises in virtue of the observations in *Yadao* v. *Namdeo* (1) is whether, if the widow of a deceased co-parcener in a joint family could adopt validly, even in the absence of any express authority from her husband, without the consent of the surviving co-parceners, it is necessarily implied that that adoption, even when effected after the death of the last surviving co-parcener of the joint family, and after the estate has vested in the widow or widows of that last deceased co-parcener, would be valid or rather have the effect of divesting the estate so vested in the widows. It is not necessary for the purpose of this case to examine the point decided in *Ramji* v. *Ghaman* (2) along with the earlier and later decisions on that point in the light of the observations in *Yadao* v. *Namdeo* (1). It is clear, however, that for a long time in this Court the rule is accepted as stated in *Thakarana Tejrani* v. *Sarupchand Chhaganbhai* (7).

"But where the circumstances are, as they are here, it seems to me quite plain that we must follow what is well-understood as the ordinary law in this Presidency and apply it to the facts. The widow of a deceased co-parcener of a joint Hindu family cannot, in the absence of any specific authority, make an adoption subsequent to the death of a co-parcener who survived her husband; and more particularly when, as here, that later surviving co-parcener left widows."

That undoubtedly was the law as understood and accepted in this Presidency before the decision in *Yadao* v. *Namdeo* (1). In the present case, we are not directly concerned with the decision in *Ramji* v. *Ghaman* (2). We are concerned with another current of decisions to which I have referred, and the question is whether after the death of the last surviving co-parcener when the estate has vested in the widow of that co-parcener the adoption effected by a widow of a pre-deceased co-parcener could have the effect of divesting that estate. On that point it seems to me to be quite safe to say that the decision in *Yadao* v. *Namdeo* (1) is silent. It is difficult to accept that the effect of that decision is to overrule by implication the current of decisions on that point. It is an oft-repeated caution that a decision is an authority for what it decides, and that it is not an authority for what may seem to be a logical consequence of that decision. In the present case I am not clear at all that, because a widow of a pre-deceased co-parcener can adopt without the consent of the surviving co-parceners, even in the absence of any specific authority from her husband during the life-time of the co-parcener, necessarily or logically even after the death of the last surviving co-parcener when the joint family has ceased, and the property has devolved upon the heirs of the last surviving co-parcener, she can make a valid adoption so as to divest the estate already vested in the heirs of the last male owner. Mr. Nilkanth has not been able to cite any authority in support of his argument for the appellant. But it is urged by Mr. Coyajee on behalf of the respondents that the decision in *Ramkrishna* v. *Shamrao* (8) which has been approved by their Lordships of the Privy Council in *Madana Mohana Ananga BheemaDeo* v. *Purushathama Ananga Bheema Deo* (9), has the effect of recognising this principle that the right of a widow to adopt may be existinguished owing to certain events or circumstances, and where that is the case it does not matter whether she had originally a right to make an adoption to her husband. It is urged that in the present case when the last surviving co-parcener, *i.e.*, Basvanta, died the right of the widow of Lagmappa to adopt

(5) 22 B. 551; 11 Ind. Dec. (N. S.) 949.
(6) 23 B. 327; 12 Ind. Dec. (N. S.) 217.
(7) 55 Ind. Cas. 964; 44 B. 483 at p. 487; 22 Bom. L. R. 209.
(8) 26 B. 526; 4 Bom. L. R. 315.
(9) 46 Ind Cas. 481; 45 I. A. 156 at p. 160; 35 M. L. J. 138; 5 P. L. W. 179; 8 L. W. 167; 16 A. L. J. 725; (1918) M. W. N. 621; 24 M. L. T. 231; 28 C. L. J. 403; 41 M. 855; 20 Bom. L. R. 1014; 23 C. W. N. 177 (P. C.).

came to an end. The application of the principle accepted in *Ramkrishna* v. *Shamrao* (8) with reference to the facts such as we have in the present case is not to be found in any reported case so far. But it is open to the respondents to urge with force that there is no reason why that principle should not be so applied as to put an end to the power of the widow to adopt, when the estate is vested already in others. Though no decision exactly bearing on the facts of the present case has been cited to show that the principle of *Ramkrishna* v. *Shamrao* (8) can apply to facts such as we have here, it may be said that the principle has been applied under varying circumstances; for instance, it has been applied to the case of widows who inherit property under the rule laid down in *Lallubhai Bapubhai* v. *Mankuvarbai* (10). However, that may be, I am entirely unable to give effect to the plaintiff's contention that *Yadao* v. *Namdeo* (1) must be taken as overruling the current of decisions to which I have referred and of which the decision in *Chandra* v. *Gojarabai* (4) is a type.

I may mention with reference to this point that after the decision in *Yadao* v. *Namdeo* (1), I had more occasions than one to refer to that case. First it was referred to in *Bhau Adganda Patil* v. *Narasagama Tatya Pitil* (11) to which Mr. Justice Fawcett was a party, and then in *Dattatraya Bhimrao* v. *Gangobai Ganeshbat* (12). It is also referred to in *Yeknath Narayan* v. *Laxmibai Kesho Gopal* (13). I refer to these decisions for the purpose of showing that except as to the effect of *Yadao* v. *Namdeo* (1) on the decision in *Ramji* v. *Ghamau* (2) it has not been so far accepted as overruling the decisions of this Court which may appear somewhat inconsistent with the view taken in that case, but which bear on a distinct point that did not arise and was not in terms considered in *Yadao* v. *Namdeo* (1). I am fully alive to the force of the contention of the appellant that in view of the observations in *Yadao* v. *Namdeo* (1) all these decisions, not only that in *Ramji* v. *Ghamau* (2) but the others also to which I have referred, should be reconsidered. But in view of the settled rule on this point and of the effect which a reconsideration of it would have upon titles to property, I do not think that it ought to be departed from by this Court in the absence of a clear ruling of the Privy Council to that effect.

The facts in the present case are rather peculiar, and it may appear anomalous that, though according to the observations in *Yadao* v. *Namdeo* (1) defendant No. 4 could have adopted after Lagmappa's death without Basvanta's consent during the three days that Basvanta survived Lagmappa, her power to adopt should have practically come to an end on Basvanta's death on the 25th October, or rather it should have become ineffective for the purpose of divesting the estate vested in the widows of Basvanta. But the principle and the dividing line are clear; and for the sake of a logical application of the theory of the inherent power of a widow to adopt in this Presidency which is probably a deviation from Hindu Law as observed by their Lordships in *Yadao* v. *Namdeo* (1), and for which, speaking with great deference, I am unable to find any support in any text of Hindu Law, I do not think that it would be right to depart from a rule which is laid down in various decisions of this Court and which is clearly understood and uniformly followed up to now. On the contrary it would be carrying the probable deviation from Hindu Law distinctly a step further as affecting the devolution of property for which it would be difficult to find a justification in the principles governing the law of adoption.

The result is that the decree of the lower Court is confirmed and the appeal dismissed with costs.

Crump, J.—I concur.

K. S. D. *Decree confirmed.*

(10) 2 B. 388; 1 Ind. Dec. (N. S.) 682.
(11) 64 Ind. Cas. 614; 46 B. 400; 23 Bom. L. R. 1272; (1922) A. I. R. (B.) 300.
(12) 77 Ind. Cas. 17; 46 B. 541; 24 Bom. L. R. 69; (1922) A. I. R. (B.) 321.
(13) 77 Ind. Cas. 117; 47 B. 37; 24 Bom. L. R. 836; (1922) A. I. R. (B.) 347.

BANWARI LAL *v.* KALLU KHAN.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 885 OF 1924.

July 3, 1924.

Present:—Mr. Justice Moti Sagar.

BANWARI LAL—PLAINTIFF—APPELLANT

versus

KALLU KHAN—DEFENDANT—RESPONDENT.

Mortgage—Redemptiin—Interest on mortgage, whether charge on property—Mortgagee, whether entitled to recover.

In the absence of a contract to the contrary, a mortgagee is entitled, in a settlement of his account with his mortgagor, to treat the interest due under the mortgage as a charge on the estate and to realise all interest due under the mortgage within 12 years from the date of suit. [p. 623, col. 1.]

Radha Kishen v. *Muhamdu*, 57 P. R. 1888, followed.

Seeond appeal from a decree of the District Judge, Karnal, dated the 11th January 1924, reversing that of the Sub-Judge, Fourth Class, Karnal, dated the 21st May 1923.

Mr. *Shamair Chand*, for the Appellant.

Lala *Prakash Chandra*, for the Respondent.

JUDGMENT.—The sole question for determination in this second appeal is whether interest from the date of the execution of the mortgage-deed till the date of possession was or was not a charge upon the property. The facts are briefly these:—On the 31st January 1897 the defendant Kallu Khan mortgaged certain land to the plaintiff for a sum of Rs. 75. It was agreed that interest would be paid at the rate of 2 per cent. per mensem after every six months and that in case of the mortgagor's failure to do so the mortgagee would be entitled to enter into possession. On the 29th July 1908 the plaintiff-mortgagee brought a suit for possession in lieu of the principal and interest then due in accordance with the terms of the mortgage-deed and obtained a decree on the 7th August 1908. Possession was obtained in execution proceedings on the 13th November 1908 and mutation was sanctioned in favour of the decree-holder on the 1st December 1908. On the 22nd November 1922 the defendant made an application for redemption under the Redemption of Mortgage Act (II of 1913) and redemption was ordered by the Revenue Officer to take place on payment of Rs. 75 on the 4th December 1922. The plaintiff's contention that he was also entitled to interest to the extent of Rs. 213 was rejected. Shortly after this order the plaintiff brought this suit for a declaration that in addition to the principal money of Rs. 75 he was also entitled to a sum of Rs. 213 on account of interest and that redemption could not be effected until that money had been paid. The Trial Court decreed the plaintiff's suit but the learned District Judge on appeal came to a contrary finding and dismissed the suit holding that interest was not a charge upon the property under the terms of the mortgage-deed in question.

Against this decision the plaintiff has now come up in second appeal to this Court through Mr. Shamair Chand, while Mr. Parkash Chandra has appeared for the respondent.

After hearing the learned Counsel for the parties and carefully reading the terms of the mortgage-deed on which the suit is based, I am of opinion that the appeal must succeed. The relevant condition in the mortgage-deed is to the following effect:—"It is agreed that interest shall be paid every half-year; in case of default in payment of interest possession of the mortgaged land shall be given to the mortgagee forthwith. The income of the mortgaged land during possession shall be paid to the mortgagee and after payment of land revenue and cesses shall be set off against interest on the mortgage, and if the interest be not fully covered by the income then the interest shall be paid at the time of redemption together with the mortgage money." The learned District Judge is of opinion that the expression "interest on the mortgage" and "interest" in the second sentence mean the annual interest accruing after the mortgagee had taken possession and do not include what had previously accrued. I do not think that the expressions are capable of this interpretation alone. There is no condition in the mortgage-deed to the effect that before

possession had been taken over interest would not be a charge upon the property. In my opinion it was clearly intended that the mortgagee would keep an account of the income of the period during which he was in possession of the property and that at the time of redemption the whole of the mortgage-money with interest from the date of the mortgage would be paid by the mortgagor after getting credit for what had already been realized by the mortgagee in the shape of the produce of the mortgaged property. In *Radha Kishen* v. *Muhamadu* (1) it was held that in the absence of a contract to the contrary the mortgagee was entitled, in a settlement of his account with his mortgagor to treat the interest due under the mortgage as a charge on the estate and the mortgagee was entitled to all interest due under the mortgage within 12 years from the date of suit. The principle laid down in the authority is fully applicable to this case and as there is no express condition in the deed that interest would not be a charge upon the property the mortgagee is entitled in the settlement of his account to treat the interest under the mortgage as a charge upon the estate.

It is, however, contended by the learned Vakil for the respondent that the claim for interest prior to 1908 is barred by limitation. I am unable to agree with this contention. The plaintiff is in possession of the property as mortgagee and it is the defendant who is claiming redemption. The plaintiff is certainly entitled to resist the claim for redemption until the whole of the money which is due to him under the mortgage has been paid and I do not think that any question of limitation arises in this case.

I accordingly accept the appeal and setting aside the order of the learned District Judge decree the plaintiff's suit with costs throughout.

Appeal accepted.

K. S. D.

(1) 57 P. R. 1888.

MADRAS HIGH COURT.

CIVIL APPEAL No. 129 OF 1921.
February 13, 1924.

Present:—Mr. Justice Spencer and Mr. Justice Kumaraswami Sastri.

BOLLAPRAGADA SUBBARAYUDU AND OTHERS—DEFENDANTS Nos. 4 TO 8, 19 AND 21 TO 34—APPELLANTS

versus

VALLURI NARASIMHA RAO—PLAINTIFF—RESPONDENT.

Landlord and tenant—Ejectment, suit for—Burden of proof.

In a suit for ejectment the plaintiff must first prove his right to eject, before the onus is shifted to the defendant to prove that he has a permanent right of occupancy, and, in order to prove a right to eject, the plaintiff must necessarily show that the tenancy is a terminable one and has been validly terminated. [p. 625, col. 1.]

Nainapillai Marakayar v. *Ramanathan Chettiar*, 82 Ind. Cas. 226; 19 L. W. 259; (1924) A. I. R. (P. C.) 65; 22 A. L. J. 130; 34 M. L. T. 10; (1924) M. W. N. 293; 46 M. L. J 546; 10 O. & A. L. R. 464; 47 M. 337; 28 C. W. N. 809 (P. C.), *Suryanarayana* v. *Patanna*, 48 Ind. Cas. 689; 41 M. 1012; 25 M. L. T. 30; (1918) M. W. N. 859; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U. P. L. R. (P. C.) 11; 36 M. L. J. 585; 21 Bom. L. R. 547; (1919) M. W. N. 463; 45 I. A. 209 (P. C.), *Chandrasekharaswami* v. *Nainar Ammal*, 43 Ind. Cas. 977; 7 L. W. 194; (1918) M. W. N. 219, *Idubilly Siyyadi* v. *Sri Rajah Viswaswara Nissanka*, 30 Ind. Cas. 416; 18 M. L. T. 142 and *Venkatarangayya Appa Rao* v. *Morampudi Bajiraju*, 76 Ind. Cas. 61; 45 M. L. J. 238; (1923) M. W. N. 755; (1924) A. I. R. (M.) 93, relied on.

Appeal against a decree of the Court of the Additional Subordinate Judge at Ellore, in O. S. No. 15 of 1920 (O. S. No. 128 of 1919 on the file of the Court of the Subordinate Judge, Ellore).

Mr. *A. Kishnaswami Iyer*, for the Appellants.

Mr. *V. Ramadoss*, for the Respondent.

JUDGMENT.

Spencer, J.—This suit was brought by the purchaser of the proprietary interest in Pedamamidipalli, a whole village in Elamanchili *Zemindari* estate, to eject the defendants who are tenants holding plaint items Nos. 1 to 16 which were once part of a *darimilla inam*, or failing the relief of ejectment, to declare the plaintiff's right to impose full rates of

rent on the lands, and to give the plaintiff a decree for recovery of rent at nine bags of grain per acre for three years. The suit lands were granted about 1819 to the defendants' ancestors for rendering *karnam* service. In 1910, Government purported to enfranchise these lands and the plaintiff filed a suit, Original Suit No. 16 of 1911, for setting aside the enfranchisement and for a declaration that the right of resumption rested with him and not with Government. In this suit he was finally successful in the High Court. The present suit is for ejectment of the defendants. The lower Court gave the plaintiff a decree for possession with mesne profits. Defendants Nos. 4 to 8, 21 to 34 and 19 appeal.

The facts of this case resemble those of *Idubilly Siyyadi* v. *Sri Raja Viswaswara Nissanka* (1) with this difference, that there was an admission in that case that prior to the *inam* grant, the lands were ordinarily *jeroyati* lands, whereas here the question whether the original grant was a grant of land to be held on a favourable rate of rent or a grant of a part of the *melvaram*, or landlord's share depends upon the evidence. Beyond the oral evidence of one witness on each side which is inconclusive, the evidence is entirely documentary. Each side has attempted to draw an inference in their favour from certain ancient documents called *yadasts*, *ghoshparas* and *bubands* marked as Exhibit C series. Exhibit C3 is the *yadast* for *Fasli* 1229 corresponding to the year 1819. This shows an increase of four *putties* in the total cultivated area of the village. It also shows for the first time the existence of $1\frac{1}{2}$ *putties* of service *inam*. For the appellant, Mr. Krishnaswami Aiyar argued that a smaller standard of measurement must have been adopted in measuring the lands for this year, and in proof of this theory, he pointed to the excess in the area of village sites, lakes, channels etc., which are items not likely to be liable to sudden increases. On the other hand, the respondent relies on this document to show that the service *inam* must have been granted out of land that had been previously lying waste. It is difficult to say which is the right assumption to be made. On the other hand Exhibit C 1, the account of cultivation in *Fasli* 1210, shows that the family of Bollapragada Kondraju, who was the defendants' ancestor, possessed two *patties* of *jeroyati* land in addition to one-fourth *dumbala inam*. The Subordinate Judge is in error in his observation that these accounts do not show that Kondraju was cultivating any land in Pedamamidipalli as *jeroyati* land before the grant.

In this state of the evidence, it is argued for the respondent that recent decisions of the Privy Council and of this Court have unsettled the principles upon which *Idubilly Siyadi* v. *Sri Rajah Viswaswara Nissanka* (1) and *Gajapathy Maharaju Garu* v. *Sondi Prahlada Bissoyi Ratno* (2) were decided and that now the burden is on the tenant to show that he was granted a right of *kudivaram* when the *inam* grant was first made. The most recent decision of the Privy Council is that in *Nainapillai Marakayar* v. *Ramanathan Chettier* (3) in which they say that "it cannot now be doubted that when a tenant of lands in India.....sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant."

In *Suryanarayana* v. *Patanna* (4) the Privy Council laid down that there was no presumption that at the date of the grant of an *inam*, there were any tenants holding lands with any rights of occupancy by custom or otherwise. It is also true that no permanent right

(1) 30 Ind. Cas. 416; 18 M. L. T. 142.

(2) 21 Ind. Cas. 833; 14 M. L. T. 562; (1914) M. W. N. 179.

(3) 82 Ind. Cas. 226; 19 L. W. 259; (1924) A. I. R. (P. C.) 65; 22 A. L. J. 130; 34 M. L. T. 10; (1924) M. W. N. 293; 46 M. L. J. 546; 10 O. & A. L. R. 464; 47 M. 337; 28 C. W. N. 809 (P. C.).

(4) 48 Ind. Cas. 689; 41 M. 1012; 25 M. L. T. 30; (1918) M. W. N. 859; 23 C. W. N. 273; 9 L. W. 126; 29 C. L. J. 153; 1 U. P. L. R. (P. C.) 11; 36 M. L. J. 585; 21 Bom. L. R. 547; (1919) M. W. N. 463; 45 I. A. 209 (P. C.).

of occupancy arising out of the enactment of section 6 of the Madras Estates Land Act, I of 1908 in favour of holders of *ryoti* land in an estate can be availed of by holders of service *inams*, as such lands are expressly excluded by section (16) (*c*) from the definition of *ryoti* land so long as the service tenure subsists. Upon resumption of a service *inam*, if the land is incorporated among the *ryoti* lands, the person let into possession would acquire an occupancy right by virtue of section 6. But in the present case with the exception of items Nos. 7 and 8, for which the plaintiff says that *jeroyati pattas* were issued by mistake, there is no admission on the part of the landlord that the lands became *ryoti* lands when they were disannexed from the burden of service. It has however been made clear not only in *Idubilly Siyadi* v. *Sri Rajah Viswaswara Nissanka* (1) but also in *Chandrasekharaswami* v. *Nainar Ammal* (5) that when a plaintiff seeks to eject a defendant from possession on the ground that the latter is his tenant whose tenancy has been terminated, he must prove not only that the defendant is his tenant as alleged, if that is denied, but also his right to eject. In order to prove a right to eject, he must necessarily show that the tenancy is a terminable one and has been validly terminated. This onus is unaffected by any defence of permanent rights of occupancy that the defendant may set up but fails to prove. The principle that in a suit for ejectment the plaintiff must first prove his right to eject before the onus is shifted to the defendant to prove that he has a permanent right of occupancy has been recently re-affirmed in *Venkatarangayya Apparao* v. *Morampudi Bajiraju* (6) which was, like this, a case of a resumption of service *inam*.

Mr. Rama Doss argued that in the previous suit it was admitted that the land was granted as *inam*. The suit was between the *Zemindar* and the Government as to the latter's rights to enfranchise and the *ryot* was only a *pro-forma* defendant. As observed in *Gunnaiyan* v. *Kamakchi Ayyar* (7) the practice of Government upon enfranchisement is to impose full assessment and not to disturb existing possession. Therefore, the use of the word "land" in the written statement of the tenant in this suit is inconclusive. In the present case the plaintiff, having come into Court with a prayer to be put in possession of lands in defendants' occupation, has faild to prove that the defendants are holding those lands upon a tenancy which is terminable and has been determined.

The lower Court was, therefore, not justified in giving the plaintiff a decree for the first relief asked by him, and the lower Court's decree directing delivery of possession of items Nos. 1 to 16 must, therefore, be modified. In lieu thereof the plaintiff will have a decree for recovery of the full assessment of the land at the rates to be determined under the seventh issue which the lower Court has left undecided. The appeal is, therefore, allowed and the suit will be remanded for deciding the seventh issue and giving the plaintiff a decree for rent in accordance with our decision upon the other issues in the case. Costs in this Court to be borne by the respondent. Costs in the lower Court will abide and be provided in the final decree.

Kumaraswamy Sastri, J.—I agree.

V. N. V. *Appeal allowed; Suit remanded.*

(5) 43 Ind. Cas. 977; 7 L. W. 194; (1918) M. W. N. 219.

(6) 76 Ind. Cas. 61; 45 M. L. J. 238; (1923) M. W. N. 755; (1924) A. I. R. (M.) 93.

(7) 26 M. 339 at p. 346.

DAD *v.* LAL.

LAHORE HIGH COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 2174 OF 1923.

May 20, 1924.

Present:—Mr. Justice Martineau and Mr. Justice Moti Sagar.

DAD—APPELLANT

versus

LAL—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Declaratory suit by reversioner—Alienor in collusion—Decree, whether can be passed.

A declaratory decree may be given in a suit to contest an unnecessary alienation by a person governed by Punjab custom, if the suit is brought honestly on behalf of a minor reversioner to protect his interests. But a decree cannot be given in a case where the minor is merely a figure-head and the real plaintiff is the alienor himself who has caused the suit to be instituted for the purpose of undoing his own act.

Miscellaneous second appeal from an order of the District Judge, Jhang at Sargodha, dated the 7th July 1923, reversing that of the Senior Sub-Judge, Jhang, dated the 8th January 1923.

Lala *Fakir Chand* and Mr. *Jiwan Lal Kapur*, for the Appellant.

Sheikh *Abdul Kadir*, K. B., for the Respondents.

JUDGMENT.—Appeals Nos. 2174 and 2175 of 1923 arise out of suits to contest sales of land effected in favour of Dad by Malka and his brother Sikandar on the 6th October 1909 and the 18th November 1909 respectively. The suits were instituted in August 1921 by Malka's minor son Lal through a relation named Sultan. The Subordinate Judge dismissed them, finding that they were collusive and had been brought at the instance of Malka and Sikandar, who were incurring the expenses of the litigation, and that the sales were effected for necessity.

The District Judge on appeal held in each case that no necessity for the alienation was proved except in respect of an item of Rs. 150 due to a mortgagee, and he accepted the appeals and remanded the cases for a decision as to the amount to which the vendee was entitled for improvements. The present appeals have been filed by the vendee from those orders, and there are cross-objections on behalf of the plaintiff.

The learned District Judge in deciding the appeals before him did not advert to the collusive nature of the suits. Malka, Sikandar and Lal all live together, and it has been brought out in evidence, as pointed out by the Subordinate Judge, that the money required for the litigation with Dad was raised by Malka himself by a mortgage effected only a few days before the institution of the suits. The Subordinate Judge's finding that Malka and Sikandar are the persons who are at the back of the litigation and that they have been financing it has not been disturbed by the learned District Judge and we have no doubt about its correctness. Without going into the question of necessity we think that on that finding alone the judgments of the Trial Court dismissing the suits should have been affirmed. A declaratory decree may be given in a suit to contest an unnecessary alienation if the suit is brought honestly on behalf of a minor reversioner to protect his interests. But, in our opinion, it would not be proper to pass such a decree in a case like the present in which the minor is merely a figure-head and the real plaintiff is the alienor himself, who has caused the suit to be instituted for the purpose of undoing his own act. There is an additional reason for not passing a decree in the suit contesting the sale by Sikandar, *viz.*, that the suit was instituted at a time when, if brought by Malka in his own name, it would have been barred by limitation under the Punjab Limitation Act, I of 1920.

We accordingly accept the appeals, set aside the orders of the lower Appellate Court, and restore the decrees of the Trial Court dismissing the suits. The plaintiff-respondent will bear the appellant's costs in all the Courts in each case. The cross-objections are dismissed.

K. S. D. *Appeals accepted.*

MUHAMMAD ASHIQ ALI *v.* HAJRA BIBI.

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL No. 159 OF 1923.

April 25, 1924.

Present:—Mr. Justice Walsh and Mr. Justice Ryves.

MUHAMMAD ASHIQ ALI—JUDGMENT-DEBTOR—APPELLANT

versus

Musammat HAJRA BIBI—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 152—Dower-decree—Form defective—Execution—Decree, whether can be amended.

A dower-decree was drawn up in general terms and did not specify the exact shares in which the decree-holder was entitled to succeed against the several defendants (heirs of the plaintiff's deceased husband). In execution it was contended that all the defendants were jointly and severally responsible:

Held, that the Execution Court was bound to construe the decree in the light of the admitted fact that both parties were fighting over a dower-decree, and if the decree itself created any obstacle, justice could be done by amending it so that the shares of the various defendants may be specifically apportioned as between them.

Execution first appeal from a decree of the Subordinate Judge, Gorakhpur, dated the 6th January 1923.

Mr. *Iqbal Ahmad*, for the Appellant.

Mr. *Mushtaq Ahmad*, for the Respondent.

JUDGMENT.—This appeal succeeds. The matter is really quite simple. A suit for dower-debt was brought by a widow against certain heirs of her husband. She herself exempted her property, and, therefore, her share in the contribution to the debt, in the plaint, and she finally claimed the balance of the debt, namely Rs. 7,500, against the balance of the heirs. Owing to carelessness, which we are afraid is too frequent, her Pleader did not in the relief claim specifically the exact shares in which she was entitled to succeed against each defendant. This may quite well have been due to the fact that it had been mentioned in the body of the pleading, and it was so well-known to everybody, that no child in the business of the law required to be told what the shares were. The relief claimed was, in the alternative, joint or several. The contest was about the amount of the dower and other matters. There was no dispute about the share of liabilities. The judgment gave the relief as prayed. If the decree had been drawn up as prayed, it would have been bad for duplicity. It was drawn up, as my brother pointed out in the argument, in general terms, which, having regard to the plaint, were ambiguous. All this is quite wrong, but it does not affect the substance of the matter. The suit was decreed and an appeal was brought to this Court. The question of the form of the decree was lost sight of in this Court as in the Court below owing to other more important issues then being disputed. The result was that nobody, until this ingenious person in execution raised the question, troubled about the precise form. Now objection is raised in execution that the decree makes all the defendants jointly and severally liable, that is to say, each of them liable for the whole amount. Everybody connected with the case knows that that was never the intention, and the only question is whether the law is so helpless as to be unable to give effect to the rights of the parties. The law is not helpless. We are of opinion that the learned Judge is wrong, and that he was bound to construe the decree in the light of the admitted fact that both parties were fighting over a dower-decree. If the decree itself created any obstacle, justice could still be done not fancifully, but on well-established principles, enunciated, for example, in the House of Lords in the case of *Hatton* v. *Harris* (1) where the Courts in Ireland with the approval of the House of Lords amended a palpable mistake about interest in a decree nearly fifty years afterwards. Also in the case of *Lachmi Narain* v. *Jwala Nath* (2) and in the case of *Srinivasa Row Saheb* v. *Yamunbhai Ammal* (3) both of which are examples of the application of the plain injunction to Courts of Law in India contained in section 152

(1) (1892) A. C. 547; 62 L. J. P. C. 24; 1 R. 1; 67 L. T. 722.

(2) 18 A. 344; A. W. N. (1896) 87; 8 Ind. Dec. (N. S.) 936.

(3) 29 M. 84; 16 M. L. J. 50.

of the Code. To remove any doubt we order that this decree be amended by apportioning the shares as between Ghasiti, the mother, now represented by Ashiq Ali on the one hand, and Ismail on the other, to 1/3rd and 5/12ths respectively. The appeal must be allowed with costs here and below and in this Court on the higher scale. The lower Court must be directed to pay to the decree-holder the amount paid into Court by the appellant less the amount of costs, which we have just ordered, when ascertained. The payment will, therefore, be delayed until the costs have been ascertained and are ready to be deducted. The lower Court will also amend the decree in accordance with the foregoing observations. The amount, namely, Rs. 3,333-5-4 deposited is to be in full discharge of the judgment-debtor's liabilities.

K. S. D. *Appeal allowed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 103 OF 1921.
March 20, 1922.

Present:—Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Kanga.

DINKARRAO GANPATRAO KOTHARE AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

NARAYAN VISHWANATH MANDLIK—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 14—Covenant for pre-emption—Perpetuities, rule against, applicability of—Covenant, whether runs with land—Construction of document—Intention of parties—Duty of Court—Specific Relief Act (I of 1877), s. 42—Bombay High Court Rules, r. 214—Originating Summons—Declaratory decree, whether can be granted.

A declaratory decree can be passed in an Originating Summons provided the case falls within the provisions of section 42 of the Specific Relief Act. [p. 630, col. 1.]

In construing a document the Court has to construe the words of the document as they stand according to their plain grammatical meaning and whatever the parties may have intended they must be bound by the plain meaning of the words to which they attached their signatures. [*ibid.*]

Covenants in a deed of transfer which cast a very onerous burden on the covenantor must be read strictly against the covenantee. [p. 631, col. 1.]

Although contracts for the sale of land which can be specifically enforced immediately, or contracts creating a right of pre-emption which cannot be specifically enforced until the proper occasion arises in the future, do not, according to the law in India, create an interest in land either equitable or executory, they do create rights which are capable of being enforced with regard to the land in certain circumstances against third parties and to that extent they are not ordinary personal contracts and stand in a category by themselves. The principle which underlies the rule against perpetuities and which is embodied in section 14 of the Transfer of Property Act is applicable to this class of contracts. [p. 632, col. 1.]

A covenant in a deed of sale reserving to the vendor and his heirs a right of pre-emption or first refusal to arise on an intended sale of the property is not a covenant which runs with the land at law, and, if it is unlimited in point of time, is void on the ground that it is obnoxious to the rule against perpetuities. [p. 635, cols. 1 & 2.]

Case-law discussed.

Appeal from an order of Mr. Justice Pratt in an Originating Summons.

Messrs. *Inverarity, Rangnekar* and *Brahmandkar*, for the Appellants.

Sir *Thomas Strangman*, Advocate General, Messrs. *Coltman* and *Bhandarkar*, for the Respondent.

JUDGMENT.

Macleod, C. J.—This is an appeal from the decision of Pratt, J., in an Originating Summons.

The facts are that, on the 18th September 1878, one Vishvanath Narayan Mandlik conveyed to one Ganpatrao Bhaskar Kothare a plot of vacant land measuring 2,843 square yards at Atlamont Road for the consideration of Rs. 5,684. This plot formed part of a larger piece of land belonging to the vendor. The sale-deed was in Marathi and contained certain covenants purporting to reserve for the vendor, his heirs, *vahivatdars* and donees certain rights of pre-emption, which covenants have given rise to the present dispute.

Vishvanath died in 1889 leaving the first defendant his adopted son as his sole heir and legal representative. Gan-

patrao built a large bungalow on the land he had bought. The following pedigree will be useful as showing the descendants of Ganpatrao:—

(died 3-5-1894) Sarasvatibai = Ganpatrao (died 29-12-1893)

- Vinayakrao.
- Wamanrao = Sundrabai (died 15-7-1903) (Plaintiff No. 2)
  - Narayanrao (died 1910).
  - Shamrao (died 1904).
- Dinkarrao (Plaintiff No. 1)
- Vishvasrao (Defendant No. 2).

Ganpatrao by his Will devised the suit property together with other separate and self-acquired properties to his wife Sarasvatibai for her life with remainder to his four sons in equal shares subject to certain trusts for maintenance and residence.

In 1897, Vinayakrao conveyed *inter alia* his share in the suit property to his three brothers; consequently that share was held by them as purchasers and not as devisees. The suit property has remained undivided, the persons at present entitled to it being Dinkarrao, Vishvasrao, and Sundrabai as heiress of her surviving son Narayanrao. For the purposes of partition it became necessary to sell the property, so the plaintiffs filed this suit as an Originating Summons in order to have the rights of the first defendant under the sale-deed of 1878 determined by the Court.

By clause 14A of the plaint which was added under the direction of the Trying Judge the plaintiff said that the first defendant on diverse occasions had asserted that he was entitled to an option to purchase the suit property in accordance with the provisions of the sale-deed of 1878, and differences had arisen which they had endeavoured to settle by negotiation but without success. The provisions of the sale-deed referred to above are as follows:—

"In case you or your heirs have to sell the said plot, the same is to be sold back to me for the abovementioned value. It is not to be sold to any other person. In case you are informed in writing that I or my heirs or *vahivatdars* or donees from me are not going to purchase it, then only you can sell it to another person, if you like. But I do not give this right to the purchaser from me. And similarly I do not give this right to the purchaser from any of my heirs or *vahivatdars*, or from any donee from them."

"When you want to sell the building that you are going to build on the said plot, you or your heirs or *vahivatdars* are to accept from me or my heirs or *vahivatdars* or donees the price of that building that may be settled amicably between ourselves or through *panch*. The said land is sold to you on the condition that I am to pay as the price of the land only as much amount as is taken from you now."

It may be mentioned as common knowledge that the land which was sold in 1878 at Rs. 2 a square yard is in a neighbourhood where in recent years building land has been sold at prices ranging up to Rs. 100 a square yard.

The question propounded in the Summons for determination by the Court was as follows:—

"Whether the first defendant is entitled as against the plaintiff and second defendant to an option to purchase the plot of land and the building thereon in the manner provided by the sale-deed of the 18th September 1878 and made between the Hon'ble Vishvanath Narayan Mandlik and Ganpatrao Bhaskerji Kothare?"

The Summons was admitted by me on the 22nd March 1921 but if I had realised how many intricate questions of law were involved within the apparently simple question propounded I should have referred the plaintiffs to a regular suit.

The Summons came on for argument before Pratt, J.

Two preliminary points were taken by the first defendant (1) that the Summons was premature, and (2) that the Court had no jurisdiction to grant a declaratory decree in an Originating Summons. How the Summons could possibly be premature is not quite clear, as obviously the plaintiffs were entitled to endeavour to clear their title to this property.

On the second point the jurisdiction of the Court to grant declaratory decrees is determined by section 42 of the Specific Relief Act. The proper procedure to be followed is regulated by the Civil Procedure Code and the High Court Rules.

By High Court Rule 214 which is in the Chapter dealing with proceedings by way of Originating Summons it is clear that the Court can pass a declaratory decree in an Originating Summons provided the case falls within the provisions of section 42 of the Specific Relief Act, and there can be no doubt that on the facts set out in the plaint the plaintiffs are entitled to ask for a declaratory decree.

The learned Judge then proceeded to ascertain the meaning of the covenants in the sale-deed of 1878, but he considered that the meaning depended on the intention of the parties. With due respect I do not think that was the correct view to take. The Court has to construe the words of the document as they stand according to their plain grammatical meaning, and whatever the parties may have intended they must be bound by the plain meaning of the words to which they attached their signatures.

In conclusion the judgment says:—

"I, therefore, construe the covenant as a valid personal contract but creating no rights *in rem*.

"Plaintiffs cannot get a declaration as to rights under a personal contract and I, therefore, do not consider whether they are the personal representatives of the covenantor against whom the contract can be enforced.

"The only answer I make to the question is, that the covenant creates no rights *in rem* affecting the plaintiffs' title."

"On the judgment a decree was drawn up as follows :—

"This Court doth declare that the covenant in the said deed of sale, dated the 18th day of September 1878, does not create any rights *in rem* affecting the plaintiffs' title to the said land and building."

The plaintiffs were directed to pay the costs of the first defendant. The wording of the decree following the wording of the judgment is not in exact legal phraseology. I presume the learned Judge intended to hold that the covenant did not run with the land so as to be enforceable against any one asserting title thereto. Whether that was a satisfactory answer to the question in the Summons or not, both parties are agreed that the covenants do not run with the land, but the plaintiffs have appealed on the ground that the decision in the judgment that the covenant was a valid personal contract is wrong, and although that portion of the judgment is not embodied in the decree still there is a decision against them which might well stand in their way in the future. Undoubtedly the dispute between the parties has been left in a very unsatisfactory condition. If the plaintiffs sell, they may render themselves liable to an action for damages and the decision that there is a valid personal contract may be considered as barring their right to dispute the validity of the contract, while the provisions of section 40 of the Transfer of Property Act, which do not seem to have been considered in the Court below, might cause trouble to their purchaser if it was asserted that he took with notice of the covenants. It was suggested by the Court that the passage in the judgment holding that the covenant was a valid personal contract might be expunged leaving that question to be decided, if necessary, by a future suit, but the plaintiffs were anxious to have the question decided in the Summons and as it was not contended by the respondent that it was necessary to take evidence we decided to hear the argument.

The sale-deed of 1878 is in Marathi and the covenants are very badly drafted. Still they may be called covenants for pre-emption, but there are separate covenants in different terms with regard to the land and the buildings respectively. Nothing is said with regard to the rights of the vendor if the purchaser after erecting a building on the land sold, desired to sell land and building together, and Mr Inverarity argued that in that event happening there was no right of pre-emption. It might be said

that the parties clearly intended that if the purchaser wished to sell land and building together the vendor had a right of pre-emption on paying the original price of the land and the agreed value of the building and that the covenants can be read as having given effect to that intention, but covenants of this nature which cast a very onerous burden on the covenantor must be read strictly against the covenantee, and as the covenant does not provide for a sale of land and building together, I am inclined to think that there is considerable force in the argument. However, even if we acceded to it we should still have to decide the real questions at issue which are:—

1. Did the covenants in the sale-deed of 1878 create an interest in immoveable property?

2. If they did, are they void as against the rule of perpetuity?

3. If they did not, are they void under the rule of perpetuity on the general principles of Hindu or English Law?

According to English Law these covenants would create an executory interest in the immoveable property which would be void as offending against the rule of perpetuity: *London and South Western Railway Co.* v. *Gomm* (1). But under Hindu Law, which governed the parties to the sale-deed, neither equitable interests nor executory interests in immoveable property are recognised.

Under section 54 of the Transfer of Property Act contracts for the sale of land do not create an interest in the land, and it would seem to follow that a contract for pre-emption is of the nature of a contract for sale.

But before the Transfer of Property Act was passed contracts for the sale of land in cases to which the English Law was applicable did create an interest in land.

By the Indian Registration Act of 1866 non-testamentary instruments purporting to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest whether vested or contingent of the value of Rs. 100 or upwards to or in immoveable property were compulsorily registrable. Although there was no substantive law enacting what instruments created an interest in immoveable property, the question would naturally arise when an instrument came before the Court which it was asserted required registration. In *Futteh Chund Sahoo* v. *Leelumber Singh Doss* (2) which was a suit between Hindus, the plaintiff sued for specific performance of a contract to sell immoveable property and their Lordships held that it required registration on the ground that it created an interest in immoveable property, and it does not seem to have been considered whether the English Law might not be applicable to a contract for the sale of land between Hindus.

Under section 17 (2) (*v*) of the Indian Registration Act of 1877 any document not in itself creating, declaring, &c., any interest in immoveable property but merely creating a right to obtain another document which would create, etc., such interest was not compulsorily registrable.

Then by section 27 of the Specific Relief Act of 1877 an agreement for the sale of land could be specifically enforced, not only against the person making the contract, but against any person claiming under the vendor's title arising subsequently to the contract, except a *bona fide* purchaser for value without notice. By section 91 of the Indian Trusts Act of 1882, a transferee taking with notice of a prior contract in favour of another held the right he obtained under his transfer as a trustee for the previous purchaser, who would consequently be in the position of a *cestui que trust*. Now the Registration Act and the Specific Relief Act enact principally adjective law, and the natural consequence of enacting adjective law on the assumption that the substantive law prevailing corresponded with the English rule of equity was to create considerable confusion. For instance, a contract which

(1) (1882) 20 Ch. D. 562 at p. 569; 51 L. J. Ch. 530; 46 L. T. 449; 30 W. R. 620.

(2) 14 M. I. A. 129; 16 W. R. P. C. 26; 9 B. L. R 433; 2 Suth. P. C. J. 467; 2 Sar. P. C. J. 709; 20 E. R. 734 (P. C.).

under English Law created an equitable interest in land might also come within the description of the documents referred to in section 17 (2) (v) of the Indian Registration Act of 1877, and very possibly the Legislature intended to exempt such contracts from registration, but the question whether they were compulsorily registrable or not could not be said to have been definitely settled until the passing of the Transfer of Property Act. Still, although contracts for the sale of land which can be specifically enforced immediately, or contracts creating a right of pre-emption which cannot be specifically enforced until the proper occasion arises in the future, do not, according to the law in India, create an interest in land either equitable or executory, they do create rights which are capable of being enforced with regard to the land in certain circumstances against third parties and to that extent they are not ordinary personal contracts and stand in a category by themselves. The question thus arises whether the principle which underlies the rule of perpetuities, made applicable to this country by section 14 of the Transfer of Property Act, should be applied to this class of contracts.

That this question would have to be decided was foreshadowed in the judgment of Bhashyam Ayyangar, J., in *Ramasami Pattar* v. *Chinnan Asari* (3). In that case a deed of usufructuary mortgage executed in 1892 contained the following covenant:—

"If we assign our right over these properties to any one, the land delivered possession of to you for appropriating the interest shall be assigned to you alone and it shall not be assigned to anybody else. When we assign the land, we shall receive fifty Fanams more from you, and then we shall assign the land for these two amounts together."

The mortgagor sold his equity of redemption in 1873 and the purchaser's interest was bought at a Court sale before 1893 by the plaintiff who in 1897 sought to redeem. The mortgagee claimed the right of pre-emption. It was held that the defendant under the covenant and by reason of section 54 of the Transfer of Property Act had no interest in the property. His only right was a right to enforce specific performance of the contract against a transferee who had taken with notice of the covenant. Plaintiff was not a transferee with notice of the contract, the time for the performance of which had long since passed without anything being done, and the inference was that the right arising under it had been waived or otherwise discharged. Bhashyam Ayyangar, J. at page 467 said:—

"Another question which arises in the case but which has not been argued is one of considerable difficulty and importance. That question is whether the covenant for pre-emption in the present case transgresses the rule against perpetuities and is, therefore, void. Of course if the covenant were construed as one enforceable only during the mortgagor's lifetime, though the mortgage may continue beyond his lifetime, it will not be obnoxious, at any rate to the law of perpetuities as based upon English doctrine. But if its right construction be, as I think it is, that the parties intended that the right of pre-emption is to last until the redemption of the mortgage, the covenant will according to English Law as settled by the decision of the Court of Appeal in *London and South Western Railway Co.* v. *Gomm* (1)...be void."

Then at page 468:—

"That decision proceeds on the principle that a covenant to convey, though it does not run with the land, binds it and creates an equitable interest in the land in favour of the person entitled to call for a conveyance and that, therefore, the rule against perpetuity is applicable as much to executory equitable estates in land as to legal estates. In the same case as well as in the case of *Borland's Trustee* v. *Steel Brothers & Co., Ltd.* (4) it is recognised that the rule against perpetuity has no application whatever to personal contracts and that position is incontrovertible."

(3) 24 M. 449.

(4) (1901) 1 Ch. D. 279; 70 L. J. Ch. 51; 49 W. R. 120; 17 T. L. R. 45.

Then after comparing the English rule of perpetuity with the restriction under Hindu Law on transfer of property the learned Judge proceeds:—

"The question as to the application of this principle of Hindu Law, or of the general doctrine of perpetuities, to transactions other than gifts by Hindus has not yet been judicially considered in any case except possibly in the Privy Council case [*Chandi Churn Barua* v. *Sidheswari Debi* (5)]...But it must be admitted that there is really no substantial difference between English and Indian Law in respect of contracts of sale of immoveable property, and it does seem reasonable and in accordance with principles of general jurisprudence that there should be some limit of time beyond which the performance of contracts for the transfer of property by way of sale, pre-emption or otherwise must not be allowed to be held in suspense or postponed. Although section 14 deals only with transfers, the provisions of that section could in some cases be practically defeated if covenants are not held to be void for remoteness on the ground that by themselves they create no interest in property...I am glad to be able to refrain from expressing any opinion on this difficult and important question of the application and the limits of the application of the doctrine of perpetuities to covenants, as it has not been really argued in this case and as in fact it is unnecessary to consider and decide it in this case."

In *Kolathu Aiyar* v. *Rangavadhyar* (6) there was an agreement that the covenantor Ammaippan Ammal in the event of selling the property in question should sell it to Appa Vethiar on receiving the value stated, and if any building should be erected thereon the cost thereof, but in case they did not desire it she could sell it away to others according to her pleasure. The suit for the enforcement of the covenent was instituted against the heirs of the covenantor. The first question was whether the agreement was enforceable against the heirs of the covenantor. Their Lordships said (page 115*):—

"We are of opinion that if no time is fixed within which the agreement to convey is to be performed the contract must be held to be invalid as infringing the rule against perpetuities. This is undoubtedly the rule...in England. A mere personal contract cannot be questioned on the ground that it is obnoxious to the rule. But a contract which gives the promisee an executory interest in land is as much liable to the objection as a grant of the land itself, because the promisee obtains by virtue of the contract an equitable right in the land."

Dealing with the objection that in India there were not two classes of estates equitable and legal their Lordships thought that there was no substantial difference in the law to be applied to the case as the benefit of an equitable estate was in substance given to a person in whose favour a promise to convey lands had been made. Referring to *South-Eastern Railway* v. *Associated Portland Cement Manufacturers* (7) and *Kalimuddin Bhuya* v. *Reaz-ud-Din Ahmed* (8) their Lordships thought that if a man promises that he and his heirs will convey, the promise may be enforced according to those cases against himself, *i. e.*, the promise might be treated as divisible so as to make it enforceable against him though it may not be enforceable against the heirs. That question, however, does not arise in this appeal.

In *Maharaj Bahadur Singh* v. *Balchand Chowdhury* (9) the proprietor of a hill agreed with a Society of Jains that if the Society should require a site thereon for the erection of a temple, he and his heirs would grant a site free of cost. The proprietor thereafter alienated

(5) 15 I. A. 149; 16 C. 71; 12 Ind. Jur. 329; 5 Sar. P. C. J. 231; 8 Ind. Dec. (N. S.) 47 (P. C.).

(6) 18 Ind. Cas. 203; 38 M. 114; 24 M. L. J. 84; 13 M. L. T. 179; (1913) M. W. N. 163.

(7) (1910) 1 Ch. 12; 79 L. J. Ch. 150; 101 L. T. 865; 74 J. P. 21; 54 S. J. 80; 26 T. L. R. 61.

(8) 4 Ind. Cas. 743; 10 C. L. J. 626; 14 C. W. N. 295.

(9) 61 Ind. Cas. 702; 48 I. A. 376; (1921) M. W. N. 157; 2 P. L. T. 131; 14 L. W. 254; 6 P. L. J. 163; 25 C. W. N. 770; 3 U. P. L. R. (P. C.) 29.

*Page of 38 M.—[*Ed.*]

the whole hill. The Society sued the alienees for possession of a site defined by boundaries, alleging notice to the proprietor requiring that site and that they had taken possessien but had been dispossessed. The High Court at Patna held that the plaintiff had failed to prove any title to the land in suit. On appeal to the Privy Council their Lordships said (page 380*) :—

"For the appellants...to succeed it is essential to show that this agreement created in them some present estate or interest which would prevent the Raja from having made the grant. That could only be effected by reading the compromise as creating in the Jains Society a grant in perpetuity of the Parasnath hill. This cannot, however, be supported...Such a covenant as this does not, and cannot, run with the land, and could not be so enforced. Further, if the case be regarded in another light—namely, an agreement to grant in the future whatever land might be selected as a site for a temple—as the only interest created would be one to take effect by entry at a later date, and as this date is uncertain, the provision is obviously bad as offending the rule against perpetuities, for the interest would not then vest *in præsenti*, but would vest at the expiration of an indefinite time which might extend beyond the expiration of the proper period."

The case is peculiar because the plaintiff did not sue for specific performance but on title, alleging apparently that the agreement amounted to a grant. But the judgment indicates that in spite of section 54 of the Transfer of Property Act the agreement could be read as creating an interest of such a nature as to bring the agreement itself within the rule against perpetuities.

It is regrettable that so much confusion should still exist owing to the fact that the law in India on the one hand does not recognize equitable interest in land, while, on the other hand, it recognises that contracts with regard to land can be specifically enforced against third parties in certain cases. The result is that the law in England and India is substantially the same with regard to the enforcement of the contract. The only difference is that in England the owner of the equitable interest is considered as the owner of the property contracted to be conveyed. But no such result can follow from a contract creating an executory interest. If such a contract purports to do by indirect means what the law forbids to be done directly it is void and the principle is the same in India as in England.

By the covenant in suit the vendor purports to give his heirs a right to buy the land at the price he got for it, and the buildings at a price to be agreed upon. In my opinion it is void and the plaintiffs are entitled to a declaration to that effect.

The appellants will get their costs of the appeal.

Kanga, J.—I agree in the judgment just delivered by my Lord the Chief Justice.

* * * *

A preliminary objection to the Originating Summons was taken by the Advocate-General, who appeared for the first defendant, to the effect that the plaintiffs and the second defendant could not in law ask for a declaration that the first defendant was not entitled to a right of pre-emption. He argued that the plaintiffs and the second defendant were by this summons praying for a declaration that the first defendant was not entitled to a right of pre-emption and that the plaintiffs were not entitled to do so by a suit, much less by an Originating Summons. He relied upon section 42 of the Specific Relief Act and on the docision of the Privy Council in the case of *Charan Das* v. *Amir Khan* (10). By section 42 of the Specific Relief Act it is provided :—

"Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny,

*Page of 48 I. A.—[*Ed.*]

(10) 57 Ind. Cas. 606; 48 C. 110; 39 M. L. J. 195; 28 M. L. T. 149; 2 U. P. L. R. (P. C.) 124; 18 A. L. J. 1035; 22 Bom. L. R. 1370; 47 I. A. 255; 13 L. W. 49; 25 C. W. N. 289; 3 P. W. R. 1921 (P. C.).

his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled..."

In this case the plaintiffs say that they and the second defendant are entitled to the property free of any claim of the first defendant to the same, and that the first defendant is asserting a right of pre-emption and denying the plaintiffs' and the second defendant's right to sell the property to any person they like and ask for a declaration that the title of the plaintiffs is not affected by the covenant contained in the aforesaid clauses of the sale-deed. It cannot be said that the plaintiffs are able at present to seek further relief than a mere declaration of title. The plaintiffs, therefore, in my opinion, are, under section 42 of the Specific Relief Act, entitled to sue for a declaration that the title of the plaintiffs to the land is not affected by the covenant contained in the aforesaid clauses of the sale-deed and that the first defendant is not entitled to a right of pre-emption and there is nothing in the Privy Council decision above cited disentitling the plaintiffs from suing for such a declaration.

If, then, the plaintiffs are entitled to ask for such a declaration by a suit, under rule 214 of the High Court Rules, they are entitled to ask for the same by an Originating Summons.

In *Evans* v. *Levy* (11) a declaration was made under O. LIVA, r. 1, of the Rules of the Supreme Court on an Originating Summons that a condition which a lessor had imposed with regard to a license to assign was unreasonable and that the lessee was entitled to assign without any further consent of the lessor. O. LIVA, r. 1, is exactly in the same terms as rule 214 of the High Court Rules.

Now it is clear that the covenant of pre-emption in this case is not a covenant which runs with the land at law: see *Spencer's case* and Smith's Leading Cases, Volume I, page 55.

(11) (1910) 1 Ch. 452; 79 L. J. Ch. 383; 102 L. T. 128.

The covenant in this case is a contract to convey the land and the building to the covenantee or his heirs, *vahivatdars* or donees in future upon the happening of an event, *viz.*, an intended sale by the covenantor or his heirs. In other words a right of pre-emption or first refusal to arise on an intended sale is given to the covenantee or his heirs.

It was contended by Mr. Inverarity that such a covenant created an interest in the land and was subject to the rule against perpetuities and was void and that even if it did not create an interest in the land it was void under section 23 of the Indian Contract Act as being opposed to the policy of the law prohibiting all devices which tended to create a perpetuity.

Counsel for the first defendant contended that it was merely a personal convenant and was not within the rule against perpetuities and that under section 54 of the Transfer of Property Act and according to the law in force prior to the Transfer of Property Act a contract for the sale of immoveable property did not of itself create any interest or charge on the property contracted to be sold.

At the date of the sale-deed the Transfer of Property Act was not in force but the Specific Relief Act I of 1877 and the Indian Registration Act III of 1877 were in force. According to the Specific Relief Act "obligation" includes every duty enforceable by law, and "trust" includes every species of constructive fiduciary ownership, and "trustee" includes every person holding constructively a fiduciary character (section 3). Illustration (*g*) to that section runs as follows:—

"*A* buys certain land with notice that *B* has already contracted to buy it. *A* is a trustee, within the meaning of this Act, for *B*, of the land so bought."

Section 27 (*b*) of the Specific Relief Act provides that specific performance may be enforced against either party to a contract or any other person claiming under him by a title arising subsequently to the contract except a transferee for value who has paid his money in good

faith and without notice of the original contract. By section 13 of the same Act it is laid down that "notwithstanding anything contained in section 56 of the Indian Contract Act, a contract is not wholly impossible of performance because a portion of its subject-matter, existing at its date, has ceased to exist at the time of the performance." Illustration (*a*) to that section runs as follows:—

"*A* contracts to sell a house to *B* for a *lakh* of rupees. The day after the contract is made the house is destroyed by a cyclone. *B* may be compelled to perform his part of the contract by paying the purchase money."

This illustration assumes that the contract for the sale of a house transfers the beneficial interest in the house to the buyer and makes him in equity the owner of the house. According to section 55 (5) of the Transfer of Property Act the risk of destruction is borne by the buyer only from the date the ownership passes to him and the ownership according to section 55 (1) (*d*) of the Transfer of Property Act passes on execution of a conveyance by the seller. The illustration cannot be applied in cases where the Transfer of Property Act is applicable.

Under the Indian Registration Act XX of 1866 an agreement of sale of immoveable property between Hindus was held to be an agreement creating an equitable interest in land and requiring registration under section 17, clause (2), of that Act; see *Futteh Chand Sahoo* v. *Leelumber Singh Doss* (2). By clause (*b*), section 17, of the Indian Registration Act III of 1877, documents containing an agreement of sale of immoveable property were expressly exempted from compulsory registration. It seems the intention of the Legislature was to exempt from registration agreements which created executory interests in the land and which could not displace a conveyance of the same land obtained in good faith by a transferee without notice and duly registered.

It seems to me that prior to the Transfer of Property Act the law assumed in illustration (*a*) to section 13 of the Specific Relief Act, that a contract for the sale of immoveable property created an equitable interest in the property and made the purchaser the owner in equity, was the law in India.

The same opinion is expressed in the note to section 13 in Pollock and Mulla's Edition of the Specific Relief Act.

Now we have before us an agreement made in 1878 to convey an immoveable property upon the happening of an event which might occur at a more remote period than the lives in being and eighteen years afterwards. It is an agreement creating under the law prior to the Transfer of Property Act an equitable interest in immoveable property which would be void as infringing the rule against perpetuities: *London and South Western Railway Co.* v. *Gomm* (1) and *Woodall* v. *Clifton* (12). But even if the law prior to the Transfer of Property Act on this point was the same as that contained in the Transfer of Property Act the result, in my opinion, would be the same.

No doubt the rule of English Law that a contract for sale of real property makes the purchaser the owner in equity of the estate has no application to those parts of India where the Transfer of Property Act is in force: see *Maung Shwe Goh* v. *Maung Inn* (13). But under section 40 of the Transfer of Property Act an obligation arising out of a contract and annexed to the ownership of immoveable property but not amounting to an interest therein to the benefit of which a third person is entitled could be enforced against a transferee with notice thereof.

The illustration to section 40 is substantially the same as illustration (*g*) to section 3 of the Specific Relief Act. It is provided by section 91 of the Indian

(12) (1905) 2 Ch. 257; 74 L. J. Ch. 555; 54 W. R. 7; 93 L. T. 257; 21 T. L. R. 581.

(13) 38 Ind. Cas. 938; 44 C. 542; 21 M. L. T. 18; 15 A. L. J. 82; (1917) M. W. N. 117; 32 M. L. J. 6; 25 C. L. J. 108; 19 Bom. L. R. 179; 21 C. W. N. 500; 5 L. W. 532; 10 Bur. L. T. 69 (P. C.).

Trusts Act that a transferee taking with notice of a prior contract in favour of another must hold the right claimed under his transfer as a trustee for the previous promisee. Section 95 of the Indian Trusts Act provides that a person holding property in accordance with that section must, so far as may be, perform the same duties and is subject to the same liabilities and disabilities as if he were a trustee of the property for the person for whose benefit he holds it. As pointed out by Scott, C. J., in *Bapu Apaji Potdar* v. *Kashinath Sadoba Gulmire* (14) section 54 of the Transfer of Property Act does not exhaust the relations which flow from a contract for the sale of immoveable property according to Indian Statute Law and the obligation of which a person who has contracted to buy immoveable property has the benefit and which he may enforce against his vendor or transferee with notice is fiduciary and can be enforced as though the person bound was a trustee. The benefit of an equitable interest is in substance given to a person who has contracted to buy immoveable property: see *Kolathu Aiyar* v. *Rangavadhyar* (6). In my opinion the law laid down in *London and South Western Railway Co.* v. *Gomm* (1) applies to a contract for sale of immoveable property in India even where the Transfer of Property Act is in force. As pointed out by Sir Bhashyam Ayyangar, J., in *Ramasami Pattar* v. *Chinnan Asari* (3) the power of a Hindu under the Hindu Law is more restricted as regards the perpetual tying up of land or property than under the English doctrine of perpetuities.

It was held in *Nabin Chandra Sarma* v. *Rajani Chandra Chakravarti* (15) following *Nobin Chandra Soot* v. *Nabab Ali Sarkar* (16) and *Sreemutty Tripoora Soonduree* v. *Juggur Nath Dutt* (17) that a covenant for pre-emption unlimited in point of time is void on the ground that it is obnoxious to the rule against perpetuities. In *Kolathu Aiyar* v. *Rangavadhyar* (6) it was held that a contract of pre-emption (with reference to lands) which fixes no time within which the agreement to convey is to be performed cannot be enforced against the heirs of the person who entered into the contract as it infringes the rule against perpetuities. In a recent Privy Council case [*Maharaj Bahadur Singh* v. *Balchand Chowdhury* (9)] in compromise of litigation the proprietor of a hill agreed with a Society of Jains that if the Society should require a site thereon for the erection of a temple and *dharmashala* he and his heirs would grant a site free of cost. The proprietor alienated the whole hill and the Society by their representative sued the alienees for possession of a site defined by boundaries. It was held by their Lordships of the Privy Council that the covenant did not run with the land and could not be enforced and that, if the covenant was regarded as an agreement to grant in the future whatever land might be selected as a site for a temple, as the only interest created could be one to take effect by entry at a later date and as that date was uncertain, the provision was obviously bad as offending the rule against perpetuities, for the interest would not then vest *in præsenti* but would vest at the expiration of an indefinite time which might extend beyond the expiration of the proper period.

In *Worthing Corporation* v. *Heather* (18) it was held by Warrington, J., that though an agreement giving an option to purchase land which is unlimited in point of time is not specifically enforceable, it is not invalid at law and damages may be recovered for a breach thereof. According to the Privy Council decision in *Maharaj Bahadur Singh* v. *Balchand Chowdury* (9) such a covenant is unenforceable as a covenant since it infringes the rule against perpetuities. Perhaps it might be argued that the case of *Maharaj Bahadur Singh* v. *Bal-*

(14) 39 Ind. Cas. 103; 41 B. 438; 19 Bom. L. R. 100 (F. B.).
(15) 63 Ind. Cas. 196; 25 C. W. N. 901.
(16) 5 C. W. N. 343.
(17) 24 W. R. 321.

(18) (1906) 2 Ch. 532; 75 L. J. Ch. 761; 95 L. T. 718; 4 L. G. R. 1179; 22 T. L. R. 750.

chand Chowdhury (9) was for possession of land and not for damages and that the observations of their Lordships of the Privy Council had no reference to a claim at law in damages. But even if that be so it seems to me that a contract with regard to land which is calculated to defeat the rule against perpetuities which is one of public policy is void under section 23 of the Indian Contract Act.

The covenant for pre-emption contained in the sale-deed, dated the 18th day of September 1878, is void and the question for the determination of which this Originating Summons has been taken out should be answered in the negative.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2011 OF 1921.

April 10, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Graham.

Srimati KHIRADAMOYI DASI—PLAINTIFF—APPELLANT

versus

HABIB SHAHA—PRINCIPAL DEFENDANT AND ANOTHER—*Proforma* DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 9, O. XXXIV, r. 1—Mortgage suit—Necessary parties—Non-joinder of all persons interested, effect of—Mortgage-debt, whether may be split up—Mortgaged property, extent of liability of—Decree proportionate to defendant's share, whether legal.

In all cases, save those excepted under O. XXXIV, r. 1, Civil Procedure Code, all persons interested in the equity of redemption should be joined as parties to a suit relating to a mortgage. [p. 639, col. 2.]

The omission to make a puisne mortgegee or a subsequent transferee of the mortgaged property a party to a mortgage suit is not fatal to the suit. [*ibid.*]

Basiruddin Biswas v. *Debendra Nath Biswas*, 12 C. W. N. 911, referred to.

A mortgage suit in which all the persons interested in the equity of redemption have not been joined need not necessarily fail. The provisions of O. I, r. 9, Civil Procedure Code, are just as applicable to a mortgage suit as to any other suit. [p. 639, col. 2; p .640, col. 1.]

Har Chandra Roy v. *Mohamad Hasim*, 66 Ind. Cas. 312; 25 C. W. N. 594, *Sabduralli* v. *Sadashiv Supde*, 51 Ind. Cas. 223; 43 B. 575; 21 Bom. L. R. 369, *Sheo Tahal Ojha* v. *Sheodan Rai*, 28 A. 174; 2 A. L. J. 630; A. W. N. (1905) 244 (F. B.) and *Sanwale Singh* v. *Ganeshi Lal*, 20 Ind. Cas. 41; 35 A. 441; 11 A. L. J. 630, referred to.

In special circumstances a mortgage-debt can be split up. [p. 640, col. 2.]

Hari Kissen Bhagat v. *Veliat Hossain*, 30 C. 755; 7 C. W. N. 723, relied on.

Every part or item of the mortgaged property is not liable for the whole mortgage-debt and where the heirs of one of several mortgagors have not been joined in a suit on the mortgage, a decree may be passed against the defendants proportionate to their shares in the mortgaged properties at the date of the suit. [*ibid.*]

Har Chandra Roy v. *Mohamad Hasim*, 66 Ind. Cas. 312; 25 C. W. N. 594, followed.

Sanwale Singh v. *Ganeshi Lal*, 20 Ind. Cas. 41; 35 A. 441; 11 A. L. J. 630, dissented from.

Appeal against the decree of the Subordinate Judge, First Court, Midnapur, dated the 1st June 1921, reversing that of the Munsif, Second Court at Tamluk, dated the 23rd of December 1919.

Babu *Sarat Chandra Khan*, for the Appellant.

Babu *Santosh Kumar Pal*, for the Respondent.

JUDGMENT.

Suhrawardy, J.—The only question involved in this appeal is whether the suit was maintainable in view of the fact that the plaintiff had not brought on the record the heir of one of the mortgagors.

The suit was for the enforcement of a mortgage-bond executed by defendant No. 1 and one Moiboo Shah who died before the date of institution of the suit. The suit was brought against the defendant No. 1 and one Abirjan Bibi who was described as the widow and heir of the deceased mortgagor Moiboo Shah. It subsequently transpired that the name of the widow was not Abirjan Bibi but Asiran Bibi. The first Court held that there was a *bona fide* mistake on the part of the plaintiff in giving the name of the widow as Abirjan and decreed the plaintiff's suit. On appeal the learned Subordinate Judge held that before instituting the suit the plaintiff was aware that the

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name of Moiboo's widow was Asiran and not Abirjan and that she had intentionally for some purpose known to her described her as Abirjan. He found that it was not a case of *bona fide* mistake and the estate of one of the mortgagors Moiboo Shah was not represented in the suit. He next proceeded to consider whether in the absence of one of the mortgagors the suit was maintainable or bad for defect of parties, and held that the entire suit failed since all the mortgagors or persons interested in the equity of redemption had not been made parties.

Against that decision the plaintiff has preferred this appeal, and it is urged on her behalf, first, that the finding of the learned Subordinate Judge that the estate of Moiboo was not represented in the suit is erroneous and, secondly, that conceding the finding on the first point to be correct the Court below erred in law in holding that the entire suit failed for want of representation of Moiboo's estate.

With regard to the first point we are unable to accept the contention of the learned Vakil for the appellant. The question is purely one of fact and the learned Subordidate Judge has found on the evidence that the plaintiff was actuated by some motive in intentionally misnaming the widow and that when she applied for the substitution of the widow by her correct name the suit was barred as against her.

The second question that is raised is of some importance. O. XXXIV, r. 1, Civil Procedure Code, lays down that "All persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage." The only exceptions to the rule are to be found in the explanation added thereto which relieves a puisne mortgagee from the necessity of making the prior mortgagee a party to the suit, and provides that a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage. This explanation makes it clear that in all other cases save those excepted all the persons interested in the equity of redemption should be joined as parties. The Code does not say what would be the effect of not joining all the parties to the suit. On this point there has been considerable divergence of opinion. Under the old Code the view generally accepted was that in view of the wording of section 85 of the Transfer of Property Act which has now been replaced by r. 1, O. XXXIV, Civil Procedure Code, the whole suit ought to fail if the plaintiff did not join as parties all the persons interested in the equity of redemption. The same view has also been adopted in some cases under the present Code.

Some change was, however, effected in the law relating to defect of parties by the enactment of O. I, r. 9, Civil Procedure Code, and it has been argued with some degree of force that O. I, r. 9 being of general application qualified the provisions of r. 1, O. XXXIV, inasmuch as no provision is made in that Order regarding the effect of non-joinder in a mortgage suit. This view is strengthened by the wording of O. XXXIV, r. 1 which begins with the words "subject to the provisions of this Code." It may fairly be argued that O. I, r. 9 is one of the provisions to which O. XXXIV, r. 1, is subject. It cannot now be disputed, though there was formerly some difference of opinion on the point that the omission to make a puisne mortgagee or subsequent transferee of the mortgaged property party to a mortgage suit is not fatal to the suit. See the case of *Basiruddin Biswas* v. *Debendra Nath Biswas* (1) decided under the old law. The puisne mortgagee is as much a person interested in the right of redemption as a mortgagor or the heir of a mortgagor. We see no reason why a distinction should be drawn between the case of a puisne mortgagee and of an heir of a mortgagor. The view which we are disposed to take is that a mortgage suit in which all the persons interested in the equity of redemption have not been joined need not necessarily fail. The

(1) 12 C. W. N. 911.

provisions of O. I, r. 9 appear to be just as applicable to a mortgage suit as to any other suit. We do not wish to lay down as a general rule that in all cases a suit need not fail by reason of non-joinder of necessary parties. In using the expression "necessary parties" we do not desire to make any distinction between necessary parties and proper parties as has been attempted in several cases. The view that finds favour with us was adopted in a very recent case of this Court, *Har Chandra Roy* v. *Mohamed Hasim* (2). In that case the suit was brought by the mortgagee against the representatives-in-interest of the original mortgagor. The defendants pleaded that all the heirs who were in the enjoyment of the property left by the mortgagor had not been made parties to the suit and that consequently the suit should be dismissed for non-joinder of parties. The issue framed on these pleadings was "Is the suit bad for defect of parties?" The first Court held on the evidence that a widow of the mortgagor named Alimannessa and a daughter had not been brought on the record and concluded that all the representatives of the mortgagor were not parties, the suit could not be maintained. On appeal the same view was held and the appeal dismissed, the learned Judges (Mookerjee and Fletcher, JJ.,) holding that the plaintiffs were at least entitled to a decree for a proportionate share of the mortgage-money as against the defendants who were on the record. The same view was adopted in the case of *Subduralli* v. *Sadashiv Supde* (3). There the mortgagor who was a Muhammadan died leaving as his heirs a widow, two daughters and a brother. After his death the mortgagee sued the widow and the daughters for the sale of the mortgaged property but did not join the brother as a party to the suit. It was held that the entire suit ought not to fail, because of the defect of non-joinder and that a decree could be made for the sale of the right, title and interest of the widow and daughters only. The facts of the present case are indistinguishable from those of the above two cases. The Allahabad High Court at one time consistently held that the omission of an heir of a deceased mortgagor would invalidate the whole suit. But the recent decisions of that Court seem to be in agreement with the view which has been adopted by this Court: *Sheo Tahal Ojha* v. *Sheodan Rai* (4) and *Sanwale Singh* v. *Ganeshi Lal* (5). The only objection which can be urged against this view is that it violates the principle that a mortgage-debt is indivisible. It has been held, however, that in special circumstances a mortgage-debt can be split up: see the case of *Hari Kissen Bhagat* v. *Velait Hossain* (6).

In the view of the law which we have taken we think that this appeal ought to succeed partially.

In some cases it has been held that every part or item of the property mortgaged is liable for the whole mortgage-debt, and on the strength of the case of *Sanwale Singh* v. *Ganeshi Lal* (5) it is argued that whatever money may be found due to the plaintiff from the first defendant ought to be declared as a charge on the entire property mortgaged. We are not prepared to accept the view that has been expressed in the Allahabad case and we think that we should adopt the course taken in the case of *Har Chandra Roy* v. *Mahomed Hasim* (2).

The result, therefore, is that the decrees of the Courts below are set aside and the case remanded to the Trial Court in order that that Court may make a mortgage decree in favour of the plaintiff against defendant No. 1 proportionate to the share of that defendant in the mortgaged properties at the date of the suit.

The plaintiff is entitled to her costs of this appeal. The costs in the lower

(2) 66 Ind. Cas. 312; 25 C. W. N. 594.
(3) 51 Ind. Cas. 223; 43 B. 575; 21 Bom. L. R. 369.
(4) 28 A. 174; 2 A. L. J. 630; A. W. N. (1905) 244 (F. B.).
(5) 20 Ind. Cas. 41; 35 A. 441; 11 A. L. J. 630.
(6) 30 C. 755; 7 C. W. N. 723.

Appellate Court will be borne by each party, and the costs of the Court of first instance will be at the discretion of that Court.

Graham, J.—I agree.

K. S. D. *Appeal allowed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 128 OF 1921.
REFERENCE No. 8 OF 1920.
March 31, 1922.
Present:—Sir Norman Macleod, KT., Chief Justice, and Justice Sir Lallubhai Shah, KT.
GOVERNMENT OF BOMBAY—APPELLANT
versus
N. H. MOOS—RESPONDENT.

Land Acquisition Act (I of 1894), s. 23—Land containing stone and moorum, *valuation of—Basis of calculation—*Toka *lands—Government interest, valuation of.*

Where there is *moorum* and stone underneath a plot of land which is being compulsorily acquired, but the evidence shows that its value as a quarry is purely problematical and that a purchaser would not give more than a certain amount for it, taking all its potentialities into consideration, the land should not be valued on a quarrying basis but should be valued on the basis of what a purchaser would be willing to offer for it. [p. 641, col. 2.]

In the case of compulsory acquisition of *toka* land, the difference between the market value of *toka* land as compared with free-hold, represents the then value of the Government interest in the land. When, however, no evidence is available to determine the value of the Government interest in this manner, the Court must arrive at the value as best as it can. No universal rule can be laid down applicable to all cases. [p. 642, col. 2; p. 643, col. 1.]

Appeal from the decision of Mr. Justice Kajiji in Land Acquisition Reference No. 8 of 1920.

Sir *Thomas Strangman*, Advocate-General, for the Appellant.

Messrs. *B. J. Desai* and *Mulla*, for the Respondent.

JUDGMENT.

Macleod, C. J.—This is an appeal from the decision of Mr. Justice Kajiji in Land Acquisition Reference No. 8 of 1920. The land in reference was notified for acquisition on the 16th May 1916, it admeasured 3,521-4/9 sequare yards, and was situated on the Golangi Hill. The Photograph of the model at page 11, Part III, gives us the best idea of the land and its surroundings. Before the Collector it was valued on what I may call a quarrying basis, that is to say, the total cubic contents of stone and *moorum* were calculated and a particular value was given to them, written back according to the period estimated to be taken up for quarrying. Nothing was allowed for the land after the quarrying was finished. The total value arrived at by this method was for all interests Rs. 26,454·88. As the land is *toka* the amount of the Government interest was deducted. Then to what was left was added fifteen per cent. for compulsory acquisition plus Rs. 500 for compensation for severance awarded to the appellant. The total for all the claim was Rs. 21,744.

The learned Judge, after considering all the evidence before him with regard to the basis of valuation, came to the conclusion that if all the materials that were placed before him had been placed before the Land Acquisition Officer, the Land Acquisition Officer would not have valued the land on the quarrying basis. But the learned Judge thought himself bound to hold that the land should be valued on the quarrying basis because that was the basis which was followed according to the evidence on both sides before the Land Acquisition Officer. We think the learned Judge was wrong in valuing the land on the quarrying basis when on the evidence before him he was of opinion that the land could not be used as a quarry. Even then on the evidence the learned Judge valuing the land on the basis that it would be used as a quarry valued all interests at Rs. 41,611, but valued the Government interest on a different basis to that on which it had been valued by the Col-

lector, with the result that the amount awarded to the claimant was Rs. 37,365 plus Rs. 5,604-12-0, fifteen per cent. for compulsory acquisition.

Two questions arise: (1) what was the proper market value of all interests in the land to be acquired? and (2) what should be deducted for the value of the Government interest as the land was held on *toka* tenure? It seems to have been admitted, at any rate for the purposes of argument before us, that the land would be worth in the market Rs. 7-8-0 a square yard if it was used for building purposes. There is no evidence whatever that a purchaser would have offered more than Rs. 7-8-0 a square yard for this land. No evidence was called on either side of any purchases of the land in the neighbourhood, and we have to rely mainly on expert evidence as to what a purchaser would be likely to give for this land. No doubt one is entitled to consider that a purchaser looking at the land, and wanting to buy it, would take into consideration the fact that it rises in places to a height of about eighty feet above the ordinary level, and that if he did not wish to build on the surface, he could get some value out of the *moorum* and stone beneath the surface. But all those calculations of the value of the cubic contents of the land above the ordinary level plus the deferred value of the land on the level when the material above it has been removed, appear to me to afford very little assistance to a Court which has to decide what should be the market value of the land at the date of the notification, because no evidence has been adduced from which the Court could hold that a purchaser would enter into all those elaborate calculations and base his offer for the land on the certainty that they would be realised. In all my experience I have never come across a purchaser who said he made hypothetical calculations of this character before he purchased; they are used by experts to justify an opinion which is as a rule equally valuable and less assailable without them; and the general fallacy underlying all these hypothetical calculations is this, that they result in the total profit a purchaser may expect on the most favourable estimates, which is a different thing from what a purchaser would give on an estimation of the profit which he would be likely to make' taking all risks into consideration.

* * * * *

I think that Kajiji, J., was quite right in thinking the evidence showed that the land should not be valued on a quarrying basis. It all amounts to this. There is *moorum* and stone underneath the land. Whether it would pay a purchaser to extract it, would be purely problematical, and it has not been shown that a purchaser would be prepared to pay anything more than Rs. 7-8-0 for the land taking all its potentialities, whether for building or for quarrying purposes, into consideration. We think, therefore, that the Collector's estimate of the value of the land was correct, and that the value of all interests taken on the basis of his award should be Rs. 26,454·88 plus Rs. 500 compensation for severance.

Then the next question is as to the valuation of the Government interest, and that is a question of considerable difficulty. There always must be a difficulty in apportioning the total value, arrived at after valuing the land as free-hold, between the various parties who have interests in the land, because if an attempt is made to value each of those interests according to its market value, the total value of those interests valued in that way would be most unlikely to correspond with the market value of the land as a free-hold. Now this land is *toka* land, the occupant of which has to pay at present an annual rent of Rs. 18-5-5. In 1929-30 Government have a right to increase the assessment, and they could levy a rate of four per cent. on the value of the land. It has in such cases generally been taken as the basis for the prospective assessment that the land will be of the same value in 1929 as at the date of acquisition. The rent, therefore, the Government could charge in 1929-30 might amount to Rs. 1,056. A method

which has been generally used to arrive at the present value of that rent is to capitalize at a certain rate and then write it back to the date of acquisition, the rate of capitalisation and the rate of writing back being the same. This is purely an artificial method of arriving at the value of the Government interest, and if it were possible to get evidence of what is paid in the market for *toka* land as compared with free-hold, the Court would be in a much better position to arrive at the difference which represents the present value of the Government interest. However we have not got that evidence. We, therefore, have to arrive at the value of the Government interest as best as we can. I do not think that a universal rule can be laid down applicable to all cases. If the land is valued at the present time at a very low rate and owing to its situation it can be estimated that in 1929 it will be much more valuable so as to be able to bear an assessment of four per cent. on the present value, no doubt that could be taken as a basis for valuing the Government interest. But in this particular case we have to consider whether in 1929 this land could possibly bear a rent of Rs. 1,056 a year. It seems to me the claimant's argument that we cannot calculate that the assessment would be raised higher than two per cent. in 1929 requires to be considered. Looking at the situation of the land, whether we consider that in 1929 all the land would be reduced to the ordinary level by quarrying, or whether we consider the land will remain as it is, if the Government rent is to be taken at Rs. 1,056, there would be practically nothing left for the occupant, as he could hardly expect to get a higher rent from a tenant if he let it out either on a building lease or for any other purpose. I quite admit we are in a region of pure speculation, but I think we ought to do that which is most fair to the claimant. We should not expect that the assessment would be increased to a higher rate than two per cent. in 1929, but at the same time we think that the rate on which it was capitalized, namely, eight per cent., was wrong and that it should be capitalized at six per cent. and written back at the same rate. The result is that the value of the Government interest is reduced by one-half on the amount of the award of the Collector.

The award of Mr. Justice Kajiji is set aside and the Collector's award is varied by apportioning to Government Rs. 3,991 instead of Rs. 7,982. The claimant will get Rs. 3,991 more plus fifteen per cent., and interest at six per cent. on the whole from the date of Collector's taking possession up to this day. The Government is entitled to withdraw such amount as has been paid into Court in excess as a result of Mr. Justice Kajiji's award. Government to get seven-eighths of their costs throughout.

Shah, J.—I concur.

Z. K. *Appeal allowed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEALS NOS. 936 AND 937 OF 1921.

March 28, 1923.

Present:—Mr. Justice Rafique and Mr. Justice Piggott.

BALLI SINGH—DEFENDANT—APPELLANT

versus

RAGHUBAR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pre-emption—Permanently settled area—Revision of records—Entry of contract for pre-emption—Parties, heirs of, whether bound.

In a permanently settled area, where there is no settlement but only a revision of records for which no time is fixed, if there is an entry of a contract for pre-emption in the record of revision, the contract will not bind the heirs of the original parties to the contract, an agreement of this nature being against the rule against perpetuities.

Dinkarrao v. *Narayan*, 82 Ind. Cas. 628; 24 Bom. L. R. 449; (1922) A. I. R. (B.) 84; 47 B. 191, relied upon.

BALLI SINGH v. RAGHUBAR SINGH.

Second appeal from a decree of the District Judge at Allahabad, dated the 30th of March 1921.

Dr. *K. N. Katju* and Mr. *Badri Narain*, for the Appellant.

Dr. *S. N. Sen*, for the Respondents.

JUDGMENT.—The two appeals Nos. 936 and 937 of 1921 arise out of two suits in which the pre-emptor is one and the same person. Both of them raise the same points and were disposed of by one judgment by the learned Judge of the lower Appellate Court. We propose to dispose of both the appeals by this judgment. It appears that Sheonath Rai, Ram Shankar Lal and Dharam Govind were co-sharers in the village of Dilwanspur in the District of Mirzapur and they executed two sale-deeds on the 31st October 1919 in favour of three persons. One sale-deed was executed in favour of Chhedi and Gursaran in lieu of Rs. 2,780 in respect of a portion of the property owned by the vendors and the other deed of sale was executed in favour of Balli Singh by the same vendors in respect of another item of property in lieu of Rs. 1,853. Raghubir Singh who is a co-sharer in the village instituted two suits out of which these two appeals have arisen for the recovery of two items of property conveyed by the deeds of the 31st October 1919 by right of pre-emption. It was stated in the plaint that the custom of pre-emption prevailed in the village under which a co-sharer was bound to give preference to his co-sharers over a stranger and that the vendees were strangers to the village. During the pendency of the two suits in the Court of first instance the status of two persons at least was changed, Balli Singh succeeded in getting a deed of gift in his favour in respect of a certain item of property in the same village, and Raghubir Singh, the pre-emptor, was appointed *lambardar* of the village prior to the decrees of the First Court. Both parties gave evidence in support of their respective allegations. The learned Subordinate Judge who tried the two suits came to the conclusion that the plaintiff pre-emptor had failed to prove his allegation of custom. The learned Judge, however, found that the revenue paper which he describes as *Wajib-ul-arz* of 1290 *Fasli*, *i. e.*, 1883 and which was signed by all the co-sharers contained a convenant with regard to pre-emption. He, therefore, enforced the terms of the *wajib-ul-arz* as a contract binding not only upon the signatories to the contract but upon their heirs and representatives also. The claim of Raghubir Singh was decreed in both the suits. On appeal the learned District Judge affirmed the decrees of the First Court.

In second appeal before us it is contended by the vendees that the *Wajib-ul-arz* of 1290 *Fasli*, *i. e.*, 1883 if a record of contract would not bind the heirs and the legal representatives of the signatories of that document. It appears that the village of Dilwanspur is permanently settled. There was no settlement in 1883 but there was a revision of records. At the time of the revision of records a statement was made by the co-sharers at that time that they would give each other preference in case of transfer over a stranger. The village being permanently settled, no time is fixed for the revision of records. No revision has taken place up to this time since 1883. The contention for the vendees appellants is that if the document of 1883 was a contract between the signatories to that document, the contract expired with their deaths. On the other hand if it be said that the signatories to that document entered into a covenant which would bind them and their heirs and legal representatives for an indefinite period such a covenant is bad in law as it contravenes the rule of perpetuities. Various authorities have been cited in support of this contention, namely, *Sreemuthy Tripoora Soonduree* v. *Juggur Nath Dutt* (1), *Nobin Chandra Soot* v. *Nabab Ali Sarkar* (2), *Nabin Chandra Sorma* v. *Rajani Chandra Chakravarti* (3), *Gurunath Balaji Matalik Deshpande* v. *Yamanava Kom Nalarav Diwan* (4)

(1) 24 W. R. 321.
(2) 5 C. W. N. 343.
(3) 63 Ind. Cas. 196; 25 C. W. N. 901.
(4) 10 Ind. Cas. 814; 35 B. 258; 13 Bom. L. R. 240.

and *Kolathu Aiyar* v. *Rangavadhyar* (5). On behalf of the respondent pre-emptor reliance is placed on the case of *Avula Charamudi* v. *Marriboyina Raghavula* (6). The observations of the learned Judges in the latter case are relied upon by the learned Counsel for the pre-emptor in support of his contention that the contract embodied in the document of 1883 is binding upon the present co-sharers of the village. The balance of authority appears to us to be on the side of the vendees, *i. e.*, the appellants before us. We cannot do better than to re-produce here the observations of the learned Chief Justice of Bombay made in the case of *Dinkarrao* v. *Narayan* (7) which were as follows :—

"Although contracts for the sale of land which can be specifically enforced immediately, or contracts creating a right of pre-emption which cannot be specifically enforced until the proper occasion arises in the future, do not, according to the law in India, create an interest in land either equitable or executory, they do create rights which are capable of being enforced with regard to the land in certain circumstances against third parties and to that extent they are not ordinary personal contracts and stand in a category by themselves. The principle which underlies the rule of perpetuities,.....applies to this class of contracts.....The law in England and India is substantially the same with regard to the enforcement of contracts in respect of lands. The only difference is that in England the owner of the equitable interest is considered as the owner of the property contracted to be conveyed. But no such result can follow from a contract creating an executory interest. If such a contract purports to do by indirect means what the law forbids to be done directly it is void and the principle is the same in India as in England".

(5) 18 Ind. Cas. 203; 38 M. 114; 24 M. L. J. 84; 13 M. L. T. 179; (1913) M. W. N. 163.

(6) 28 Ind. Cas. 871; 39 M. 462; 28 M. L. J. 471; 18 M. L. T. 76; (1915) M. W. N. 596.

(7) 82 Ind. Cas. 628; 24 Bom. L. R. 449; (1922) A. I. R. (B.) 84; 47 B. 191.

We accept these observations as correctly describing the nature of the contract which is the subject-matter of discussion in the present appeals. We are, therefore, of opinion that the contract mentioned in the *Wajib-ul-arz* of 1883 upon which reliance is placed by the Courts below in discussing the claim of the plaintiff-pre-emptor is not one which can be enforced now. We, therefore, allow the two appeals, set aside the decrees of the Courts below and dismiss the claim of the plaintiff-pre-emptor with costs throughout including fees in this Court on the higher scale.

M. A. A. *Appeals allowed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 34 OF 1922.

January 15, 1923.

Present:—Mr. Hallifax, A. J. C.

DAU AND OTHERS—DEFENDANTS—APPELLANTS

versus

HARPRASHAD—PLAINTIFF—RESPONDENT.

Evidence Act (I of 1872), ss. 101, 102—Suit for possession of land—Encroachment, allegation of—Burden of proof.

In a suit for possession if the *malguzar* of a village alleges that the defendants have been rightly in possession of some portion of *abadi* but have extended their boundaries and encroached on some other portion, it is for the plaintiff to prove that the area which he claims is not a portion of the plot which the defendants have been holding all along.

Appeal from the decree of the Additional District Judge, Raipur, dated the 30th November 1921, in Civil Appeal No. 175 of 1921.

Mr. *S. C. Dutt Chowdhry*, for the Appellants.

Mr. *M. R. Bobde*, for the Respondent.

JUDGMENT.—The appellants' only contention in this case is that the burden of proof has wrongly been placed

on their shoulders. I am inclined to think that this contention is sound. The plaintiff, who is *malguzar* of the village in which they live, alleges that they were rightly in possession of a plot of land in the *abadi* which they had held for many years but had lately extended their boundaries and encroached upon a comparatively small area of the *abadi*. In view of sections 101 and 102 of the Evidence Act I think it was for the plaintiff to prove that the area which he claimed was not a part of the plot that the defendants have been holding all along. The case was originally decided on these lines and on appeal by the plaintiff it was remanded as long ago as 12th May 1920, on the ground that the burden of proof was on the defendants and not on the plaintiff. Section 105 (2) of the Civil Procedure Code precludes the defendants from questioning the correctness of that decision now. This appeal must, therefore, be dismissed and they must pay all the costs of the respondent.

G. R. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 1143 OF 1921.

January 26, 1923.

Present:—Mr. Justice Rafique and Mr. Justice Piggott.

GOPI RAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JEOT RAM—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Covenant to re-convey—Rule against perpetuities, applicability of—Contract Act (IX of 1872), s. 37, scope of.

The law in England and in India is substantially the same with regard to the enforcement of contracts in respect of lands; the only difference is that in England the owner of the equitable interest is considered as the owner of the property contracted to be conveyed. But no such result can follow from a contract creating an executory interest. If such a contract purports to do by indirect means what the law forbids to be done directly, it is void, and the principle is the same in India as in England. [p. 649, col. 1.]

Although contracts for the sale of land which can be specifically enforced immediately, or contracts creating a right of pre-emption which cannot be specifically enforced until the proper occasion arises in the future, do not, according to the law in India, create an interest in land either equitable or executory, they do create rights which are capable of being enforced with regard to the land in certain circumstances against third parties, and to that extent they are not ordinary personal contracts and stand in a category by themselves. The principle which underlies the rule against perpetuities applies to this class of contracts. [*ibid.*]

Dinkarrao Ganpatrav v. *Narayan Vishwanath*, 82 Ind. Cas. 628; 24 Bom. L. R. 449; 47 B. 191; (1922) A. I. R. (B.) 84, relied on.

A covenant in a sale-deed that, "if the vendee, his heirs or representatives, desire to sell the house purchased, they shall, in such a case, first ask the executant, his heirs or representatives for the time being to purchase it. If the executant, or his heirs or representatives refuse to purchase, the vendee, his heirs or representatives shall have a right to transfer it to some one else. In case they make breach of this covenant, the executant, his heirs and representatives will be entitled to the specific performance of the contract," offends against the rule against perpetuities and is, therefore, unenforceable. [p. 647, cols. 1 & 2.]

Sreemutty Tripoora Soonduree v. *Juggur Nath Dutt*, 24 W. R. 321, *Nobin Chandra Soot* v. *Nabab Ali Sarkar*, 5 C. W. N. 343, *Nabin Chandra Sarma* v. *Rajani Chandra Chakravarti*, 63 Ind. Cas. 196; 25 C. W. N. 901, *Gurunath Balaji Mutalik* v. *Yamanava Nalarao Divan*, 10 Ind. Cas. 814; 35 B. 258; 13 Bom. L. R. 240, *Kolathu Aiyar* v. *Rangaradhyar*, 18 Ind. Cas. 203; 38 M. 114; 24 M. L. J. 84; 13 M. L. T. 179; (1913) M. W. N. 163 and *Arula Charamudi* v. *Marriboyina Raghavulu*, 28 Ind. 871; 39 M. 462; 28 M. L. J. 471; 18 M. L. T. 76; (1915) M. W. N. 596, referred to.

Egala Nagappa Naidu v. *Muniswamy Iyer*, 65 Ind. Cas. 720; 42 M. L. J. 432; 30 M. L. T. 175; 15 L. W. 409; (1922) M. W. N. 201; (1922) A. I. R. (A.) 16; 46 M. 30, *Dinkarrao Ganpatram* v. *Narayan Vishwanath*, 82 Ind. Cas. 628; 24 Bom. L. R. 448; 47 B. 191; (1922) A. I. R. (B.) 84, relied on.

Quære.—Whether the provisions of section 37 of the Contract Act enable an owner of immovable property to enter into an agreement imposing a restrictive covenant for an indefinite period on the disposition of the property so as to bind his heirs and representatives. [p. 648, col. 2.]

Second appeal from a decision of the District Judge, Ghazipur, dated the 25th of May 1921.

GOPI RAM *v.* JEOT RAM.

Dr. *M. L. Agarwala* and Dr. *S. N. Sen*, for the Appellants.

Munshi *Surendra Nath Sarma* (with him Dr. *S. M. Sulaiman*), for the Respondents.

JUDGMENT.—It appears that one Narain Ram was the owner of a house in the town of Ghazipur which is the subject-matter of dispute in this appeal. He sold it to one Madhuri Das under a registered deed of sale on the 7th of March 1894 in lieu of Rs. 275. One of the covenants of the sale was as follows :—

"If the vendee, his heirs or representatives, desired to sell the house purchased, they should in such a case first ask the executant, his heirs or representatives for the time being to purchase it. But if the executant or his heirs or representatives refuse to purchase, the vendee, his heirs or representatives had a right to transfer it to some one else. That, in case they make breach of this covenant, the executant, his heirs and representatives will be entitled to the specific performance of the contract".

Both the vendor and the vendee are dead. On the 31st of July 1919 the heirs of Madhuri Das, the vendee, who are represented by the defendants second party, sold the house in question to the defendants first party in lieu of Rs. 700.

On the 28th June 1920 the suit out of which this appeal has arisen was brought by Jeot Ram, the son of Narain Ram, for the possession of the house on the payment of Rs. 700. He based his claim on the covenant in the sale-deed of the 7th March 1894, recited above, and described his suit as one for specific performance. The claim was resisted on the ground, among others, that the covenant on which the plaintiff relied was bad for remoteness and was not enforceable. The Court of first instance dismissed the claim on the ground that the contract sought to be enforced was bad for remoteness and that the suit being one for specific performance and it being discretionary with the Court to grant or refuse specific performance of a contract, the present case was one in which discretion should not be exercised in favour of the plaintiff. On appeal by the latter the learned Judge disagreed with the First Court and allowed the claim of the plaintiff.

The defendants first party, the vendees of the 31st of July 1919, have filed the present appeal before us and contend that the covenant giving an option of pre-emption without any limit of time to the vendor under the deed of the 7th of March 1894 is void at law and cannot be given effect to. They argue that if the contract relied upon by the plaintiff was merely a personal contract it could not be enforced against or bind the heirs and representatives of the parties to the original contract. On the other hand, if the said contract created a prepetual covenant as to the disposition of the house, such a covenant would be void as contravening the rule against perpetuities. In support of his contention the learned Counsel for the defendants has relied upon the following cases: *Sreemutty Tripoora Sunduree* v. *Juggur Nath Dutt* (1), *Nobin Chandra Soot* v. *Nabab Ali Sarkar* (2), *Nobin Chandra Sarma* v. *Rajani Chandra Chakravarti* (3), *Gurunath Balaji Mutalik* v. *Jamanava Nalarao Divan* (4) and *Kolathu Aiyar* v. *Rangavadhyar* (5).

For the plaintiff-respondent the argument is that under the sale-deed of 1894 the contract to re-sell the house to the vendor, his heirs and representatives, was made by the vendee on his behalf and on that of his heirs and representatives at any time whenever the latter wanted to part with the house. A contract of sale of immoveable property under the Indian Law creates no interest in the immoveable property as is clearly laid down under section 54. Act IV of 1882, and if no interest is created in an immoveable property under a contract of sale the latter cannot be vitiated by the rule against perpetuities. The cases cited for the appellants, it

(1) 24 W. R. 321.
(2) 5 C. W. N. 343.
(3) 63 Ind. Cas. 106; 25 C. W. N. 901.
(4) 10 Ind. Cas. 814; 35 B. 258; 13 Bom. L. R. 240.
(5) 18 Ind. Cas. 203; 33 M. 114; 24 M. L. J. 84; 13 M. L. T. 179; (1913) M. W. N. 163.

is argued, do not apply as they follow the English Law and proceed on the assumption that an option of re-purchase reserved to the vendor of an immoveable property under a sale made by him creates an interest in that property in his favour. There is nothing in the Indian Law to confine the enforcement of a contract of sale to the lifetime of a contracting party. On the contrary section 37 of the Contract Act binds the representatives of the promisors also. In justification of his position the plaintiff-respondent relies upon the case of *Avula Charamudi* v. *Marriboyina Ragharulu* (6).

After due considerarion of the arguments for the parties and the cases cited by them, we think that the contention of the appellants should prevail. The balance of authority seems to be in favour of the case of the appellant. The solitary case against him is the Madras case just mentioned above. The facts of the case before us are distinguishable from those of the case of *Charamudiful* (6). In the latter case the plaintiff executed a deed of sale in respect of some land in favour of the managing member of a joint Hindu family. The manager gave a separate agreement on the same day agreeing to re-convey the land, whenever demanded to do so, on the payment of a certain sum. The plaintiff sued to enforce the agreement. He was met with the objection that as there was no limit of time in which there sale was to be made, the agreement for re-sale was void as contravening the rule against perpetuities. For the plaintiff the contention was that the agreement was a personal contract and created no interest in land and hence did not offend the rule against perpetuities. It is obvious that in the case of *Avula Charamudi* v. *Marriboyina Raghavulu* (6) the dispute was between the contracting parties and not between their representatives. The question whether an agreement such as that entered into between the parties to the Madras litigation, could bind their heirs and representatives also, was not before the Court, nor was it raised at the Bar, according to the report of the arguments. The dictum that a contract under which an option of re-sale is given without any limit of time, can be enforced against the representatives of the contracting parties also, under section 37, Act IX of 1872, was not necessary for the decision of the case of *Charamudiful* (6). The plaintiff-respondent, however, adopts and presses upon us the observation made in the case of *Charamudiful* (6) in connection with section 54, Act IV of 1882 and section 37 of Act IX of 1872. As to the last mentioned section, *i. e.*, section 37, Act IX of 1872, with due deference to the learned Judges who dicided the case of *Avulu Charamudi* v *Marriboyina Raghavulu* (6), we think it doubtful whether its provisions enable an owner of an immoveable property to enter into an agreement with another, imposing a restrictive covenant for an indefinite period on the disposition of the said property, so as to bind his heirs and representatives. The case law under that section would not bear such an interpretation. A somewhat similar case came before the Madras High Court, subsequent to the case of *Avulu Charamudi* v. *Marriboyina Raghavulu* (6). The latter case was mentioned and in a way explained. The case is reported as *Egala Nagappa Naidu* v. *Muniswami Iyer* (7). In discussing the case of *Charamudiful* (6) their Lordships said that the case arose between the parties and the offer was not revoked by the death of the promisor or otherwise.

It appears from this remark that the observations made in the former case in connection with section 37 of the Contract Act were neither urged for the appellant nor accepted by the Court. As regards section 54 of Act IV of 1882 we would refer to the case of *Dinkarrao Ganpatrao* v. *Narayan Vishwanath* (8). The true nature of contracts

(6) 28 Ind. Cas. 871; 39 M. 462; 28 M. L. J. 471; 18 M. L. T. 76; (1915) M. W. N. 596.

(7) 65 Ind. Cas. 720; 42 M. L. J. 432; 30 M. L. T. 175; 15 L. W. 409; (1922) M. W. N. 201; (1922) A. I. R. (A.) 16; 46 M. 30.

(8) 82 Ind. Cas. 628; 24 Bom. L. R. 449; 47 B. 191; (1922) A. I. R. (B.) 84.

like the one of 1894 between Narain Ram and Madhuri Das is described by the learned Chief Justice in the Bombay case. The learned Chief Justice remarked:—

"Althoug contracts for the sale of land which can be specifically enforced immediately, or contracts creating a right of pre-emption which cannot be specifically enforced until the proper occasion arises in the future, do not, according to the law in India, create an interest in land either equitable or executory, they do create rights which are capable of being enforced with regard to the land in certain circumstances against third parties and to that extent they are not ordinary personal contracts and stand in a category by themselves. The principle which underlies the rule of perpetuities applies to this class of contract. The law in England and India is substantially the same with regard to the enforcement of contracts in respect of lands. The only difference is that in England the owner of the equitable interest is considered as the owner of the property contracted to be conveyed. But no such result can follow from a contract creating an executory interest. If such a contract purports to do by indirect means what the law forbids to be done directly, it is void and the principle is the same in India as in England".

We are in accord with these observations of the learned Chief Justice and we think that the rule of perpetuities applies to the contract of 1894 also. We, therefore, allow the appeal, set aside the decree of the lower Appellate Court and restore that of the First Court by dismissing the claim of the plaintiff-respondent. Costs are allowed to the defendants-appellants throughout including fees in this Court on the higher scale.

Z. K. *Appeal allowed.*

CALCUTTA HIGH COURT.

CIVIL RULE No. 337 OF 1924.

April 28, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

PADMA LOCHAN PAL—PLAINTIFF No. 1—PETITIONER

versus

KALI KAMAL PAL AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. I, r. 10—Transfer of plaintiff to category of defendants—Court, power of.

Under O. I, r. 10, Civil Procedure Code, a Court has power to pass an order transferring a plaintiff from the category of plaintiffs to that of defendants.

Bhairabendra Narain Deb v. *Udai Narain Deb*, 79 Ind. Cas. 298; 50 C. 853; (1924) A. I. R. (C.) 251, *Brojendra Kumar Das* v. *Gobinda Mohan Das*, 34 Ind. Cas. 186; 20 C. W. N. 752, relied on.

Rule against an order of the Sub-Judge, First Court, Tipperah, dated the 18th April and 1st September 1923.

Babus *Ram Chandra Mazumdar* and *Nripendra Chandra Das*, for the Petitioner.

Dr. *Sarat Chandra Basak* and Babus *Hemendra Kumar Das*, *Satyendra Kishore Ghose*, for the Opposite Party.

JUDGMENT.

Suhrawardy, J.—This Rule is directed against an order of the Subordinate Judge of Tipperah transferring the plaintiff No. 2 from the category of plaintiffs to that of defendants. I have patiently heard the learned Vakil who appears for the petitioner and have gone through all the relevant documents in the case but I am not satisfied that the petitioner has been able to make out a case for our interference under section 115, Civil Procedure Code. It is argued that the learned Subordinate Judge had no jurisdiction to pass the order he passed under O. I, r. 10, Civil Procedure Code. There is no substance in this contention. As has been observed in the case of *Bhairabendra Narain Deb* v. *Udai Narain Deb* (1), such an order is within the jurisdiction of the Court in the exercise of its

(1) 79 Ind. Cas. 298; 50 C. 853; (1924) A. I. R. (C.) 251.

inherent powers or as is remarked in the case of *Brojendra Kumar Das* v. *Gobinda Mohan Das* (2), the Court has jurisdiction to pass such an order under O. I, r. 10. In any event, it cannot be said that the order is without jurisdiction.

It is next contended that the Subordinate Judge was wrong in making this order under O. I, r. 10 as he should have proceeded under O. XXXII, r. 15 read with rule 9. I do not think that this contention ought to prevail. No doubt the language used by the Subordinate Judge is rather losse as has been pointed out by Mr. Garlic the District Judge but what he meant to say was that it would be to the interest of the second plaintiff to have been transferred to the list of defendants.

Again it is argued that the learned Subordinate Judge's order is without jurisdiction inasmuch as it overrides the order of the District Judge passed on the 17th August 1922 in the lunacy proceedings. The District Judge by that order directed the then manager of the estate of the lunatic to sign the present plaint. It is, therefore, maintained that the learned Subordinate Judge had no right to allow the application of the plaintiff No. 2 to be made a defendant in the suit. It is not necessary for me to consider whether the Subordinate Judge who had seisin of the suit had exceeded his jurisdiction in allowing the application of a party before him in the suit thus virtually modifying the order of the District Judge passed in his extraordinary jurisdiction. But whatever substance there might be in this contention has now been removed by the subsequent order of the District Judge on the application of the petitioner. It is alleged that the petitioner moved this Court sometime ago and he was asked to apply to the District Judge to direct the guardian representing the lunatic to continue to act as a plaintiff and in pursuance of that suggestion the petitioner moved the present District Judge who upheld the order of the learned Subordinate Judge. He has observed that it is clear that the interests of the first plaintiff are adverse to those of the lunatic in some respects and that there are considerable objections to the lunatics joining the suit as a co-plaintiff. This has set the matter right. The District Judge in his capacity as a District Court under the Lunacy Act is entitled to pass order for the management of the lunatics' estate and in course of management to revise his order. No doubt the officer who passed the second order is not the same officer who passed the first order, but that does not in any way curtail the power of the District Judge.

Lastly it is argued that the order that has been passed by the Subordinate Judge is calculated to cause injury to the petitioner. There is no question that there will be some change in the frame of the suit, but according to the lunatic's case it is unavoidable.

Apart from all the questions that have been raised I am not satisfied that the petitioner has been able to make out a case for our interference in the exercise of our extraordinary jurisdiction under section 115, Civil Procedure Code.

The Rule is, therefore, discharged with costs to Opposite Party No. 10. The hearing-fee is assessed at three gold *mohur*.

Duval, J.—I agree with the order that my learned brother proposes to pass. I would only make one remark on one point in connection with this case and that is as to the way in which the guardian of the lunatic came into the case as a plaintiff and has been transferred to the position of a defendant. It appears that on the application of the plaintiff No. 1 Padmalochan Pal, the then guardian of the lunatic Gobindo, was ordered by the District Judge to become a plaintiff on certain allegations mainly made by Padma Lochan Pal. It also appears that the plaint itself was not before the District Judge when he passed that order and I doubt, when we consider the nature of the plaint and the pleadings of the parties, whether if he had considered them whether the District Judge would have passed any such order at all, as it appears to me to be very clear that the interests of the plaintiff No. 1 and plaintiff No. 2 are adverse to one another and that, to no inconsider-

(2) 34 Ind. Cas. 186; 20 C. W. N. 752.

able extent, and though no doubt it was proposed in the suit to leave open the question of the exact share of these to brothers *interse* in the partnership property, there was no reason why that matter should not be decided in this litigation. I feel, however, that when the Subordinate Judge found that the District Judge in his lunatic jurisdiction ordered the plaint to be signed, he had no power, on his own motion to permit one party or the representative of that party to withdraw from category of the plaintiff and I consider that technically he acted without jurisdiction. But the matter did at the instance of this Court go back to the Court below to be looked into the merits by the learned District Judge as to whether the lunatic ought to be yoked with Padma Lochan Pal as a co-plaintiff in a suit of this nature, and the present learned District Judge of Tipperah went fully into the question and decided that it was not desirable that the two should be co-plaintiff, nor has anything in the argument of the learned Pleader for the petitioner before me convinced me that the order of the District Judge in this respect is wrong in this view, therefore, it is only just that the parties should not be yoked together as plaintiffs in this particular litigation. I, therefore, agree that the Rule should be discharged.

K. S. D. *Rule discharged.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 152 OF 1923.

June 25, 1924.

Present:—Mr. Justice Daniels.

MR. IQBAL AHMAD AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

SURAJ BALI AND OTHERS—DEFENDANTS —RESPONDENTS.

Agra Tenancy Act (II of 1901), ss. 34, 58, 199—Landlord and squatter—Suit for ejectment—Omission to plead s. 34, effect of—Question of proprietary right—Reference to Civil Court—Criminal Procedure Code (Act V of 1898), s. 145, proceedings under, whether bar suit—"Eviction in due course of law," meaning of.

Under section 34 of the Agra Tenancy Act, a person who occupies land without the consent of the land-holder can be ejected as a non-occupancy tenant. [p. 652, cols. 1 & 2.]

The fact that section 34 of the Agra Tenancy Act has not been specifically pleaded in a suit for ejectment is not necessarily fatal to the suit. [p. 652, col. 2.]

Balli v. *Naubat Singh*, 16 Ind. Cas. 120; 9 A. L. J. 771 and *Jagardeo Singh* v. *Ali Hammad*, 44 Ind. Cas. 919; 40 A. 300; 16 A. L. J. 249, doubted but followed.

In a suit for ejectment under section 34 of the Agra Tenancy Act it is open to the defendant to ask to have the question of proprietary right referred to Civil Court under section 199 of the Act. [*ibid.*]

An order passed under section 145 of the Criminal Procedure Code is no bar to a suit for ejectment of a tenant under the Agra Tenancy Act. [p. 652, col. 1.]

The expression "eviction in due course of law" in section 145, Criminal Procedure Code, is just as much applicable to ejectment in proceedings under Chapter V of the Agra Tenancy Act as it is to ejectment under the decree of a Civil Court. [*ibid.*]

Second appeal from a decree of the District Judge, Azamgarh, dated the 6th of November 1922.

Mr. *U. S. Bajpai*, for the Appellants.

Mr. *Harendra Krishna Mukerji*, for the Respondents.

JUDGMENT.—This is a second appeal in a suit for ejectment of a non-occupancy tenant under section 58 of the Agra Tenancy Act. The appeal has apparently been preferred to the Civil Court because a question of proprietary right is involved. The real question in dispute is whether the land in suit is situated in Dewara Jadid in the Azamgarh District of which the plaintiffs-appellants are *zemindars* or in the village of Dewara Sabitpur in the Fyzabad District of which the defendant Babu Narendra Bahadur Singh is in charge. The other defendants are the persons actually cultivating the land and claiming to cultivate under Babu Narendra Bahadur. The dispute between the principal parties the plaintiffs and Babu Narendra Bahadur Singh, was the subject of proceedings in the Criminal Court under

section 145, Criminal Procedure Code. In those proceedings Babu Narendra Bahadur Singh was found to be in possession and an order was passed in his favour under section 145 (6). The plaintiffs thereupon filed the present suit for his ejectment and that of the persons cultivating under him. No reference was made in the plaint to section 34 of the Tenancy Act, but there was also no reference to any agreement of tenancy between the parties and it was admitted that no rent had been fixed. Under the circumstances it must have been clear to all parties that the suit was filed with reference to section 34.

The Assistant Collector dismissed the suit on the ground that it was barred by section 145, Criminal Procedure Code. The learned District Judge appears to agree with this conclusion and he also finds that there is nothing to show that the defendants are tenants of the appellants. On both these grounds he has dismissed the appeal.

It is clear at the outset that section 145, Criminal Procedure Code, is no bar to the present suit and no attempt has been made to support the judgment of the Court below on this point. Section 145 (5) lays down that the party in whose favour an order is passed shall be entitled to possession of the land "until evicted therefrom in due course of law." The expression "eviction in due course of law" is just as much applicable to ejectment in proceedings under Chapter V of the Tenancy Act as it is to ejectment under the decree of a Civil Court.

The learned Pleader for the respondents supports the judgment of the Court below on the ground, first that there was no relationship of landlord and tenant between parties, and secondly that section 34 of the Tenancy Act not having been pleaded in the plaint it is not open to the appellant to fall back on the provisions of that section. The two points are closely connected. If the plaintiffs-appellants are entitled to rely on section 34 it is not necessary for the success of their suit that any contract of tenancy should have been entered into between the parties. Section 34 applies wherever agricultural land is occupied by the defendant without the consent of the land-holder. If the plaintiffs' assertion that the land is within their *zemindari* is correct, a point which has not yet been determined, the case falls precisely within the terms of section 34. It is true that section 34 was not specifically pleaded, but I am not aware that it has ever been laid down that this omission is necessarily fatal and, as I have said above, in view of the pleadings and of the circumstances of the case it must have been perfectly clear to all the parties concerned that this was the provision on which the plaintiffs were relying for the success of the suit. If the matters were *res integra* there is, in my opnion, much to be said for the view that section 34 was not intended to be made use of for the purpose of ejectment. The land-holder has the option either of treating the squatter as a tenant and claiming rent from him under section 34, or of treating him as a trespasser and ejecting him through the Civil Court. The contrary view was, however, laid down by Sir George Knox in *Balli* v. *Naubat Singh* (1) as far back as the year 1912, and was re-affirmed by a Bench of this Court in *Jagardeo Singh* v. *Ali Hammad* (2) in 1918. It has also been adopted by the Board of Revenue in a large number of cases. The matter must, therefore, be regarded as settled and it is not open to me to dissent from these rulings. It is certainly an anomalous position that a dispute between two rival *zemindars* should be fought out by proceedings under the Tenancy Act, but this is what section 34, as interpreted by this Court, allows, and it is open to the defendant to ask to have the question of proprietary right referred to Civil Court under section 199 of the Act. The suit has been disposed of on a preliminary point and the real question at issue between the parties has not been determined by either of the Courts below. I, therefore, set aside the decrees of both the Courts below

(1) 16 Ind. Cas. 120; 9 A. L. J. 771.
(2) 44 Ind. Cas. 919; 40 A. 300; 16 A. L. J. 249.

and remand the case through the lower Appellate Court to the Court of first instance for determination on the merits. Costs here and heretofore will abide the result. The same order will govern Appeal No. 153.

K. S. D. *Appeal allowed; Case remanded.*

PATNA HIGH COURT.

MISCELLANEOUS JUDICIAL CASES NOS. 66 AND 73 OF 1923.

July 3, 1924.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

Sri Sri Raja SHIVA PRASAD SINGH OF JHARIA AND ANOTHER —PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Income Tax Act (XI of 1922), s. 66—Case stated —Commissioner, duty of—Royalty, whether income —Salami, *character of—Liability to assessment— Hindu Law—Widow—Maintenance, right of —Charge on joint property—Finance Act (XII of 1922), Sch. III, Part II—Impartible estate —Income to whom belongs—Super-tax—Larger deduction, when made.*

While an Income Tax Commissioner may state his opinion on the questions involved, it is his first duty to state clearly and fully the material facts admitted or proved in evidence before him. [p. 654, col. 1.]

Royalties paid by a lessee to the lessor are income within the meaning of the Income Tax Act and are liable to assessment. [p. 655, cols. 1 & 2.]

In the matter of Raja Jyoti Prasad Singh Deo, 60 Ind. Cas. 357; 6 P. L. J. 62; 2 P. L. T 188; (1921) Pat. 81; (F. B.) and *Secretory of State for India v. Sir Andrew Scoble*, (1903) A. C. 299; 72 L. J. K. B. 617; 51 W. R. 675; 89 L. T. 1; 19 T. L. R. 550, referred to.

Where a lump sum is paid to the landlord under the name of *salami* for the granting of a lease, the sum so paid is in no sense income within the meaning of the Income Tax Act, but if the lease reserves rent or royalty, the sum so paid is income. [p. 656, col. 1.]

The right of a widow under the Hindu Law to be maintained out of her late husband's share in the family property in the hands of surviving co-parceners creates no immediate charge upon the property, but if it becomes necessary to do so, she can by proper steps obtain such a charge upon a reasonable portion of the joint property not exceeding her husband's share. [p. 657, col. 1.]

Jayanti Subbiah v. *Alamelu Mangamma*, 27 M. 45, referred to.

The Finance Act contemplates the larger deduction for purposes of super-tax only in a case where the income is that of an undivided family in which the members are all jointly interested and not in the case of an impartible estate where the income is the sole property of the holder for the time being. [p. 658, col. 1.]

Reference made by the Commissioner of the Income Tax.

Messrs. *N. C. Sinha* and *B. B. Ghosh*, for the Petitioner.

The Government Advocate, for the Opposite Party.

JUDGMENT.

Miller, C. J.—These two cases were heard together as they involve to a large extent the determination of the same questions. In Case No. 66 of 1923 the petitioner is the Raja of Jharia. He was assessed to income-tax for the year 1922-23 upon a total income of Rs. 8,97,111. This included (1) a sum of Rs. 3,37,632 received by the assessee during the year by way of *salami* or premium for the grant of leases of the mineral rights on a portion of his estate, (2) Rs. 3,84,800 for royalties paid by the lessees of mining leases upon the coal raised, and, (3) a sum of Rs. 7,574 representing annuities paid to the widows of the late Raja under his Will and charged upon the estate.

The assessee objected that the amounts entered under the above three heads were not assessable to income-tax and applied to the Court on the 2nd August last to require the Commissioner to state a case and refer it to the High Court for decision under section 66 of the Income Tax Act, 1922. The Court granted the application and the matter has now come before us for decision upon a case stated by the Commissioner of Income-tax upon the 15th November last.

Some difficulty arises at the outset as the facts have not been very fully or clearly stated by the Commissioner. We are not told in the case stated anything about the nature of the leases under which the *salami* is payable except that they are leases of coal mining rights for a term of years. The number of the leases the amount of the *salami* in each case making up the total sum of Rs. 3,37,632 and the duration of the term are not stated nor are any other provisions of the leases referred to.

Again with regard to the annuities no very definite findings of fact are arrived at by the Commissioner. He refers to the Will of the late Raja but does not state the terms of the Will under which the annuities are granted. He assumes that the estate is impartible and passed by succession according to the law of primogeniture but in a later passage he treats the case as one in which the devolution is governed not by inheritance but by survivorship and he questions the right of the late Raja to dispose of the estate by Will in so far as it has granted annuities to his widows for their maintenance, if such grants should exceed that which they would otherwise be entitled to under Hindu Law. The case stated is in fact an argumentative expression of his opinion as to the law to be applied in the course of which certain facts incidentally appear. We desire to take this opportunity of stating for the guidance of the Income Tax Commissioner in future that whilst it is quite proper for him to state his opinion upon the questions involved, it is his first duty to state clearly and fully the material facts admitted or proved in evidence before him. To adopt any other course must, in most cases, result in embarrassment and uncertainty when the matter comes before the Court for its decision, the Court being bound by the findings of fact arrived at. The result in the present instance is that we have had to consider some of the documents and the verbal evidence for ourselves and with the help of admissions by Counsel for the parties arrive at certain conclusions of fact. Otherwise we should have felt bound to return the case for further findings.

It appears that the total *salami* amounting to Rs. 3,37,632 is made up of seven different sums payable to the proprietor by the lessees under seven instruments of lease. The leases which are for all material purposes in similar terms are for a period of 999 years. The *salami* is payable at the inception of the lease and is a non-recurring payment. An annual rent is reserved and royalty is also payable by the lessees on the quantity of coal extracted. It would seem that the *salami* in the present case is really in the nature of a premium paid for granting a lease. In other words it is the purchase price of a leasehold interest and it is contended on behalf of the assessee that it represents not income but capital and that the transaction is merely the transference of the corpus from one form of security into another, from minerals or mineral rights into cash. Section 4, clause (3) of the Income Tax Act, 1922 provides that the Act shall not apply to certain classes of income including "any receipts, not being receipts, arising from business or the exercise of a profession, vocation or occupation, which are of a casual and non-recurring nature, or are not by way of addition to the remuneration of an employee." Now these *salamis* are in no sense receipts arising from business or the exercise of a profession, vocation or occupation but it is urged on behalf of the Crown that they may recur for the leases may fall in by forfeiture and in any event they are for a definite term. The case of *Birendra Kishore Manikya* v. *Secretary of State for India* (1) has been relied on. There the question was whether certain receipts including, *inter alia*, (*a*) *salami* paid by transferees of occupancy holdings for obtaining the landlord's consent to the transfer, and, (*b*) *patta salami*, a fee generally of one rupee, paid by the tenant on settlement of waste lands or abandoned holdings were assessable to income-tax. The real question for determination in that case was whether the sums so paid were agricultural income which is exempt from income-tax under the Act. It does not appear to have been argued that they were not income at all. The Court held that the first of the above classes of *salami* was not agricultural income within the meaning of sections 2 and 4 of the Income Tax Act, 1918 but that the second class was exempt from tax as it might reasonably be regarded as rent or revenue derived from land. It by no means follows, however, that because a particular class of payment

(1) 61 Ind. Cas. 112; 48 C. 766; 32 C. L. J. 433; 25 C. W. N. 80.

included under the term *salami* is regarded as the income of the recipient, every payment which may be popularly described as *salami* must be income. Small payments recurring from time to time in connection with the same holding may perhaps be legitimately regarded as income in most cases, although I am not prepared to subscribe to the proposition which might be deduced from the case cited that the capitalised value of the rent paid in a lump sum is in all cases to be regarded as income. The fees payable on transfer of holdings may perhaps bear some analogy to certain classes of fines payable to the lord of the manor in England on the enfranchisement of copy holds: (*Earl*) *Cowley* v. *Wellesley* (2) or those paid to the landlord on the grant of a fresh lease under a covenant for perpetual renewal: *Brigstocke* v. *Brigstocke* (3) or under the power to renew contained in the settlement: *Simpson* v. *Bathurst* (4). These are now regarded as casual profits to which under the Settled Land Acts the tenant for life is entitled. The distinction between capital and income is one of importance in the case of settled lands in England and the principles there followed are of some assistance but not necessarily conclusive, and it may be mentioned that under these Acts a fine received on the grant of a new lease under statutory powers is treated as capital money arising under the Act and not as casual profits to which the tenant for life is entitled as in the case of renewals under a power conferred by the Settlement. Moreover in the case of mining leases a part of the rent must be set aside and applied as capital money unless a contrary intention is expressed in the settlement. It would appear that under the Settled Land Acts except in so far as they make such receipts income to which the tenant for life is entitled they are treated as capital.

Royalties paid to the lessor although they may be regarded in one sense as instalments of the purchase price of the minerals forming part of the land are treated in England as income and have been so treated in this Court. See *In the matter of Raja Jyoti Prasad Singh Deo* (5). They are nonetheless income merely because they are paid for rights the exercise of which involves a waste of the capital. As was pointed out by Lord Halsbury, L. C., in *The Secretary of State for India* v. *Sir Andrew Scoble* (6) "where you are dealing with income-tax upon a rent derived from coal (and the same would apply to royalties) you are in truth taxing that which is capital in this sense that it is a purchase of the coal and not a mere rent," but he adds "The income-tax is not and cannot be, I suppose from the nature of things, cast upon absolutely logical lines." At the same time there is a vast difference between a sum paid once for all for the lease of mineral rights and a rent or royalty paid annually to the lessor. The lessor in this case who holds an unfettered right of disposal would appear, in granting these leases to have had two objects in view which are distinguishable. In so far as rent and royalty are reserved, he is founding an annual increment to the income of the Raj for himself and his successors but with regard to *salami* it is the price he demands for parting with his direct enjoyment of the property by himself and his successors for a period of 999 years. He is parting with the capital to persons who, whilst not purchasers of the fee simple, are undoubtedly purchasers of a large interest therein. The purchase price is presumably not based upon the estimated out-turn but is paid in exchange for the long term transferred. Possibly it may be objected that the distinction is one of degree rather than of kind, recurring payments at short periods being treated as income and a single payment of a similar kind covering a long period being treated as capital, but after all this is a distinction acknowledged

(2) (1866) 1 Eq. 656; 14 L. T. 425; 14 W. R. 528; 35 Beav. 635.
(3) (1878) 8 Ch. D. 357; 47 L. J. Ch. 817; 38 L. T. 760; 26 W. R. 761.
(4) (1870) 5 Ch. 193; 22 L. T. 29; 18 W. R. 772.
(5) 60 Ind. Cas. 357; 6 P. L. J. 62; 2 P. L. T. 188; (1921) Pat. 81 (F. B.).
(6) (1903) A. C. 299; 72 L. J. K. B. 617; 51 W. R. 675; 89 L. T. 1; 19 T. L. R. 550.

in section 4 of the Act itself and, as has been observed, the Income Tax Acts are not cast upon absolutely logical lines. Nor does there appear to be any reason why we should extend the exception made in the case of rent and royalty to the case of a non-recurring payment made to cover a long period.

In so far as the leases in question form transactions by which a lump sum is paid under the name of *salami* for the granting of the lease I consider that it is more in the nature of an out and out sale of property and that the sum so received by the lessor is in no sense income within the meaning of the Indian Income Tax Act. In so far as the leases reserve rent or royalty the sums so paid are in my opinion income.

It was also urged that the question could not be judged by *a priori* standards but that it should first be ascertained how the money was in fact treated by the assessee, that is whether it was re-invested as capital or spent as income. The short answer to this argument would appear to be that the assessee having absolute control over his estate was under no obligation to invest the capital for the benefit of those who might succeed him. Imprudent or embarrassed persons might spend their capital as they would their income, but it is nonetheless capital and an enquiry on these lines would be fruitless.

With regard to the annuities payable to the widows of the late Raja under his Will the facts as I have stated do not fully appear from the case presented for our opinion. The Will, however, is on the record. It is dated the 27th August 1915. It recites that the entire *Parganas* Jharia and Jaynagar in Manbhum are the ancestral *zemindari* of the testator and that he has other immoveable properties in the District of Manbhum and elsewhere. These he leaves to whoever may be his heir at his death. Of his cash and moveable properties including diamonds and precious stones a 6-annas share is to appertain to his *zemindari* and to go to his heir. The remaining 10 annas share he leaves to his wives who shall survive him in equal shares for their absolute use. The Will then provides as follows :

"Each of my wives shall get a maintenance of Rs. 3,600 per annum and he who will inherit and be in possession of the *zemindari* at any time shall be bound to pay to each of my wives maintenance at the above rate, *i.e.*, at the rate of Rs. 3,600 per annum and he shall pay the said amount of maintenance in 12 equal instalments, *i. e.*, Rs. 300 every month. If the amount be not paid according to the instalments, then he shall pay interest at the rate of Re. 1 per cent. per mensem, and the *zemindari* left by me shall remain charged for the amount of maintenance and interest for default, *i. e.*, my wives shall be competent to sue, individually or jointly, for the amount of maintenance with interest which will be due to them respectively and realize the same by selling the property left by me."

The assessee contends that the sums paid by him as maintenance under the above terms of the Will should be deducted from his assessable income. These sums are payable out of the income of the *zemindari* which includes in addition to the taxable income agricultural income which is immune from tax and which admittedly is much more than sufficient to pay the maintenance. It is clear that on the facts disclosed the assessee has made out no case for deducting the whole of this sum from his taxable income nor has he shewn how much is charged thereon. The maintenance granted to the widows is charged upon the whole *zemindari* and to that extent it is the income of the widows. The income of the *zemindari*, however, is that of the assessee subject to the charge. This he may pay either from the agricultural or the non-agricultural income and so fulfil the obligation cast upon him, but there is no evidence from which we can say how much should be charged to agricultural income and how much to the taxable income. The agricultural income has not been disclosed and although I am not prepared to say that no portion could be properly deducted from the taxable income if proper materials were forthcoming I consider

that there is no evidence which would entitle us to direct any reduction on the taxable income of the assessee in the present case.

It was argued that the widows were entitled to be maintained in any case out of the income of the estate and, therefore, the fact that maintenance was granted to them under their husband's Will could make no difference to the assessee's obligation to pay income-tax on the sums paid for their support. It may be that he could not deduct sums expended by him out of his income to support his children and others dependent upon him even though he were bound by law to support them but in the present case the maintenance is made a charge upon the estate by the late Raja's Will. The right of a widow under the Hindu Law to be maintained out of her late husband's share in the family property in the hands of surviving co-parceners it is true creates no immediate charge upon the property but if it became necessary to do so she could by proper steps obtain such a charge upon a reasonable portion of the joint property not exceeding her husband's share. See *Jayanti Subbiah* v. *Alamelu Mangamma* (7). But in the present case the obligation of the assessee arises not by reason of the Hindu Law but because the income of the *zemindari* to the extent of the maintenance granted belongs to the widows and not to the assessee and the whole *zemindari* is subject to a charge for its enforcement. As already stated, however, there is no evidence before the Court to enable it to determine to what extent the maintenence is charge upon the taxable income of the assessee and we do not think the decision of the Commissioner in its result can be disturbed.

The result is that I find that the *salami* received in this case is not chargeable to income-tax, that the royalties received are taxable income and that in the particular circumstances and on the facts disclosed no case has been made out for deducting the maintenance annuities from the taxable income of the assessee. The petitioner has succeeded roughly as to half the deductions which he claims and has failed as to the other half. We consider that in the circumstances he is entitled to be paid half the costs of this reference. The hearing fee we assess at Rs. 80.

In Case No. 73 of 1923 the petitioner is Raja Jeoti Prashad Singh Deo of Panchkote. His income for the year 1922-23 was assessed at a sum of Rs. 3,19,693 for the purposes of income-tax. This includes (1) Rs. 1,25,279 received as *salami* under mining leases similar to those in the other case and (2) Rs. 1,97,752 on account of royalties from the mines. It is conceded that the facts material for determining these two questions are similar to those of the previous case and that the same considerations apply. The judgment just pronounced in the previous case will govern this case in so far as the above two items are concerned.

A further point, however, arises in this case as to the amount which should be deducted from the total income for the purpose of arriving at the income assessable to super-tax. Section 55 of the Income Tax Act provides for the imposition of super-tax in any year at the rates laid down for that year by Act of the Indian Legislature. The super-tax for the year in question is laid down in the Indian Finance Act, 1922, Schedule III, Part 2. The effect of the latter enactment is that in the case of every individual super-tax shall be payable on the excess over Rs. 50,000 of total income whereas in the case of every Hindu undivided family it is payable only on the excess over Rs. 75,000 of total income. The assessee was assessed to super-tax as an individual. He claims that his income is that of a Hindu undivided family and that the larger exemption should be made. He admits that his estate is an impartible Raj and that the collateral members of his family have their separate property, but he contends that he and his three sons constitute a Hindu undivided family and that the income is that of the joint family. Once it is admitted that the estate is impartible, and this is the only evidence we have about it, then we must assume that the

(7) 27 M. 45.

members of the joint family have none of the rights of co-parcenership except a right of succession by survivorship limited by the rule of impartibility which allows only one member at a time to hold. They cannot demand partition or assert any right to any individual share in the estate nor can they restrain alienation. The income of the estate is that of the incumbent for the time being, nor does the fact that he is bound to maintain his sons entitle him to treat the income as that of the undivided family. It is essentially his income and I so hold. The Finance Act contemplates the larger deduction for purposes of super-tax only in a case where the income is that of the undivided family in which they are all jointly interested and not in the case of an impartible estate where the income is the sole property of the holder for the time being. In my opinion the Income Tax Commissioner was right in assessing super-tax upon the excess over Rs. 50,000 of total income. There will be the same order as to costs as in the previous case. We assess the hearing fee at Rs. 80.

Foster, J.—I agree.

K. S. D. *Order accordingly.*

RANGOON HIGH COURT.

CIVIL REVISION No. 153 OF 1923.
December 17, 1923.
Present:—Mr. Justice Young.
RASU—PLAINTIFF—APPELLANT
versus
KATTARA—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), ss. 102, 103—Burden of proof—Sale on credit or for cash—Civil Procedure Code (Act V of 1908), s. 115—Revision—Provision of law disregarded.

Where the seller of goods avers their sale for credit and the buyer pleads that he bought them for cash, the onus of proving payment is on the latter.

Where a Court has applied its mind to the law and decides wrongly, there is no ground for revision but where it disregards some provision of law and has not applied its mind to that provision, there is ground for revision.

Revision against the decree of the District Court, Yamethin, in Civil Appeal No. 33 of 1923.

Mr. *P. S. Chari*, for the Appellant.

Mr. *Hay*, for the Respondent.

JUDGMENT.—In this revision case the plaintiff pleaded that he had sold certain cattle on credit. The defendant replied that he had bought them for cash. The learned Judges in the Courts below placed the onus on the plaintiff to prove that he had sold them for credit. The plaintiff contended that the onus was wrongly placed. In this, I think, he was correct. The plaintiff pleaded the sale and no payment. The defendant replied pleading payment. The onus, therefore, was on him.

The next question is to consider whether I can take cognizance of this fact in revision.

The learned Judge certainly applied his mind to the question but came to a wrong decision. He considered the case fell under section 102 of the Evidence Act. It is contended that section 103 is the more specific section, more particularly applicable, and that this provision of law would have been of valuable assistance if he had applied his mind to it.

In *Zeya* v. *Mi On Kra Zan* (1) it was held that where a Court has applied its mind to the law and decides wrongly, then there is no ground for revision; but, where it disregards some provision of law and has not applied its mind to that provision, then there is ground for revision. In my opinion, the learned Judge failed to apply his mind to section 103, and I think there is ground for revision. The decree must be set aside and the case must be remanded for a new trial. Costs two gold *mohurs*.

S. D. *Case remanded.*

(1) 2 L. B. R. 333 at p. 340.

HANUMAN PRASAD v. RAGHUNATH PRASAD.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 129 OF 1922.

March 7, 1924.

Present:—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

HANUMAN PRASAD AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAGHUNATH PRASAD—DEFENDANT—RESPONDENT.

Public highway—Immediate access, right of—Private right—Infringement—Special damage.

A right of immediate access from private property to a public highway, as a private right, is distinct from the right of the owner of that property to use the highway itself as one of the public. An infringement of such private right of access amounts to special damage to found a private action thereon against the infringement. [p. 659, col. 2; p. 660, col. 1.]

Lyon v. *Fishmonger's Co.*, (1877) 46 L. J. Ch. 68 at p. 80; 1 App. Cas. 662; 35 L. T. 569; 25 W. R. 165, *Ram Chandra* v. *Joti Parshad*, 8 Ind. Cas. 808; 8 A. L. J. 19; 33 A. 287, *Bhawan Singh* v. *Narotam Singh*, 2 Ind. Cas. 365; 31 A. 444; 6 A. L. J. 499, referred to.

Letters Patent Appeal against the judgment of Mr. Justice Gokul Prasad, dated the 14th July 1922.

Messrs. *B. K. Mukerji* and *P. L. Banerji*, for the Appellants.

Dr. *K. N. Katju*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit in which the plaintiffs asked that a certain portion of a recently constructed building which had been put up by the defendant might be removed inasmuch as it was interfering with a right of way which the plaintiffs had in respect of the houses they occupy. Shortly their case was that for a period of over 40 years they had been accustomed to travel by foot, with *ekkas* and carts over what is marked upon the map before us as "public way BBBB". They traced the origin of this public way by saying that at one remote period round about 1864 the land was covered with houses which at some date not specifically stated fell down and that for a very long period of time there were marks of where the houses had been and portions of the ruined houses, that there arose a practice of passing over the site of the ruined houses and that for a period longer than is necessary to obtain a prescriptive right *ekkas* and carts and foot possengers had uniformly, openly and without interruption passed to the houses lying to the east along this defined route. Recently the defendant having purchased the land has erected buildings upon it. The particular building which is said to interfere with the right of way is the smaller southern rectangular building. According to the map it completely blocks out the old route and a new road appears to the south and is indicated by letters, YY, but the plaintiffs' complaint is that YY is only 4′ 11″ in width whereas the previous public way was more than 6′ 7″ wide. The lower Appellate Court accepted the contention of the plaintiffs that the building of the smaller southern rectangular portion of the house was an infringement of the right of way which they had acquired and though the pleadings indicated a private right of way the discussion in the Courts seemed to have opened out until this right of way was being talked of as a public right of way. To our mind the matter is not one of great practical importance because what the plaintiffs are complaining of is the particular damage which they now suffer inasmuch as whereas formerly they were able to drive *ekkas* and carts right up to their houses they are now compelled to leave those *ekkas* and carts some 400 or more yards away from their house. It has been contended by Dr. Katju that this action is not competent to be brought by the plaintiffs because they have not suffered a particular damage over and above that which other people have suffered: but that is not quite a complete statement of the law because although the plaintiffs must show a particular damage it is clear that a private right of this kind has been recognised as being particular damage in the case of individual members who have enjoyed access to the highway from adjoining property and if authority were needed for that passage it is to be found in the case of *Lyon* v. *Fishmonger's Co.* (1). Lord Selborne said after referring to several authorities: "Those authorities recognise such a right of immediate access from private

(1) (1877) 46 L. J. Ch. 68 at p. 80; 1 App. Cas. 662; 35 L. T. 569; 25 W. R. 165.

property to a public highway, as a private right, distinct from the right of the owner of that property to use the highway itself as one of the public." Therefore, the plaintiffs in this case can be regarded in two capacities, one as ordinary members of the public in relation to this road and, secondly, as having a particular right in it by virtue of the long user. In our opinion the decision of the learned Judge of this Court cannot stand. It is certainly not in conformity with the case of *Ram Chandra* v. *Joti Parshad* (2) nor with the case of *Bhawan Singh* v. *Narotam Singh* (3) and the decision of this Court in the unreported case of *Mahpal Singh* v. *Manwa* and *Jankia* [Letters Patent Appeal No. 35 of 1914 dated the 7th of November 1914]. This is a case in which we set aside the judgment of the learned Judge of this Court and restore that of the lower Appellate Court, but we stay execution for three months if within that period the defendant is able to provide a way by deepening YY to the south which will permit of an uninterrupted access. We think that this is a case in which the defendant should confer with the Municipality and if the defendant can within three months produce before us an alternative scheme which will do away with the necessity of cutting their smaller building in half as will be the consequence of the order of the lower Appellate Court we will vary our order by embodying such scheme in our decree. In our opinion all that would be necessary would be for the defendant to obtain the consent of the Municipality to a passage 6′ 7″ passing round the southern part of the smaller building and proceeding northway until it joins the public way BBBB. We have very roughly in black lead pencil indicated the sort of pathway that we mean but the object of the defendant's obtaining the help of the Municipality is that there may not hereafter come forward some owner of land lying to the eastward of the smaller building who will contend that the road is an invasion of his private right. On this point we must have proper assurances. Our decision, therefore, to-day is that we restore the judgment of the lower Appellate Court subject to our embodying in the decree an alternative arrangement within three months if such alternative arrangement can be arrived at. The period of three months is not to be extended unless for good cause shown. The question of costs will be decided later.

N. H. *Order accordingly.*

(2) 8 Ind. Cas. 808; 8 A. L. J. 19; 33 A. 287.
(3) 2 Ind. Cas. 365; 31 A. 444; 6 A. L. J. 499.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 61 OF 1923.
February 11, 1924.
Present:—Mr. Justice Lentaigne and Mr. Justice Carr.

T. D. FOSTER AND OTHERS—DEFENDANTS—APPELLANTS
versus
R. M. A. L. CHETTY FIRM—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 59—Payment—Appropriation.

If a creditor does not agree to appropriate and apply a payment according to the debtor's specific directions, he should reject the payment at once, otherwise he is bound to apply it as directed. This will be so even if he were to tell the debtor at the time of payment that he will not apply it in accordance with the latter's directions. [p. 662, cols. 1 & 2.]

Davenport v. *Queen*, (1877) 3 App. Cas. 115; 47 L. J. P. C. 8; 37 L. T. 727 and *Croft* v. *Lumley*, (1858) 6 H. L. C. 672; 10 E. R. 1459; 27 L. J. Q. B. 321; 4 Jur. (N. S.) 903; 6 W. R. 523, referred to.

First appeal from the District Court, Amherst, in Civil Regular No. 136 of 1922.

Mr. *Villa* (with him Messrs. *Hay* and *Jeejeebhoy*), for the Appellants.

Mr. *Chari*, for the Respondent.

JUDGMENT.

Lentaigne, J.—I would hold that on the 9th May 1922 when Dayalal handed the cheque for Rs. 6,000 to the plaintiff Chetty, he gave the Chetty a specific direction that the proceeds of that cheque should be paid to the promissory-note in suit.

It is admitted that the Chetty realised the proceeds of this cheque on the 18th

May, and I would hold that payment by cheque, which was only conditional on the 9th, became an absolute payment on the 18th May when the proceeds were obtained. The Chetty states that he then credited the Rs. 6,000 to Dayalal's account in order to keep it in suspense until he could see Dayalal. I will discuss below the legal question whether he was legally entitled to take that course.

The Chetty has then stated, and the District Judge has found as a fact, that on the 22nd May an arrangement was come to between the Chetty and Dayalal that the Rs. 6,000 should be appropriated to certain earlier promissory-notes and that only Rs. 750 and Rs. 120 should be credited to the promissory-note in suit. The District Judge has also found as a fact that the Chetty had entered the amount in the suspense account with the object of persuading Dayalal to alter the previous appropriation to that recorded in the accounts on the 22nd May and that he succeeded in persuading Dayalal to do so. Having regard to the fact that Dayalal admits that he signed Exhibit B, showing that he had received the other promissory-notes from the Chetty on the 22nd May, I would agree with these findings of fact as to what occurred on the 22nd May, but, in my opinion, these facts will not affect the legal position as existing on the 18th May.

I think that a question arises whether Dayalal was really acting in part as the agent of Foster when he made the payment on the 9th May, but for the purposes of argument I will first assume that Dayalal was not acting as agent for anybody and that he was merely paying a debt due by himself and others. On this assumption he was a debtor paying a debt by a cheque which was a conditional payment and when making such payment he gave a direction as to the appropriation of that payment which became an absolute payment on the 18th May at a time when the said direction still remained uncancelled. It appears to me that there is no question that the Chetty, on the 9th May, accepted this conditional payment by cheque, and it is clear that he did not repudiate such acceptance at any time up to the date of his receiving the actual cash amount. In my opinion it was the duty of the Chetty creditor to obey the direction as to appropriation when he received the cash or proceeds on the 18th May, and that the provision at the end of section 59 of the Indian Contract Act, 1872, would have applied and was mandatory to the effect that the payment "must be applied accordingly." If then the Chetty had done what he was bound by law to do, he would on the 18th May have made an entry of satisfaction to the extent of Rs. 6,000 in respect of the promissory-note in suit. In that case there would be no question that both Foster and Datta, as well as the other, appellants, would have ceased to be liable to the Chetty for more than the small balance of Rs. 120 by reason of the increase of the total debt to the extent of the one month's interest of Rs. 120 then due. I think that the appellants were entitled to that benefit from this payment, whether the Chetty did his duty or not, and I do not think that the Chetty can alter that position by committing a breach of duty. If it is held, as I think it must be, that Foster and Datta were released from liability to the extent of Rs. 6,000 on the 18th May 1922, I do not see how any agreement come to between Dayalal and the Chetty on the 22nd May could alter that position and revive a liability which had been *pro tanto* extinguished. I think that it would be necessary to get Foster and Datta, as well as the other appellants, to join in the agreement reviving that liability for the portion of the debt which had been extinguished.

Though I am satisfied that the above propositions are correct statements of the law applicable to the facts of this case, I have been unable to find any authorities on cases exactly parallel to this case; and it was admitted at the Bar that the Advocates concerned had been unable to obtain any authority in point. On behalf of the respondent it was contended that so long as the Chetty did not act on the direction, if any, received on the 9th May, it was

open to him to keep the money in a suspense account and subsequently to get the debtor to cancel the appropriation. My answer to this argument is that, in my opinion, the Chetty was not entitled to keep the money in a suspense account for a single hour, because he had received and accepted the cheque and the money with a specific direction which by law he was bound to carry out. Section 59 of the Indian Contract Act is specific and mandatory to the effect that the payment must be applied accordingly, and a failure to carry out that statutory provision for a single day or a single hour was illegal and a breach of duty. The section does authorise a creditor to refuse to receive a payment, if he does not agree to the specific direction as to the appropriation thereof; but, in my opinion, it is clear that such election must be made at once, and if he does not at once reject the payment, it is too late for him to contend that he has not received a payment legally appropriated to the particular debt. Once he receives the payment, the question arises with what intention did the debtor make the payment? For example, it has been held by their Lordships of the Privy Council in *Davenport* v. *Queen-Empress* (1), that in a case where a tenant, who had incurred a forfeiture, tendered a sum for rent which the landlord nominally refused to accept as rent but did in fact keep under protest, stating that he was receiving it conditionally and without prejudice to the right to deal with the land as forfeited, the landlord was taking a course he was not entitled to take and had thereby waived the forfeiture. The same point had previously been decided by the House of Lords in the case of *Croft* v. *Lumley* (2), where the landlord told the tenant at the time of payment that he refused to accept the money as rent but that he took it solely as compensation for the use of the land. Consequently, it would seem that even if the Chetty had told Dayalal on the 9th May that he refused to comply with his direction to apply the cheque to the note in suit and that he intended to apply it to other notes, it would not have justified him in keeping the cheque in contravention of Dayalal's direction, and his only proper course would have been to return the cheque then and there to Dayalal. *A fortiori* the Chetty after apparently accepting the cheque without protest on the 9th May, was not entitled to disregard the direction on the 18th May when he received the cash. These two authorities and other decisions to which I have referred bear out the construction which I have placed on section 59 of the Indian Contract Act, 1872. That being so it seems clear that the note would have been satisfied and discharged *pro tanto* on the receipt of such payment; and such was in fact the intention of Dayalal on the 9th and there is no evidence that he had any change of intention before the 22nd May, and, moreover, it is not suggested that he had any communication with the Chetty between 9th and 17th May. Once it is clear that the note was satisfied and discharged *pro tanto* on the 18th May, it seems an obvious proposition that the satisfied portion could not be revived without the consent of the five obligors, assuming even that a revival with their consent would not have been a breach of the stamp law.

For the above reasons I would hold that the promissory-note in suit was satisfied by the two payments discussed above except as regards a small balance of Rs. 4-12-0 due for interest which has not been referred to in the argument and is too small to justify a decree when it can more conveniently be deducted from the cost to be awarded.

I, therefore, set aside the decree of the District Court and direct that the suit as against all defendants be dismissed, but that the plaintiff Chetty shall pay the costs in both Courts to the appellants, Foster and Datta, less Rs. 4-12-0 to be deducted therefrom as the balance of interest.

Carr, J.—I concur.

S. D. *Decree set aside.*

(1) (1877) 3 App. Cas. 115; 47 L. J. P. C. 8; 37 L. T. 727.

(2) (1858) 6 H. L. C. 672; 10 E. R. 1459; 27 L. J. Q. B. 321; 4 Jur. (N. S.) 903; 6 W. R. 523.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 113 OF 1923.

April 17, 1924.

Present:—Sir Lancelot Sanderson, Kt., Chief Justice, and Mr. Justice Chakravarti.

RAJANI KANTA SAHA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAJENDRA KUMAR BOSE—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 23—Specific provisions meeting necessities of case—Remand, whether should be made—Practice.

Where the Code of Civil Procedure contains specific provisions which would meet the necessities of the case in question the Court should not exercise its powers of remand. [p. 634, col. 1.]

Abdul Karim Abu Ahmad Khan Ghaznavi v. *The Allahabad Bank, Ltd.*, 41 Ind. Cas. 598; 44 C. 929; 21 C. W. N. 877; 26 C. L. J. 49 (F. B.), followed.

Prosunna Chandra Chattopadhya v. *Boidya Nath Mistry*, 56 Ind. Cas. 516; 24 C. W. N. 708; 31 C. L. J. 360, referred to.

Appeal against the decree of the Second Additional District Judge, Dacca, dated the 14th of July 1922, reversing that of the Munsif, Fourth Court at Munshigunj, dated the 27th of January 1921.

Babu *Heramba Chandra Guha*, for the Appellants.

Babus *Sarat Chandra Roy Choudhury* and *Heralal Chuckerbutty*, for the Respondents.

JUDGMENT.

Sanderson, C. J.—This is an appeal by defendants Nos. 1 and 2 from a judgment of the Second Additional District Judge of Dacca, dated the 14th of July 1922.

The judgment of the lower Appellate Court dealt with two Suits Nos. 305 and 321. The plaintiff alleged that the first and the second defendants had by erection of a building encroached beyond the land which the plaintiff had settled with them.

It appears that the defendants had a building in the Srinagar Bazar, that the building was blown down in the Cyclone of 1919. Thereupon, defendants Nos. 1 and 2 erected a new building and it is in respect of this building that the plaintiff alleged the encroachment, and two suits were brought and, it was alleged that two plots of land belonging to the plaintiff had been encroached upon.

Suit No. 305 referred to the alleged encroachment on the West, and suit No. 321 related to the alleged encroachment on the South and the East.

The learned Munsif who tried three suits dismissed Suit No. 305 altogether. Suit No. 321 was decreed in part. The learned Munsif made a decree that the plaintiff's alleged title to the extent of half a cubit of land in breadth lying along the length of defendants' hut and to the East thereof should be declared and established: and, he made a further order granting a permanent injunction against the defendants restraining them from using *Jhaps* horizontally to their shop in the east side.

When the appeal was before the lower Appellate Court, the learned Additional District Judge referred to the fact that the defendants admitted an encroachment to some extent, but on what part, whether it was on the North or South, East or West, was not clear and, apparently he was not satisfied with the decision of the Trial Court. He was not satisfied where the encroachment was or to what area the encroachment extended: and, he came to the conclusion that the only satisfactory way of dealing with the case was to remand it to the lower Court for further trial after local enquiry. The result was that he made that order and remanded both the suits to the lower Court for further trial after local enquiry.

The learned Vakil for the defendants-appellants, argued that the learned Judge had no jurisdiction to make that order: or, that at all events under the circumstances of this case he ought not to have made that order.

On the other hand, the learned Vakil for the respondent relied upon the decision of a Full Bench of this Court in the case of *Abdul Karim Abu Ahmed Khan Ghaznavi* v. *The Allahabad Bank, Ltd.*, (1), and argued that the learned Judge had jurisdiction. I content

(1) 41 Ind. Cas. 598; 44 C. 929; 21 C. W. N 877; 26 C. L. J. 49 (F. B.).

myself by referring to a passage in my judgment in that case which is to be found at page 936*. It runs as follows: "The question whether it is necessary for the ends of justice to exercise such powers of remand must depend upon the circumstances of each particular case and in exercising such jurisdiction the Court must, no doubt, be careful to see that its decision is based on general legal principles and subject to the rule that if the Code does contain specific provisions which would meet the necessities of the case in question, such provisions should be followed and the inherent jurisdiction should not be invoked". Assuming for the sake of argument, though I do not decide it, that the learned Judge had jurisdiction in this case to make the order of remand, in my judgment he ought not to have made it, because the Code contains specific provisions which would meet the necessities of the case. It is not disputed by the learned Vakil for the respondent that the learned Judge could have made an order that an independent surveyor should proceed to the "*locus in quo*", make measurements and give his evidence before the lower Appellate Court, having regard to the difficulty in which the learned Judge found himself. That order might have been made under O. XLI, r. 27 (*b*) of the Code: and in my judgment that was the course which the learned Judge ought to have followed in this case and that course would have met the necessities of this case. Consequently, the learned Judge, even if he had jurisdiction to order a remand should not, in my opinion, have made use of it.

During the course of the argument my learned brother drew attention to the case of *Prosunna Chandra Chattopadhya* v. *Boidya Nath Mistry* (2), where a course similar to that which I have indicated was directed by the learned Judges who heard the appeal.

The result, therefore, in my judgment is that the judgment and the order of the learned Additional District Judge so far as directed a remand must be set aside.

It appears that the order of the learned Additional District Judge has been carried out, and that a Civil Court Commissioner was appointed by the Trial Court to carry out the directions of the lower Appellate Court and that he has in fact made reports. The learned Vakil who appeared for the appellants has agreed, and if I may say so, wisely agreed that the reports should be submitted to the lower Appellate Court instead of to the learned Munsif's Court, so that the learned Judge in the lower Appellate Court may have the advantage of the reports of the Civil Court Commissioner and may, if necessary, take the evidence of the Commissioner in his own Court to enable him to pronounce judgment on the appeal.

The learned Judge in the lower Appellate Court dealt with the question of the permanent injunction restraining the defendants from erecting the *jhaps*. He came to the conclusion that the defendants had failed to prove any custom entitling them to erect and use the *jhaps* in the manner contended for by the defendants. Upon that point his judgment must stand. But if the defendants Nos. 1 and 2 can succeed in showing that the *jhaps* do not project at any time beyond the boundaries of the land settled with the defendants, then, of course, the injunction will be set aside. That will be a matter which the lower Appellate Court will consider.

In the circumstances of this case each party will pay his or their own costs of this appeal. All other costs will be in the discretion of the lower Appellate Court.

Chakravarty, J.—I agree.

K. S. D. *Order accordingly.*

(2) 56 Ind. Cas. 516; 24 C. W. N. 703; 31 C. L. J. 360.

*Page of 41 C.—[*Ed.*]

STEEL BROTHERS & CO. *v.* EMPEROR.

RANGOON HIGH COURT.
FULL BENCH.

CIVIL REFERENCE No. 12 OF 1923.

March 10, 1924.

Present:—Sir Sydney Robinson, KT., Chief Justice, Mr. Justice Heald and Mr. Justice Beasley.

STEEL BROTHERS & COMPANY, LIMITED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Income Tax Act (XI of 1922), ss. 2 (15), 12, 16, 55—Undivided profits—Bonus shares—Income, profit or gain.

Where a Limited Company in order to increase its capital allots its undivided profits to its share-holders in the form of fully paid up bonus shares, and no amount is taken from the Company or received by the share-holders, the acceptance of the allotted shares by the share-holders is not an acceptance of an income, profit or gain within the meaning of the Income Tax Act. [p. 677, col. 2; p. 678, col. 1.]

REFERENCE.—This was a reference to the High Court made on the 7th December 1923 by the Commissioner of Income-tax Burma, (J. C. Mackenzie, Esquire, M. A., I. C. S.), the question referred being,

"Did the transactions evidenced by the resolutions passed by the Indo-Burma Petroleum Company, Limited, dated 19th July 1921 and 10th October 1921 respectively, by the returns of allotment dated 27th July 1921 and 25th October 1921, and by the contracts dated 23rd July and 10th October 1921, involve the receipt by Messrs. Steels of any income, profits or gains within the meaning of section 2, sub-section 15, section 16 and section 12 of the Indian Income Tax Act, 1922, and consequently liable to super-tax] under section 55?"

The learned Commissioner's opinion on the question referred to as required by section 66 of the Income Tax Act is reported below:—

"In the case in point the sum of Rs. 56½ lakhs capitalized was profits in the hands of the Indo-Burma Petroleum Company, Limited, and they had paid income-tax on it. The sum was taken out of profits current and accumulated, a bonus was voted to the share-holders, and the money was appropriated to the payment for new shares issued in satisfaction of the bonus. The bonus shares received by Messrs. Steels were issued in respect of an actual sum of Rs. 28¼ lakhs. *Prima facie*, in receiving these shares, which were saleable and were certainly worth their face value, Messrs. Steels certainly received money's worth. As will be shown below this was the opinion both of the Company at home and of their representatives in Rangoon. The letter dated January 1923 from Messrs. Allan, Charlesworth & Co., show that Messrs. Steels base their claim that the sum of Rs. 28¼ lakhs, being the value of the bonus shares, is not liable to super-tax, on the House of Lords' decision in the case of *Commissioners of Inland Revenue* v. *Blott* (1). In that case Lords Haldane, Finlay and Cave (Lords Dunnedin and Summer dissenting) held that in the circumstances of that case the bonus shares received by John Blott were of the nature of an accretion to capital and that the recipient had not received anything that could be classed as income. The decision in *Commissioners of Inland Revenue* v. *Blott* (1) followed a previous House of Lords' decision in *Bouch* v. *Sproud* (2). A Privy Council decision in *Swan Brewery Co.* v. *King* (3) was differed from; but as will be noted below, there is considerable doubt as to how far the majority Lords in *Commissioners of Inland Revenue* v. *Blott* (1) were aware that they were overruling the principles laid down in *Swan Brewery Co.* v. *King* (3):

My opinion is that the decision in *Commissioners of Inland Revenue* v. *Blott* (1) does not apply, that furthermore if the reasoning of the majority Lords in *Commissioners of Inland Revenue* v. *Blott* (1) be analysed it will be found to be fallacious; and that the present case is governed by the Privy Council ruling in *Swan Brewery Co.* v. *King* (3); and that Messrs. Steels are liable to pay super-tax on the sum of Rs. 28¼ lakhs being the value of the bonus shares received from the

(1) (1921) 2 A. C. 171; 90 L. J. K. B. 1028; 125 L. T. 497; 65 S. J. 642; 37 T. L. R. 762.

(2) (1887) 12 A. C. 385; 56 L. J. Ch. 1037; 57 L. T. 345; 36 W. R. 193.

(3) (1914) A. C. 231; 83 L. J. P. C 134; 110 L T. 211; 30 T. L. R. 199.

Indo-Burma Petroleum Company Limited.

II

The arguments against the application of the principle followed in *Commissioners of Inland Revenue* v. *Blott* (1) to the present case, which are stated at greater length below, may be summarized as follows :—

(*a*) The language of the taxing section involved in *Commissioners of Inland Revenue* v. *Blott* (1) is different to that of the section involved in the present reference.

(*b*) The relations existing between Messrs. Steels and the Indo-Burma Petroleum Company, Limited, make the circumstances of the present case so completely different from the circumstances in respect of which the decision of the majority Lords in *Commissioners of Inland Revenue* v. *Blott* (1) was specifically given that that decision does not apply.

(*c*) The circumstances attending the declaration of the bonus and the issue of the shares, and in particular the fact that Messrs. Steels by crediting the bonus shares to profits and loss and subsequently by taking them into consideration in distributing a dividend have treated the value of the bonus shares as income, differentiate the case entirely from *Commissioners of Inland Revenue* v. *Blott* (1).

(*d*) The reasoning of the majority Lords in *Commissioners of Inland Revenue* v. *Blott* (1) is fallacious. If the facts are analysed it will be seen that in the present case Messrs. Steels in receiving the bonus shares have received a profit or gain and that they are liable to pay income-tax on their value.

(*e*) A necessary step towards the issue of the bonus shares is the distribution, by imputation, to each share-holder of his proportional share of the amount capitalized. This involves the receipt by him of a profit or gain, which is liable to super-tax. There is no justification for disregarding this necessary step.

(*f*) Even if there were, in the case of an individual share-holder, justification for disregarding this necessary step, there is none where the recipient share-holder is a juridical person like a Limited Company.

III (*a*)

The first point to be noticed is that there is a difference between the United Kingdom Act and the Indian Income Tax Act, 1922, in the wording of the relevant portion of the taxing sections. The charging section of the English Act [section 66 of Finance (1909-10) Act 1910, as reproduced later] imposes super-tax 'in respect of the *income* of any individual, the total of which from all sources exceeds' a certain sum. In the Indian Income Tax Act, 1922, the charge-ing section (section 55) imposes an additional duty, (*i.e.* super-tax) in respect of the *total income* of the previous year of any individual, unregistered firm, Hindu undivided family or Company. Section 2 (15) defines "*total income*" as the total amount of income, profits, and gains from all sources to which this Act applies.

The Indian super-tax is charged with reference to an assessee's 'income, profits and gains,' whereas in the United Kingdom super-tax is charged in respect of the income of an individual. The scope of the taxing section in the Indian Act is wider than that of the English Act.

III (*b*)

Even if it were conceded that the principles laid down by the majority of the Lords in *Commissianers of Inland Revenue* v. *Blott* (1) were right as applied to the circumstances in that particular case, the present case differs so much in essentials from *Commissioners of Inland Revenue* v. *Blott* (1) that these principles cannot be held to apply. Of the five noble Lords who gave judgments in *Commissioners of Inland Revenue* v. *Blott* (1) two (Lords Dunnedin and Sumner) were completely against Blott's; and three (Lords Haldane, Finlay and Cave) decided in his favour.

When the individual judgments of the majority Lords are scrutinised in detail it becomes clear that the judgment as a whole has no reference to a case like the case in point. For it is clear throughout that John Blott was merely

an ordinary share-holder, an individual who happens to own certain shares in a particular Company. He had no controlling interest in the Company. On the other hand Messrs. Steels own half the shares in the Indo-Burma Petroleum Company, Limited, the other half being owned by another Limited Company, Messrs Jamals. These two Limited Companies had between them the appointment of the Directorate of the Indo-Burma Petroleum Company.

The following passages from the judgments may be cited as showing that the majority of the Lords in *Commissoners of Inland Revenue* v. *Blott* (1) had in mind, in arriving at their decisions, circumstances entirely different from those in the present case.

Lord Haldane states (*vide* page 182, Volume II, Appeal Cases, 1921) :—

'A share-holder is not entitled to claim that the Company should apply its undivided profits in payment to him as dividend. Whether it must do so or not is matter of internal management to be decided by the majority of the share-holders'.

Lower down (page 184, *ibid*) he states:—

'It is by no means certain that the majority in such a general meeting would consist of persons liable to super-tax and assembling to devise a method of escaping it . . . . . The majority may on any occasion consist of persons who escape from super-tax because their incomes, even with the additions to be derived from the distribution by the company, are below the level required for the tax.'

Lord Finlay discussing the case of *Commissioners of Inland Revenue* v. *Blott* (1) states (page 194, *ibid*) :—

'No option was left to any particular share-holder. He was compelled by the action of the Company to take the preference shares.'

Lord Cave explicitly states :—

'I think it right to add that if in the present case [as in *Bouch* v. *Sproud* (2)] an option had been given to the share-holders to take or refuse the bonus shares, different considerations would have arisen ; and I desire to reserve my judgment as to the effect of such an option upon the liability to tax.'

The above passages show clearly that the majority of the Lords in *Commissioners of Inland Revenue* v. *Blott* (1) had in mind an individual share-holder who had no controlling interest in the Company. The reverse is the case in the present case. The two limited companies which between them owned all the shares in the Indo-Burma Petroleum Company, Limited, and appointed the Directorate, could, as they wished, have distributed their surplus profits either as dividends or bonus shares. They had complete control over the doings of the Indo-Burma Petroleum Company. Messrs. Steels and Messrs. Jamals undoubtedly had the option of taking the money as dividends or through the medium of bonus shares. This in itself differentiates the present case from the case of *Commissioners of Inland Revenue* v. *Blott* (1) to such an extent that the same principles do not apply. This *dictum* of Lord Cave's quoted specifically rules out a case like the present case from the scope of the principle laid down in *Commissioners of Inland Revenue* v. *Blott* (1). A further point of difference between *Commissioners of Inland Revenue* v. *Blott* (1) and the present case is that in *Commissioners of Inland Revenue* v. *Blott* (1) the bonus shares issued were part of capital previously authorised but as yet unissued. In the case in point prior to the declaration of the first instalment of the bonus on July 1921 the Indo-Burma Petroleum Company, Limited, had not the power to "capitalize" profits or reserves. This power was assumed by a special resolution amending the Articles of Association passed at a meeting on 29th June 1921 and confirmed on July 19th, 1921. The authorised capital of the Company had up till June 1921 been Rs. 1,00,00,000 of which Rs. 93,38,000 had been issued. The amount of unissued capital would not have permitted the capitalization of the Rs. 31·5 lakhs capitalized by the resolution of 19th July 1921. But just prior to this a special resolution passed at a meeting on 18th May 1921 and confirmed at a meeting on 2nd

June 1921 had increased the capital of the Company from Rs. 1,00,00,000 to Rs. 2,00,00,000.

The next set of arguments against the application to the present case of the principles laid down in *Commissioners of Inland Revenue* v. *Blott* (1) is that Messrs. Steels have themselves treated the value of the bonus shares as a profit. It must first be noted that the intention of the Indo-Burma Petroleum Company, Limited, in declaring the bonus apparently was that the bonus should be income. The words of the resolution authorising the bonus show this:—

'.....that that sum be distributed as bonus free of income-tax.. .....'

It is to be remembered that the present appellants, Messrs. Steels themselves, supplied half the Directorate of the Indo-Burma Petroleum Company, Limited.

The manner in which the present question was raised is significant. Messrs. Steel Brothers & Company, Limited, in their accounts treated the value of the bonus shares as a profit. The value of the bonus shares was taken into account by showing it in the Profit and Loss Account as a profit received. This was done in the accounts prepared in London. The assessment in Rangoon was made after Messrs. Steels' representative had had several interviews with the Income Tax Officer. The details of the assessment were fixed up between the Income Tax Officer and Messrs. Steels' representative before Messrs. Steels made a formal return. When the formal return was made Messrs. Steels also filed a *pro forma* assessment. The actual assessment finally made was practically the same as the *pro forma* assessment put in by Messrs. Steels. At none of the preliminary meetings was any question raised as to Messrs. Steels' liability to pay super-tax on the value of the bonus shares. In the return of income and in the *pro forma* assessment the value of the bonus shares—Rs. 28¼ lakhs—was included in Messrs. Steels' income. The point is of significance as showing that the ordinary unsophisticated business man regarded the value of the bonus shares as income, and income liable to tax. The assessment was finally made on 9th January 1923. It was not till seventeen days later that Messrs. Steels having presumably in the meantime received enlightenment from some quarter, raised the question as to whether or not the value of the bonus shares was liable to super-tax.

However, the main point raised in this paragraph is this: that Messrs. Steels having in general meeting passed the account in which the value of the bonus shares is treated as a profit, have irrevocably, so far as the Company is concerned, stamped the sum in question with the character of profits.

The Company in general meeting having thus declared the amount now in question to be profits, I cannot see that the executive of the Company is competent now to plead that this amount is not profits.

An examination of the Profits and Loss Account shows that not only was this sum of Rs. 28¼ lakhs taken into account as a profit received but that if this sum had not been so taken into account, Messrs. Steels would not have been able to pay so large a dividend.

The value of the bonus shares formed part of the fund from which Messrs. Steels paid their dividend.

Article 129 of the Articles of Association of Messrs. Steel Brothers & Company, Limited, is as follows:—

'No dividend shall be payable except out of the profits of the Company and no dividend shall carry interest.'

It may be argued that the manner in which a Company in its account deals with a particular sum of money does not determine the nature of that sum of money as regards its liability to taxation. The reply to this argument is that the ruling in *Commisssoners of Inland Revenue* v. *Blott* (1) is to the effect that a Company can decide what is to be the nature of certain of its profits as regards liability to taxation. According to *Commissioners of Inland Revenue* v. *Blott* (1) in the present instance, the Indo-Burma Petroleum Company have stamped the sum of Rs. 28¼ lakhs with the character of

capital, and Messrs. Steels have received neither money nor money's worth. As a matter of hard fact, on the other land, Messrs. Steels have declared this sum of Rs. 28¼ lakhs to be profit and taken it into account as such and proceeded to distribute it as a dividend.

I cannot see any reason why for the purpose of deciding the question of liabilitiy or non-liability to super-tax, the distributing Company should be dominant, any more than the recipient Company.

III (*d*)

At the end of the previous paragraph it was shown that the application to the present case of the principle laid down in *Commissioners of Inland Revenue* v. *Blott* (1) leads to an incongruity. According to the ruling in *Commissioners of Inland Revenue* v. *Blott* (1) the Indo-Burma Petroleum Company, Limited, declared validly against all the world, that the sum of Rs. 28¼ lakhs at present in question was capital. Messrs. Steels had received neither money nor money's worth. And Messrs. Steels, equally validly against all the world, have declared that this sum is income and proceeded to take it into account in distributing a dividend. There is a complete incongruity.

The majority Lords in *Commissioners of Inland Revenue* v. *Blott* (1) say that Messrs. Steels in receiving the bonus shares have received neither money nor money's worth. Yet Messrs. Steels, one of the largest concerns in India, in their accounts which, be it noted, were prepared by a leading London firm of Chartered Accountants, show the value of the bonus shares a profit received and take it into account in order to distribute a dividend. Their representative in Rangoon, in submitting the firm's return for income-tax purposes included the value of the bonus shares in the income received.

The inevitable conclusion, it is submitted, is that the decision of the majority Lords in *Commisstoners of Inland Revenue* v. *Blott* (1) is not in accordance with the facts and that the reasoning is fallacious. One may take this line with more boldness as the noble Lords who passed orders in *Commissioners of Inland Revenue* v. *Blott* (1) take exactly opposite views on a question of fact regarding one of the previous rulings referred to in the judgment, *viz.*, that in *Swan Brewery Co.* v. *King* (3). The point in question is as follows:—

Lord Haldane held that the finding in that case turned on the fact that in the relevent part of the Statute concerned (The Dividend Duties Act, 1902, of Western Australia) the word 'advantage' is used.

As quoted on page 188 of Volume II of Appeal Cases, 1921, Lord Haldane states: 'What is clear is that the wide character of the word 'advantages' was a primary consideration in what was said by their Lordships who took part in advising His Majesty.'

Lord Dunedin—*vide* page 203, *ibid*—is of the same opinion.

On the very same point Lord Sumner states (*vide* page 217 *ibid*):—

'That case did not turn on the special definition of dividend in the Taxing Statute of West Australia.'

The judgment in *Swan Brewery Co.* v. *King* (3) can be read in a few minutes. A perusal will show that the case did not turn on the word 'advantage.'

The question given shows that it was not at all clear to what extent the principle involved in *Swan Brewery Co.* v. *King* (3) was being differed from. Nor yet is it clear how far *Commissioners of Inland Revenue* v. *Blott* (1) confirms the principle laid down in *Bouch* v. *Sproud* (2). Lords Dunedin and Sumner held that *Bouch* v. *Sproud* (2) did not apply. In a passage already quoted Lord Cave differentiated the case of *Commissioners of Inland Revenue* v. *Blott* (1) from *Bouch* v. *Sproud* (2). The passage is: 'I think it right to add that if in the present case [as in *Bouch* v. *Sproud* (2)] an option had been given to the share-holders to take or refuse the bonus shares, different considerations would have arisen; and I desire to reserve my judgment as to the effect of such an option upon the liability to tax.'

Surely the effect of this passage is that Lord Cave did not consider that the case of *Commissioners of Inland Revenue* v.

Blott (1) was governed by the decision in *Bouch* v. *Sproud* (2). The fact is that it is not clear how far the majority Lords in *Commissioners of Inland Revenue* v. *Blott* (1) were consciously differing from the decision in *Swan Brewery Co.* v. *King* (3). Nor yet how far they regarded the point at issue in *Commissioners of Inland Revenue* v. *Blott* (1) as previously decided by *Bouch* v. *Sproud* (2) is further justification for a critical attitude towards the decision of the majority Lords in *Commissioners of Inland Revenue* v. *Blott* (1).

The gist of the ruling in *Commissioners of Inland Revenue* v. *Blott* (1) is that when bonus shares are issued there is merely an appreciation of the capital of the recipient share-holder but he received nothing that can be classed as income. In examining the decision in *Commissioners of Inland Revenue* v. *Blott* (1) it must be kept clearly in mind that the liability of a share-holder who receives bonus shares to pay super-tax on their value depends solely on whether or not in receiving the bonus share, he has received, as distinct from his capital, either money or money's worth. If this criterion be adhered to, some of the *dicta* in the judgments in *Commissioners of Inland Revenue* v. *Blott* (1) are seen to be irrelevant. It is stated for instance, that when bonus shares are issued what might have gone to the share-holder as dividend has gone to increase the capital of the Company. But surely the fact that the Company has not parted with any of its assets is quite compatible with the share-holders having received a profit or gain. It is true that the Company has retained the money capitalized. But the bonus shares have a value. In receiving the bonus shares the share-holder receives money's worth. The fact that the Company has not parted with any of its assets is quite irrelevant so far as the liability or otherwise of the share-holders to pay super-tax on the value of the bonus shares is concerned.

It is also said that when the bonus shares are issued to share-holders the new shares do not give the share-holder an immediate right to a larger amount of the existing assets. The new shares, it is argued, together with the old ones entitle him merely to the same amount of the existing assets as he was entitled to by the old shares before the issue of the bonus shares. This is so far true. It must be pointed out, however, that exactly the same is true of a dividend. After the declaration of a dividend the dividend-warrant of any share-holder taken together with the shares entitle him only to the same amount of the existing assets as, prior to the declaration of the dividend, he was entitled to by reason of his shares alone. The significant point, for our present purpose, is that when a dividend is paid, the share-holder receives something quite separate from and above and beyond his capital as represented by his shares. The processes which lead up to the paying of a dividend are as follows:—

'A Company begins a successful year with a certain amount of assets. At the end of the year these assets have increased. The extent of the increase can only be ascertained after an account has been taken. By the process of accounting the increased amount of assets at the end of the year is divided up into the assets with which the Company started (the capital) and the profit. The profit is separated out after precautions are taken, by allowing for depreciation, for doubtful debts, etc., for ensuring that, so far forth the original assets (the capital) is left intact. The profits are what is left over when all provision has been made for ensuring that the original capital, *cateris paribus*, is undiminished. In India the Company pays income-tax on its profit. Out of its profits, current or accumulated, the Company pays a dividend. When the share-holder receives a dividend he receives something separate from and in addition to his capital as represented by his shares. He has received a 'profit' or 'gain,' or 'income'. This is liable to income-tax. Accordingly under section 16 of the Indian Income Tax Act, 1922, sums received as dividends are included in the total income of an assessee and in his assessment he is given credit for the amount paid by the Company. When

a dividend is paid, the share-holder receives a dividend-warrant which he can encash.

It appears to me that all the essential factors which make dividends liable to income-tax and super-tax are present in the case of an issue of bonus shares like the present. To begin with the fund which is capitalized was profits. The Company has paid income-tax on these profits. These profits had been separated off from the capital, which after they had been separated off, was still, so far forth, undiminished. The value of the bonus shares falling to each share-holder is the portion of the total amount capitalized proportionate to his holding in the Company. The bonus shares are realizable quite apart from the share-holder's original shares. He can sell his bonus shares and still have his capital as represented by his original shares intact. I do not see, therefore, that it can be held that a share-holder who receives bonus shares has not received money or money's worth. In the present case Messrs. Steels having their capital, invested in the Indo-Burma Petroleum Company, Limited, intact received in addition thereto bonus shares to the value of Rs. 28¼ lakhs. Surely this is obviously a profit or gain. That it was so is shown by the fact that Messrs. Steels took the value of these shares into account in their Profit and Loss Account. It is to be noted that it is not necessary that what the share-holder receives should be cash. Even in the United Kingdom if the shares distributed by the Indo-Burma Petroleum Company, Limited, had been shares in another Company, Messrs. Steels would have been liable to pay super-tax on the value of these shares—*vide* the ruling in *Pool* v. *The Guardian Investment Trust Co.* (4). There does not appear to be, so far as income-tax purposes are concerned, any difference between its own shares which a Company distributes to a share-holder as a bonus and shares in another Company which it similarly distributes. Both alike are equally separate from and in addition to the share-holder's capital as represented by his original shares. Both are therefore to the share-holder a 'profit' or 'gain' or 'income.' The same process of sale is necessary before the shares in either case can be turned into money.

The present case is simplified by the fact that Messrs. Steels have, since the formation of the Indo-Burma Petroleum Company, Limited, in 1909, held practically the same holding in the Company right up till the end of the period which is concerned in the present reference.

III (*e*)

In the preceding paragraph it has been shown, quite apart from the machinery used in issuing the bonus shares, that the bonus shares are a 'profit' or 'gain'. Another line of argument is that adopted by the dissentient Lords—Lords Sumner and Dunedin—in *Commissioners of Inland Revenue* v. *Blott* (1). This line of argument is that in order to effect the issue of the bonus shares two steps are necessary:—

(1) the distribution by imputation of a sum of money to the share-holders,

(2) the application of the money so imputed to the payment of the bonus shares,

Lord Dunedin states the case concisely:—

'The Company cannot issue the shares for nothing. They must be paid for in money or, under certain conditions, in money's worth. Furthermore, the Company cannot itself provide, the money to pay for the new shares. If it did so, it would do what is equivalent to buying its own shares, and that it cannot do: *Trevor* v. *Whitworth* (5).'

Accordingly a necessary step to the issue of the bonus shares is the distribution, by imputation, to each share-holder of his proportional share of the amount capitalized. This amounts to the receipt by the share-holder of this particular sum of money. The share-holder receives a 'profit' or 'gain' which is liable

(4) (1922) 1 K. B. 347; 91 L. J. K. B. 242; 126 L. T. 540; 8 Tax. Cas. 167; 38 T. L. R. 177.

(5) (1887) 12 A. C. 409; 57 L. J. Ch. 28; 57 L. T. 457; 36 W. R. 145

to income-tax and, if the total income of the share-holder in question is above the requisite minimum, to super-tax. The fact that the amount capitalized is credited, in their several appropriate amounts, to the share-holders, is not affected by the fact that the share-holders are bound by the decision of the Company as to the manner in which such money will be utilized.

In the present case—*vide* the resolution cited in the statement of facts—the Indo-Burma Petroleum Company, Limited, decided that the two sums of money, of which the sum of Rs. 28¼ lakhs now in question is one moiety, should be distributed to the share-holders as a bonus. The returns of allotment filed show that the consideration for which the shares were allotted was the satisfaction of the bonus in question. The procedure folllowed—and it was the inevitable, necessary procedure—involved the payment by imputation, of the amounts in question to the share-holders. The receipt by the share-holders of such moneys rendered them liable to pay super-tax on them.

In the case *Bouch* v. *Sproud* (2), which the majority of the Lords in *Commissioners of Inland Revenue* v. *Blott* (1) followed, the Company actually issued a warrant for the amount distributed as bonus. The fact that as a necessary step to the issue of the bonus shares, payment, by imputation or otherwise of his proportional amount must be made to each share-holder was got round by disregarding the actual processes followed and regarding solely the substance of the whole transactions, which was that a sum which had been available for distribution as dividends had been added back to capital. This procedure may have been justifiable in deciding a question between a tenant-for-life and a remainder-man. It does not appear to be justifiable in deciding a question of liability to income-tax or super-tax where the question at issue is whether or not an assessee received anything amounting to a profit or gain.

III (*f*)

A further consideration is this: in the judgments of the three Lords who decided against the Crown in *Commissioners of Inland Revenue* v. *Blott* (1), as in the previous judgment *Bouch* v. *Sproud* (2) which they followed, the principle adopted was that it was necessary to look, not at the form of the processes by which the bonus shares were issued, but at the substance. Admittedly the form of the transactions involved was

(1) the distribution of a sum of money as a bonus to the share-holders,

(2) the issue of bonus shares in satisfaction of that bonus. The distribution of the bonus unquestionably involves the receipt by the share-holder of "profits" or "gains". But according to the principle followed in *Bouch* v. *Sproud* (2) and by the majority of Lords in *Commissioners of Inland Revenue* v. *Blott* (1) one must look not at the form but at the substance of the transactions. This in net effect was that a certain amount of money available for dividends was added to capital; the share-holders getting nothing that could be classed as "income". Whatever justification there may have been for this view taken either in *Commissioners of Inland Revenue* v. *Blott* (1) or in the case *Bouch* v. *Sproud* (2) .the circumstances of the present case require that the actual formal process followed should alone be taken into consideration. As has been shown above, John Blott was an ordinary share-holder with no controlling interest in the Company concerned in his case. The tenant-for-life in *Bouch* v. *Sproud* (2) was in a similar position.

In the present case Messrs. Steels are not, as regards their holding in the Indo-Burma Petroleum Company, Limited, in the position of ordinary share-holders. They owned half the shares, the other half being held by another Limited Company. There were provisions in the Articles of Association reserving to Messrs. Steels and to Messrs. Jamal Brothers and Company, Limited, rights controlling the

transfer of shares to outsiders, and also controlling the Directorate. Both Messrs. Steels and Messrs. Jamal Brothers and Company were precluded from engaging in any other oil-business and, without the consent of the Indo-Burma Petroleum Company, Limited, even from holding shares in another oil Company. By the Articles of Association the Mangaing Agency of the Indo-Burma Petroleum Company, Limited, was reserved to Messrs. Steels. As set out in the statement of the facts of this case, Messrs. Steels carry on some branches of their business directly while other branches are carried on through the agency of Limited Companies. Thus Messrs. Steels own all the shares in the Burma Company Limited, a Company whose business is rice-milling except five shares (out of 22,500) which are held by Directors or Managers of Messrs. Steels. Messrs. Steels are in a similar position as regards Messrs. George Gordon & Company (Burma), Limited, a Company whose business is insurance.

"Messrs. Steels are not in the position of ordinary share-holders as regards either the Burma Company, Limited, Messrs. George Gordon and Company (Burma), Limited, or the Indo-Burma Petroleum Company, Limited. The truth is that these subordinate limited companies are artificial devices through which Messrs. Steels find it convenient to carry on different branches of their business. These subordinate companies are artificial devices. Their status, powers and duties are those formally fixed by Statute. Formal procedure is of the essence of their being. In their case, whatever may be true in the case of individuals like John Blott, there is no justification for looking away from the form of the processes by which the bonus shares were issued and regarding only the net effect of the processes. The parties concerned are all juridical persons and as such, their whole existence is regulated by Statute. There is, therefore, no justification for disregarding the formal steps in the procedure."

Mr. *McDonnell*, for the Applicants.

Mr. *Higinbotham*, Government Advocate, (with him Mr. *Allan Keith*), for the Crown.

JUDGMENT.

Robinson, C. J.—This is a reference by the Commissioner of Income Tax, and the question referred is :—

"Did the transactions evidenced by the resolutions passed by the Indo-Burma Petroleum Company, Limited, dated 19th July 1921, and 10th October 1921 respectively by the returns of allotment dated 27th July 1921 and 25th October 1921, and by the contracts dated 23rd July and 10th October 1921, involve the receipt by Messrs. Steels of any income, profits or gains within the meaning of section 2, sub-section (15), section 16 and section 12 of the Indian Income Tax Act, 1922, and consequently, liable to super-tax under section 55?"

The Indo-Burma Petroleum Company, Limited, is a Company consisting, in effect, of two share-holders only, namely, Messrs. Steel Brothers and Company, Limited, and Messrs. Jamal Brothers and Company, Limited. There are a few other share-holders—nominees of these two compaines—who hold shares for the purposes of the Companies Act. But we may treat this reference as if there were only two share-holders holding an equal number of shares each in the Company.

During 1921, the Indo-Burma Petroleum Company, Limited, capitalized a sum of Rupees fifty-six and a half lakhs, being part of their profits, accumulated and current, and issued bonus shares for this amount. Messrs. Steel Brothers and Company, Limited, received bonus shares to the value of Rupees twenty-eight and a quarter lakhs.

The question is whether these bonus shares are income, profits or gains on which, subject to the provisions of the Act, Messrs. Steel Brothers and Company, Limited, can be called upon to pay super-tax.

Acting in accordance with the powers conferred by their Articles of Association, the Indo-Burma Petroleum Company, Limited, increased their capital, and then proceeded to pass resolutions authorizing the issue of bonus shares

with the object of transferring the accumulated profits of the Company to capital. There were two resolutions in respect of two sums, but the resolutions are the same, and it will be sufficient if I set out the first resolution :—

"That this meeting pursuant to Article 105A directs—That it is desirable to capitalize the sum of Rs. 31,50,000, being part of the undivided profits of the Company standing to the credit of the Company's Profit and Loss Account on the 31st December 1920, and since carried into Reserve Fund and accordingly that that sum be distributed as a bonus free of income-tax amongst the holders of the ordinary shares or their nominees in proportion to the ordinary shares held by them respectively and that the Directors be authorized to distribute amongst them 31,500 of the unissued Rs. 100 shares credited as fully paid in like proportions in satisfactton of such bonus."

The resolutions were carried, and the bonus shares were issued.

We have been referred to several authorities :—

Bouch v. *Sproud* (2), *Swan Brewery Co.* v. *King* (3) and *Commissioners of Inland Revenue* v. *Blott* (6). This last case was first heard by Rowlatt, J., whose judgment is to be found in Law Reports, (1920) 1 King's Bench Division, page 114. The appeal is to be found in Law Reports, (1920) 2 King's Bench Division, page 657 [*Commissioners of Inland Revenue* v. *Blott* (7)]. The case was taken to the House of Lords whose decision is to be found in *Commissioners of Inland Revenue* v. *Blott* (1).

The decision of their Lordships of the Privy Council in the *Swan Brewery Co.* v. *King* (3), if applicable to the facts of the present case, is binding on us. It is impossile to reconcile that decision with the decision in *Bouch* v. *Sproud* (2) or with the decision in *Commissioners of Inland Revenue* v. *Blott* (1). I propose, therefore, first of all, to consider how far the *Swan Brewery Co.* v. *King* (3) was a decision under a special Act, and whether it can be distinguished from the present case on that ground. The matter is rendered specially difficult, because the learned Lord who delivered the judgment in the Privy Council case was also one of the Law Lords who delivered the judgment in the House of Lords in *Commissioners of Inland Revenue* v. *Blott* (1). He there stated (page 217): "Having arrived at this conclusion on the general law of statutory companies as now settled by decisions, I turn to the case of *Swan Brewery Co.* v. *King* (3) I have re-examined the case of the appellants and the respondents represented to the Privy Council and the record on that appeal, the report in the Court below, and the Companies Act of West Australia applicable to the case, that of 1893. I am quite clearly of opinion that what was said by the Judicial Committee, as to the effect in law and in business of a distribution of bonus shares, was part of the decision and cannot be distinguished from the present case. Of course it does not bind your Lordships, but I think it ought to be followed by all who do not feel themselves prepared to say, that it was wrong and to say clearly why it was wrong. That case did not turn on the special definition of dividend in the Taxing Statute of West Australia." He further said : "*Bouch* v. *Sproud* (2) was cited and was considered. The passage in question was an essential part of the decision. It is in point now and I adhere to it. My Lords, no authority has been cited to the contrary of the proposition laid down in the *Swan Brewery Co.* v. *King* (3) apart from *Bouch* v. *Sproud* (2) and, with all respect to the Court of Appeal, I do not think there is anything in the opinions there expressed which really touches the present case." Sir Robert Finlay, K. C., as he then was, argued the case for the appellants before the Privy Council, and he is recorded to have stated in argument (page 233): "The decisions in cases as between a tenant-for-life and a remainder-man, such as *Bouch* v. *Sproud* (2) etc., are not applicable to the case, which depends entirely upon the construction of the Statutes."

There is no reference in the judgment

(6) (1920) 1 K. B. 114; 89 L. J. K. B. 58.
(7) (1920) 2 K. B. 657; 89 L. J. K. 677; 123 L. T. 516; 64 S. J. 348; 36 T. L. R. 575.

delivered by Lord Sumner to *Bouch* v. *Sproud* (2), that it was referred to is clear; that it was considered, we have the word of Lord Sumner. But there is nothing in the judgment to show why it was held to be inapplicable. So far as the judgment itself goes, it refers throughout, except for a passage at the very end, to which I shall presently refer, to refer to the Dividend Duties Act of Western Australia, and to the special definition of the word "dividend" therein, and it emphasizes in particular the word "advantage" which forms part of that definition. Lord Sumner said (page 234): "In ordinary language the new shares would not be called a dividend, nor would the allotment of them be a distribution of a dividend. The question in issue here is whether or not the new shares were a dividend under the Act above mentioned." He then quotes the definition of the word "dividend" and goes on: "The new shares were intended to be and were distributed among the share-holders; they were intended to be and doubtless are advantages to the allottees. The Supreme Court of Western Australia held that they were dividends within the meaning of the Act, and that duty was payable on their amount or value accordingly." Then, after setting forth the argument for the appellants, the judgment goes on (pages 235, 236): "There can be no doubt that the new shares were distributed and were not the same things as the old ones. They certainly were supposed to be advantages to the members of the Company, none-the-less that the making of the issue was probably an advantage to the Company also. In so flourishing a business doubtless they really were advantages." And then comes the passage to which I have referred above: "True, that in a sense it was all one transaction, but that is an ambiguous expression. In business, as in contemplation of law, there were two transactions, the creation and issue of new shares on the Company's part, and on the allottees' part the satisfaction of the liability to pay for them by acquiescing in such a transfer from reserve to share capital as put an end to any participation in the sum of £ 101,450 in right of the old shares, and created instead a right of general participation in the Company profits and assets in right of the new shares, without any further liability to make a cash contribution in respect of them. In the words of Parker, C. J., 'Had the Company distributed the £101,450 among the share-holders and had the share-holders re-paid such sums to the Company as the price of the 81,160 new shares, the duty on the £101,450 would clearly have been payable. Is not this virtually the effect of what was actually done? I think it is'."

This decision appears to me to be in direct conflict with the decision of the House of Lords in *Bouch* v. *Sproud* (2) and the question whether it was a decision based on the special wording of the West Australia Act or not was considered by all the learned Judges who dealt with *Commissioners of Inland Revenue* v. *Blott* (6). Mr. Justice Rowlatt, in the First Court, referring to it said (page 134): "There it was held that a share-holder receiving bonus shares, as in the present case, was receiving an advantage within the meaning of a highly artificial definition of the word 'dividend' in a Colonial Act notwithstanding that his proportionate interest in the assets of the Company remained the same after the transaction as it had been before. It was further recognized that such advantage was the same as that which he would have received, if he had been paid the bonus in cash and expended it in subscribing for the new shares. Here the question is whether he has been paid and in my opinion the decision has but little, if any, bearing." In the Court of Appeal [*Commissioners of Inland Revenue* v. *Blott* (7)] the Master of the Rolls said (pages 664, 665): "I have, however, felt great difficulty about *Swan Brewery Co.* v. *King* (3) where Lord Sumner, delivering the judgment of Lord Moulton, Lord Parker of Waddington and himself, said that in a transaction similar to this the shares in ordinary language would not be called a dividend nor would the allotment of them be the dis-

tribution of a dividend, but in another part of his judgment, that both in business and in law the share-holder received so much dividend out of undivided profits, and then used it in paying up the new shares. The actual decision was upon the special words of a Colonial Act containing what Rowlatt, J., calls a highly artificial definition of the word 'dividend,' and the learned Judge distinguished the case on that ground. Lord Sumner also stated that the question turned merely on the construction of a particular Act, and the case may be distinguishable from *Bouch* v. *Sproud* (2) on that ground; but I find it very difficult to reconcile the reasoning of the two cases. If, however, they cannot be reconciled, I consider that we are bound to follow *Bouch* v. *Sproud* (2)." Warrington, L. J., referring to the *Swan Brewery Co.* v. *King* (3) said (pages 670, 671): "The decision itself was on the construction of an Act of Western Australia imposing on a Company declaring a dividend a duty on the amount or value of such dividend and providing that 'dividend' should include ....." and he then quotes the definition. He goes on: "Obviously, therefore, the question for decision was far away from that in the present case. The discussion, both in argument and in the judgment, was mainly on the question whether there was any 'advantage' to anybody in the mere transfer of accumulated profits to capital and the allotment of shares representing the capital; but at the end the judgment contains the following passage....." and he then quotes the passage I have quoted. He goes on: "It was admitted in the argument that *Bouch* v. *Sproud* (2) and cases of that nature were inapplicable to the case under discussion, and I can hardly think that Lord Sumner intended by the expression he used to express a view of his own or to approve of a view of the Chief Justice which would conflict with that expressed by Lord Herschell in *Bouch* v. *Sproud*, (2)."

Scrutton, L. J., referring to the *Swan Brewery Co.* v. *King* (3) stated (pages 673, 674 675): "That case turns on the construction of an Australian Act which taxes 'dividends,' defining them as..... ..... The Privy Council held bonus shares paid up out of accumulated profits to be 'dividends' under that Act, though saying: 'In ordinary language the new shares would not be called a dividend, nor would the allotment of them be the distribution of a dividend.' The judgment states that the question is merely the construction of the particular Act, but Lord Sumner treats the transaction as one, both in business and in law, in which the share-holder receives so much dividend out of undivided profits, and then uses it in paying up the new shares. This decision, of course, is on another Statute, and is not binding on us, though entitled to the greatest respect, ... But it is very difficult to reconcile it with the reasoning of a decision which is binding on us, the decision of the House of Lords in *Bouch* v. *Sproud* (2)..... It appears to me that the reasoning of Lord Sumner in the *Swan Brewery Co.* v. *King* (3) would have led the House of Lords to a different conclusion..... The Privy Council do not state their view of *Bouch* v. *Sproud* (2) probably because for some reason, which I do not understand, Counsel for the appellant treated that decision as irrelevant; but the reasonings of the two cases appear to me to be in conflict, and if so, we are bound by the decision of the House of Lords."

In the House of Lords, Viscount Haldane, dealing with the *Swan Brewery Co.* v. *King* (3) stated (page 188): "But the Taxing Statute was couched in very different language..... There were expressions in the judgment which may be construed as having gone rather further, and treated the payment made by the Company as equivalent in substance to a payment by the Company to the share-holders, and by them back to the Company. It may have been so, and without a fuller knowledge of the facts in the case and of the local law than the report discloses, it is difficult to be quite sure about the point, but what is clear is that the wide character of the word 'advantages' was primary consideration in what was said by their

Lordships who took part in advising His Majesty. I, therefore, do not feel embarrassed by the decision in that case."

Viscount Finlay merely stated (page 199): "I must, however, confess that the reasoning on which the judgment is rested appears to me to be inconsistent with the decision of this House in *Bouch* v. *Sproud* (2)."

Viscount Cave stated (page 202): "In *Swan Brewery Co.* v. *King* (3) it was held that transactions similar to those now in question were, in effect, a declaration of a dividend within the meaning of the Dividend Duties Act, 1902, of Western Australia, and accordingly that duty was payable under that Act. The decision in that case is no doubt fully supported by the definition clause in the Western Australian Act; but if it were not for the definition clause the decision would, I think, be inconsistent with the decision in *Bouch* v. *Sproud* (2)."

Lord Dunedin merely said (page 206): "In conclusion, I would only add that I have in this opinion of set purpose refrained from relying on the *dictum* of Lord Sumner delivering the judgment of the Judicial Committee of the Privy Council in the Australian case, not because I in any way disagree with it, but because I recognize that if it is in conflict with the necessary grounds of decision in *Bouch* v. *Sproud* (2), then as I am sitting in the House I should be bound to follow the latter-mentioned case....."

It is thus clear that all the learned Judges who have considered the Privy Council case have held that it is based on a special Act, although there are some remarks of a general character in the judgment. They all also recognize that, if it was not to be explained as being based on a special Act, it would conflict with the decision in *Bouch* v. *Sproud* (2) as to which Lord Sumner himself stated: (page 219):—

"My Lords, needless to say, I fully accept every thing laid down in *Bouch* v. *Sproud* (2) unreservedly, but I think it is only indirectly a decision upon the power of companies to capitalize undistributed profits and, as regards the steps by which this is or is deemed to be done, it is not a decision at all."

Lord Sumner distinguished *Bouch* v. *Sproud* (2) in *Commissioners of Inland Revenue* v. *Blott* (1), but, as will be seen from the quotations I have already made, that view was not accepted by any of the other Law Lords.

The only conclusion possible, to my mind, on these judgments is that the fact that a decision had to be arrived at in *Bouch* v. *Sproud* (2) for the purpose of deciding a question between a tenant-for-life and a remainder-man in no way affected the decision of the general question as to bonus shares in cases similar to the present one—a fact which had to be decided in that case just as much as it had to be decided in *Commissioners of Inland Revenue* v. *Blott* (1).

I have given the matter my most careful consideration, and in my opinion the *Swan Brewary Co.* v. *King* (3) need not be taken to be a binding authority on us for the purpose of deciding the present reference, because it was a decision based on the special provisions of a particular Act of Western Australia —an opinion in which I am supported by a very large number of authorities.

The question before us, therefore, has been decided twice by the House of Lords, and in each case it has been held that bonus shares, such as were distributed in this case, are not income, profits or gain, and are not, therefore, liable to super-tax.

There can be no question as to what was the object of the Indo-Burma Petroleum Company, Limited, and of its share-holders in passing the resolutions and making the large allotments of shares that they did. They were acting in exercise of the powers conferred by their Articles of Association. Their object was to transfer certain sums standing in their Profit and Loss Account and in their reserves to their capital in order thereby to increase their capital and enable them to use that money as capital for a purpose which they had in mind. There was no intention of paying any dividend to the share-holders. In my opinion the transaction must be regarded

as a whole, and the obvious intention of the Company must be taken into account. There never was, and was never intended to be, any payment at all to the share-holders. No amount whatever was taken from the Company or received by the share-holders. Both the Company and the share-holders were merely adopting a means, in accordance with their Articles of Association, for transferring profits to capital; because of the accretion to the capital effected by the resolutions, there had to be an allotment of shares, and the acceptance of the shares was in no sense the acceptance of an income, profit or gain within the meaning of the Income Tax Act.

It has been argued that the whole of these transactions were effected merely for the purpose of enabling the Indo-Burma Petroleum Company, Limited, to acquire shares in the Attock Oil Company and that, therefore, the effect of the issue of the bonus shares was really equivalent transfer to the share-holders of share in the Attock Oil Company so as to bring the case within the rule in *Pool* v. *The Guardian Investment Trust Co., Limited* (4). I cannot accept this argument at all. No shares in any other Company were transferred to the share-holders; and, furthermore, we are not concerned with what the Company may do with its increased capital, but only with the effect of adopting this method of increasing its capital.

It was further argued that the resolution directs that a sum be capitalized; that that sum be distributed among the share-holders; and that the Directors be directed to distribute it as bonus shares. It is pointed out that the language differs somewhat from the language of the resolution in *Comissioners of Inland Revenue* v. *Blott* (1). The difference appears to me to be slight, and to be one of language only. In *Commissioners of Inland Revenue* v. *Blott* (1) the resolution ran that a bonus at a certain rate be declared, and for the rest, the resolution was the same.

There was, it will be observed, in this case no direction to the Directors to pay any dividend; on the contrary they were directed to distribute the bonus shares, and it, therefore, appears to me to be impossible to hold that there was in effect, a payment to the share-holders, returned immediately by them to the Company in satisfaction of the bonus shares. There was no option left to the share-holders; they had to take the bonus shares; they could not demand any cash payment.

It is said that they had an option, and they exercised it prior to the passing of the resolution. Of course, they had; but we are not concerned with that but with the question whether they had an option, when the bonus shares were presented to them, of refusing them and demanding instead an equivalent in cash.

It is unnecessary for me to recapitulate the arguments that are given much more ably than I could do in the judgments in the cases I have already referred to.

In my opinion, therefore, the question referred should be answered in the negative.

Heald, J.—Up to the 2nd of June 1921 the Indo-Burma Petroleum Company had an authorised capital of one crore of rupees divided into one lakh of Rs. 100 shares of which 94,380 were issued. On the 18th of May 1921 the Company by special resolution resolved to increase its capital to two crores. That special resolution was confirmed on the 2nd of June 1921, so that thenceforward the authorised capital of the Company was two crores, of which nearly one crore was represented by shares already issued. On the 29th of June 1921 the Company by special resolution resolved to add to its Articles of Association a new article authorising a General Meeting of the Company on the recommendation of the Directors to direct capitalisation of the whole or any part of the profits or reserve funds of the Company by the distribution of paid-up shares of the Company among the holders of the ordinary shares of the Company in proportion to the number of shares held by them and directing the Directors to apply such portion of the profits or reserve funds as may be required for the purpose of making payment in full at par for the shares of the Company so distributed. That

resolution was confirmed on the 19th July 1921 and thereafter the Company had power to capitalize its profits or reserve funds by the distribution of shares among its share-holders. On the same date, the 19th of July 1921, the Company resolved to capitalize the sum of 31½ lakhs of rupees out of its reserve fund and to distribute that sum as a bonus free of income-tax amongst the holders of the ordinary shares in proportion to the ordinary shares held by them, and authorised the Directors to distribute amongst the holders of the ordinary shares 31,500 of the unissued Rs. 100 shares, credited as fully paid in the same proportion in satisfaction of such bonus. On the 10th of the October 1921 by an exactly similar resolution the Company resolved to capitalize another 25 lakhs of the reserve fund and to distribute similarly another 25,000 of the unissued shares.

As a result of those resolutions Messrs. Steel Brothers & Company, Limited, received shares in satisfaction of bonus to the amount of Rs. 28¼ lakhs, and the question which we have to decide is whether or not those shares represented "income, profit or gains" within the meaning of those words in the Indian Income Tax Act (XI of 1922).

A somewhat similar question was decided by their Lordships of the Privy Council in 1913 in the case of *Swan Brewery Co.* v. *King* (3).

That Company, like the Indo-Burma Petroleum Company, resolved to increase its capital, and did increase it by £ 101,450. It then resolved that £ 101,450 out of its reserve fund should be transferred to the share capital account to represent the capital value of the new shares. It also authorised its Directors to allot the new shares *pro rata* amongst the existing ordinary share-holders of the Company in consideration of the sum of £ 101,450 transferred to the capital account from the reserve fund which, it is to be noted, represented accumulated profits, exactly as it did in the present case. In Western Australia a Dividend Duties Act provided for the levy of a duty on "dividends" and defined or described "dividends" as including "every dividend, profit, advantage, or gain intended to be paid or distributed among any members . . . . of any Company." What, therefore, the Privy Council had to decide was whether or not shares distributed in the same manner and by the same procedure as the shares in this case were a dividend, profit, advantage or gain intended to be paid or credited to or distributed among the share-holders. Their Lordships held that the shares were an "advantage" distributed among the share-holders and were, therefore, liable to the tax. They said: "There can be no doubt that the new shares were distributed and were not the same thing as the old ones. They certainly were supposed to be advantages to the members of the Company . . In so flourishing a business doubtless they really were advantages. The new shares were credited as fully paid, and what is more they were fully paid, for after the allotment the Company held £ 101,450 as capital produced by the issue of those shares and for that consideration, and no longer as an undivided part of its accumulated reserve fund. True, that in a sense it was all one transaction, but that is an ambiguous expression. In business, as in contemplation of law, there were two transactions, the creation and issue of new shares on the Company's part, and on the allottees' part the satisfaction of the liability to pay for them by acquiescing in such a transfer from reserve to share capital as put an end to any participation in the sum of £ 101,450 in right of the old shares, and created instead a right of general participation in the Company's profits and assets in right of the new shares without any further liability to make a cash contribution in respect of them." It was on this reasoning that their Lordships decided that the shares were an "advantage" distributed to the share-holders and so were liable to duty as a "dividend."

But in the case of the *Commissioners of Inland Revenue* v. *Blott* (1), the House of Lords decided that shares similarly distributed were not income but were an addition to capital and so were not assess-

able under the English Income Tax (or Super Tax) Acts.

These two decisions can hardly be reconciled and if we follow one of them we are bound to answer the reference in the affirmative while if we follow the other we must answer it in the negative.

The only question to be decided, therefore, is which of them we are to follow.

We are bound to follow the decision of the Privy Council if that decision is applicable to the case before us and we ought to follow the decision of the House of Lords if the decision of the Privy Council is not applicable and that of the House of Lords is.

The House of Lords considered the Privy Council decision, and distinguished it from *Commissioners of Inland Revenue* v. *Blott* (1) on the ground as Lord Haldane put it, that it was a decision on a Taxing Statute which was couched in very different languge from the English Act which the House was considering. But it must be remembered that the House of Lords was not bound by the decision of the Privy Council while we are bound by it, and I do not think that a mere difference in the purpose for which the decision on the facts is necessary would warrant us in coming to a decision which was different from that of the Privy Council on the same facts. The purpose of the decision in *Bouch* v. *Sproud* (2) was that Lord Herschell himself called the "artificial" division of the enjoyment of property between a tenant-for-life and remainder-man and there were special difficulties in that case because it was not clear what part of the accumulated profits with which that case was concerned had been earned before the death of the testator. Nevertheless the House of Lords felt itself bound by that decision in *Commissioners of Inland Revenue* v. *Blott* (1), which was a decision on a Taxing Statute couched in very different language from the law for division between a tenant-for-life and remainder-man and in which no such difficulties arose. The present case and the *Swan Brewery Co.* v. *King* (3) are both on Taxing Statutes couched in very similar language, and although the definition or description of dividend in the Colonial Act may be, as Mr. Justice Rowlatt said "highly artificial" the description of "income" in the Indian Income Tax Act is similarly artificial, so that it seems clear that there is a much closer analogy between the present case and the *Swan Brewery Co.* v. *King* (3) than there was between *Commissioners of Inland Revenue* v. *Blott* (1) and *Bouch* v. *Sproud* (2). If, therefore, in *Commissioners of Inland Revenue* v. *Blott* (1) the House of Lords felt itself bound to follow *Bouch* v. *Sproud* (2) we can hardly avoid the conclusion that in this case we are bound to follow the *Swan Brewery Co.* v. *King* (3) to the full extent to which it goes.

I have considered whether this case can be distinguished from the Privy Council case on the ground that it was not necessary for their Lordships to decide more than that the shares were dividend "intended to be paid or credited or distributed," but it seems clear that what their Lordships decided, on facts which were essentially similar to those of the present case was that the shares were an "advantage" actually distributed to the share-holders, so that if the question which we had to decide in the present case was whether or not the shares represented such "advantages" we could hardly avoid an affirmative answer.

But the word "advantage" does not appear in the provisions of the Income Tax Act which we are considering and, therefore, we have to decide whether the difference in meaning between the words "advantage" and "gains" is such that although the Privy Council has found such shares to be "advantages" we should be justified in finding that they were not "gains."

In *Commissioners of Inland Revenue* v. *Blott* (1) Lord Haldane said that it was clear that the wide character of the word "advantages" was a primary consideration in what was said by the Privy Council in the *Swan Brewery Co.* v. *King* (3), and it must be admitted that the meaning of the word "advantage" as used in the Australian Dividend Duties Act was probably wider than that of the word "gain" as used in the same Act.

I have little doubt that the meaning to be attached to the word "gains" in

the Income Tax Act is to some extent artificial since it could hardly be read as including what might be called intangible gains.

Webster's Dictionary defines "gains," as "profits in the form of sums of money or acquired assets arising from business transactions or dealings" and although it is possible that in the Income Tax Act "gains" are not restricted to business profits, I think, that they must be restricted to "profits in the form of money or acquired assets."

I think, therefore, that it does not follow that because the Privy Council found that shares distributed in the same way as the shares in this case were distributed were "advantages" to the share-holders, we are bound to find that they represented "gains". If the matter had been *res integra* I should, I must admit, have felt justified in going a step further than the Privy Council actually went in the *Swan Brewery Co.* v. *King* (3) and in finding on the reasoning of the Privy Council in that case that the shares in this case represented not only "advantages" but actual "gains" received by Messrs. Steel Brothers and Company, Limited, but I feel that I am precluded by the decision of the House of Lords in *Commissioners of Inland Revenue* v. *Blott* (1) from taking that further step and that in accordance with the decision of the House of Lords I must hold that the shares did not represent "gains" within the meaning of the Indian Income Tax Act.

I would accordingly answer the reference by saying that in my opinion the transactions mentioned in the Order of Reference did not involve the receipt by Messrs. Steel Brothers and Company of "income profits or gains" within the meaning of section (2) (15) and section 12 of the Indian Income Tax Act or within the meaning of "total income" in section 16 of the Act.

Beasley, J.—In my opinion the only point to be considered on the question referred to us is whether we are bound by the decision of the Privy Council in the case of the *Swan Brewery Co.* v. *King* (3) or whether we can and ought to follow the judgment of the House of Lords in the *Commissioners of Inland Revenue* v. *Blott* (1).

The facts in *Commissioners of Inland Revenue* v. *Blott* (1) are identical with those in the case before us and the facts in the *Swan Brewery Co.* v. *King* (3) are very similar; but the Taxing Statute, *viz.*, the Dividend Duties Amendment Act, 1906, of Western Australia, is differently worded to the Taxing Statutes both in India and in England, and the question is whether the decision of the Privy Council was a decision based upon the construction of that particular Act, or whether it was of wider and more general application. In the latter case undoubtly we are bound by that decision, but in the former case we are not bound by it and can, and in my opinion ought to follow the decision of the House of Lords in *Commissioners of Inland Revenue* v. *Blott* (1).

According to the report of the *Swan Brewery Co.* v. *King* (3) the whole of the argument of Sir Robert Finlay, for the appellants, which appears on page 233 of the report, was directed to and concentrated upon that particular Taxing Statute and the Statute it amended; and when Lord Sumner delivered the judgment of the Privy Council on page 234, he stated as follows: "The question in issue here is whether or not the new shares were a dividend under the Act abovementioned." (The Dividend Duties Amendment Act of 1902 of Western Australia.) "If they were, dividend duty was and is payable and the judgment appealed against was right. Section 2 of the Act defines, or rather describes the word 'dividend' as used in the Act, as including, 'every profit, advantage, or gain intended to be paid or credited to or distributed among the members of any Company'." And with the exception of the last few lines of Lord Sumner's judgment, the remainder of it discusses throughout the question as to whether or not this allotment of bonus shares was an advantage to the members of the Company and, therefore, assessable to income-tax.

Upon reading the report of the argument and the judgment in the *Swan Brewery Co.* v. *King* (3) I am of the opinion

that the decision of the Privy Council was based upon the construction of the particular Taxing Statute, and, when the expressed opinions of the eminent Judges and Law Lords who considered *Commissioners of Inland Revenue* v. *Blott* (1) are referred to will be seen that with the exception of Viscount Finlay, who expressed no opinion on this point and Lord Sumner who very definitely was of the contrary opinion, all of them, Rowlatt, J., in the King's Bench Division, in the Court of Appeal, Lord Sterndale, M. R., and Warrington and Scrutton, L. JJ., and in the House of Lords, Viscounts Haldane and Cave and Lord Dunedin, took to the view that the decision in the *Swan Brewery Co.* v. *King* (3) was a decision upon the particular Taxing Statute of Western Australia.

In the King's Bench Division, Rowlatt, J., thus states his opinion with reference to the *Swan Brewery Co.* v. *King* (6) on page 134 :—"There it was held that a share-holder receiving bonus shares, as in the present case, was receiving an advantage within the meaning of a highly artificial definition of the word 'dividend' in a Colonial Act notwithstanding that his proportionate interest in the assets of the Company remained the same after the transaction as it had been before." And then Rowlatt, J., stated that in his opinion the decision of the *Swan Brewery Co.* v. *King* (3) had little, if any, bearing upon *Commissioners of Inland Revenue* v. *Blott* (1).

In the Court of Appeal, the Master of the Rolls in the course of his judgment on page 664, stated :—"The actual decision was upon the special words of a Colonial Act containing what Rowlatt, J., calls a highly artificial definition of the word 'dividend' and the learned Judge distinguished the case on that ground."

Warrington, L. J., on page 670, stated that "The decision itself was on the construction of an Act of Western Australia imposing on a Company declaring a dividend a duty on the amount or value of such dividend....." Later on he said : "Obviously, therefore, the question for decision was far away from that in the present case." And Lord Justice Scrutton, on page 673, stated that, "That case turns on the construction of an Australian Act which taxes 'dividends'..... The judgment states that the question is merely the construction of the particular Act,..... This decision, of course, is on another Statute and is not binding on us, though entitled to the greatest respect....."

In the House of Lords, Viscount Haldane, in commenttng upon the *Swan Brewery Co.* v. *King* (2) expressed a very definite opinion that it had no bearing upon *Commissioners of Inland Revenue* v. *Blott* (1) because on page 188 he stated that the Taxing Statute was couched in very different language and after some observations upon his requiring a fuller knowledge of the facts of the case and of the local law he further stated, "but what is clear is that the wide character of the word 'advantages' was a primary consideration in what was said by their Lordships who took part in advising His Majesty. I, therefore, do not feel embarrassed by the decision in that case."

Viscount Cave in dealing with the *Swan Brewery Co.* v. *King* (3) on page 202 of the report stated that "the decision in that case is no doubt fully supported by the definition clause in the Western Australia Act ; but if it were not for the definition clause the decision would, I think, be inconsistent with the decision in *Bouch* v. *Sproud* (2)." And Lord Dunedin on page 203 stated as follows :—"I may say at once that I do not feel that the case is concluded by a decision. *Swan Brewery Company* v. *King* (3) was a decision upon an Australian Statute in the words of which if anything became 'an advantage' it would fall within the tax." In the House of Lords, their Lordships, with the exception of Lords Dunedin and Sumner took the view that the decison in the *Swan Brewery Co.* v. *King* (2) would be inconsistent with the decision in *Bouch* v. *Sproud* (2) were it not for the definition clause in the Western Australia Act ; and in the Court of Appeal Lord Justice Warrington was

of the opinion that Lord Sumner, in delivering the judgment of the Privy Council, did not intend to express any opinion in conflict with *Bouch* v. *Sproud* (2) because, he stated "I can hardly think that Lord Sumner intended by the expressions he used to express a view of his own or to approve of a view of the Chief Justice which would conflict with that expressed by Lord Herschell in *Bouch* v. *Sproud* (2)."

From the judgment in the *Swan Brewery Co.* v. *King* (3) itself and from the judgments of the Judges and the Law Lords who had to consider the bearing of the *Swan Brewery Co.* v. *King* (3) upon *Commissioners of Inland Revenue* v. *Blott* (1), I am clearly of the opinion that we need not follow the decision in the *Swan Brewery Co.* v. *King* (3) it being a decision upon a particular act and not of general application. That being so, we are not embarrassed in considering whether we can follow *Commissioners of Inland Revenue* v. *Blott* (1). The facts in *Commissioners of Inland Revenue* v. *Blott* (1) are identical with those in this case and the Taxing Statutes are similarly worded. By a majority in the House of Lords it has been held that such an allotment of bonus shares to the members of a Company does not render the shares so allotted liable to be assessed for super-tax inasmuch as they are not a part of income but are an addition to capital. In my opinion, we ought to follow the decision in *Commissioners of Inland Revenue* v. *Blott* (1) and I would, therefore, answer the question referred to us in the negative.

S. D. *Answered in the negative.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2464 OF 1921.

April 11, 1924.

Present:—Mr. Justice Walmsley and Mr. Justice Mukerji.

DHANPAT SINGH KUTHARI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HARI CHARAN AGARWALA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Principal and agent—Purchase by agent—Agent, whether acquires property in goods bought—Goods destroyed by fire—Agent, liability of.

When a relationship of agent and principal exists between two persons and the agent enters into a contract for purchase of goods on behalf of his principal, property in the goods bought does not pass to the agent as against the principal.

Ireland v. *Livingstone*, (1872) 5 H. L. 395 at p. 408; 41 L. J. Q. B. 201; 27 L. T. 79, distinguished.

Therefore, where goods purchased by an agent on behalf of his principal are destroyed by fire, the principal and not the agent must bear the loss.

Appeal against the decree of the District Judge, Murshedabad, dated the 14th September 1921, affirming that of the Munsif, Second Court at Jangipur, dated the 27th March 1922.

Babus *Brojo Lal Chukerbutty* and *Susil Coomar Bose*, for the Appellants.

Babus *Ram Chunder Majumdar* and *Bankim Chunder Mookerjee*, for the Respondents.

JUDGMENT.

Walmsley, J.—The plaintiffs who are the appellants sued the defendants for a sum of Rs. 663 as due on *Arat* accounts for business done by them as agents for the defendants.

It is common ground that the plaintiffs were employed by the defendants as agents for buying various goods.

The dispute has arisen between them because a fire broke out after some goods had been bought for the defendants by the plaintiffs, and practically the question is whether the plaintiffs or the defendants are to bear the loss. The decision of the lower Court is that it is the plaintiffs who must bear the loss, and it is against that decision that the plaintiffs appeal.

It appears to me that both the Courts below have fallen into error in their conception of the agent's position. Both take the view that there is a time at which the property in the goods bought by the agent for the principal vests in the agent. The learned Judge speaks of the plaintiffs as commission agents who re-sell the goods to the defendants. This view, the learned Pleader for the respondents, admits, goes too far.

The error is probably due to the fact that the plaintiffs made allegations about

a representative of the defendants being present at the time of purchase and about the method of delivery to the defendants. Connected with the latter allegation was an answer elicited from plaintiffs' witness about property passing to the defendants when the goods were put in sacks provided by the defendants. The question must have been put in the belief that the matters referred to in section 18 of Sale of Goods Act had something to do with the relation between the parties.

It appears to me that those allegations in the plaint have nothing to do with the question, and that the failure of the plaintiffs' to prove their allegations does their case no harm. They were admittedly employed as agents and it is contrary to the whole idea of the relation between agent and principal to hold that property passes to the agent as against the principal. An attempt has been made to support such a view by reference to the case of *Ireland* v. *Livingstone* (1) but that was a case of a merchant in one country and a commission agent in another, and the passage to which reference is made must be read with due regard to the words of limitation which it contains.

Apart, however, from the law as contained in the Contract Act, I think that the defendants are bound by the statement contained in the fourth paragraph of their written statement. They deliberately charged the plaintiffs with telling a false story about the fire, with a view to taking advantage of a rising market and selling goods which belonged to the defendants. It is said that this statement was made to meet the hypothetical case that the property in the goods had passed to the defendants, but in my opinion it is impossible to put that construction on the paragraph.

Lastly an attempt was made to justify the decision of the lower Courts on the ground that the plaintiffs were guilty of negligence. It appears however that the plaintiffs were not guilty of any act or omission which could be regarded as negligent.

(1) (1872) 5 H. L. 395 at p. 408; 41 L. J. Q. B. 201; 27 L. T. 79.

In my judgment the Courts below were wrong and the appeal must be allowed, and the suit decreed in full with costs in all Courts.

Mukerji, J.—I agree and wish to add only a few words. The contract in the present case was essentially one of agency and the findings of the Courts below as to purchase of the goods by the plaintiffs to the order of the defendants clearly show that in the present case they acted as commission agents on behalf of the latter. The views of the respective liabilities of the parties taken by the Courts below are to my mind wrong, the Court of first instance having laid too much stress upon the stray statement of a witness for the plaintiffs about the property in the goods passing to the defendants when the goods are put into sacks supplied by the latter, and the lower Appellate Court having introduced into its consideration a theory of re-sale by the plaintiffs to the defendants after making the purchase to the order of the latter. The former is an opinion on a question of legal liability which should not form the basis of the Court's decision and the latter is based upon a misconception of the relations between the parties. In support of the latter view reliance has been placed upon a *dictum* of Lord Blackburn in *Ireland* v. *Livingstone* (1) which is in these words: "It is quite true that the agent who in thus executing an order, ships goods to his principal is in contemplation of law a vendor to him. The persons who supply goods to a commission merchant sell them to him, and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them.....and just so does the property in the goods pass from the country producer to the commission merchant, and then, when the goods are shipped, from the commission merchant to his consignee. And the legal effect of the transaction between the commission merchant and the consignee, who has given him the order, is a contract of sale passing the property from the one to the other; and

consequently the commission merchant is a vendor, and has the right of one as to stoppage in *transitu*." These observations define the relations between the commission agent and his foreign correspondent and proceed upon an appreciation of the difficulty which would exist in establishing any privity of contract between the foreign correspondent and the original vendors. In his work on contract on Sale Lord Blackburn reviews the cases of *Feise* v. *Wray* (2), *Siffken* v. *Wray* (3) and *Tucker* v. *Humphrey* (4) and says that the same conclusion follows from them in respect of a factor acting for a foreign correspondent and purchasing goods in his own name. In *Turner* v. *Liverpool Docks* (5) it was assumed that the relation of vendor and purchaser existed between the foreign commission merchant and his principal in England. Story in his work on Agency in like manner treats a factor in a foreign country who purchases goods on his own credit for his principal and ships them to the latter as one having the rights and remedies and being in the same predicament as a vendor of the goods. This *dictnm* of Lord Blackburn was explained in the case of *Cassaboglou* v. *Gibbs* (6). In that case Brett, M. R., observed as follows: "Lord Blackburn has not said that as long as the contract of principal and agent is executory the principal can sue the agent and make him pay as though the contract were that of vendor and purchaser. He has considered the point with reference to two matters; one with regard to the theory of passing the property in the goods, and the other as to the power of stopping the goods in *transitu*, and as to these two matters, he has said with reference to the first of them, that if a foreign commission agent has purchased the goods which he was ordered to purchase, and has put them on board consigned to his principal, by that appropriation the property in the goods passed from the commission agent to the principal as if such agent were a vendor. Then as regards the power to stop in *transitu* Lord Blackburn has said that if the commission agent abroad is bound to pay for the goods to the foreign seller of whom he bought them, and after he has shipped them to his principal, such agent has not been paid, and his principal is insolvent, so that the foreign seller could only have the agent to look to for payment, the Courts have held that such agent may stop the goods in *transitu* as *if he were a vendor*, or *in the position of a vendor*." These observations make it clear that even in the case of foreign correspondent, the contract remains a contract of agency, and only for certain purposes he was to be treated as a vendor or as one in the position of a vendor. In this connection the remarks of Fry, L. J., in that case are worth quoting, as they clearly summarise the position. He observed as follows:—"Now as to the first of these grounds, was there such a contract (meaning such a contract as created the relation between a vendor and a purchaser)? Was the contract of principal and agent merged into that of vendor and purchaser? This must be a question of fact, and as a matter of fact there was no such contract. It is said..... for two reasons, first, because otherwise the property in the goods would not pass to the English merchant for whom the agent abroad bought them. In my judgment the property would pass. If the article was specific it would pass by the purchase, and if not specific, but was appropriated by the agent for his principal; it would pass by virtue of the appropriation. The other reason for inferring the relation of vendor and purchaser was said to be because the foreign agent who has bought for his principal has the right of stoppage in *transitu*, but that; in my opinion, is no reason for such inference." After dealing the cases of *Lickbarrow* v.

(2) (1802) 3 East. 93; 6 R. R. 551; 102 E. R. 532.
(3) (1805) 6 East 371; 2 Smith 480; 102 E. R. 1328.
(4) (1828) 4 Bing. 516; 1 M. & P. 378n; 6 L. J. (o. s.) C. P. 92; 130 E. R. 866.
(5) (1851) 6 Ex. 543; 20 L. J. Ex. 393; 155 E. R. 659; 17 L. T. (o. s.) 212; 86 R. R. 377.
(6) (1883) 11 Q. B. D. 797; 52 L. J. Q. B. 538; 48 L. T. 850; 32 W. R. 138.

Mason (7) and other cases where the right to stop in *transitu* has been allowed without the relationship of vendor and purchaser existing, and where it was held that even an agent, who puts the goods on board is able to exercise that right being in the same condition as if he had been an ordinary unpaid vendor. Fry, L. J., referred to the case of *Ireland* v. *Livingstone* (1) and observed as follows:—"Then in the case of *Ireland* v. *Livingstone* (5) Cleasby, B., says that there was 'there not a mere contract between vendor and purchaser although after the goods were shipped a relation like that of vendor and vendee might arise.' No doubt in that case Lord Blackburn uses stronger language, and says that the legal effect of the transaction is a contract of sale passing the property from the one to the other, and consequently the commission merchant is a vendor and has the right of one as to stoppage in *transitu*; but by the legal effect of the transaction, he means the legal effect of an analogous contract to that of a contract of purchase and sale. It is important also to observe that Lord Chelmsford in that case puts the matter so as to exclude the existence of any contract of purchase and sale. He says 'I would preface what I have to say by stating my opinion that the question is to be regarded as one between principal and agent though the plaintiffs might in some respects be looked upon as vendors to the defendants, so as to give them a right of stoppage in *transitu*.' Therefore, in such a case as the present there is in fact no contract of a vendor and purchaser."

K. S. D. *Appeal allowed.*
N. H.

(7) (1787) 1 Sm. L. C. (8th Ed.) 753, and (11th Ed.) 693; 1 R. R. 425; 2 T. R. 63; 8 H. Bl. 357; 6 East 21n; 4 Bro. P. C. 57; 100 E. R. 35.

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 191 OF 1923.
March 11, 1924.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice May Oung.

LECUN—DEFENDANT—APPELLANT
versus
LECUN—PLAINTIFF—RESPONDENT.

Benami *transactions—Transfer of property by Anglo-Indians — Presumption of advancement, whether arises—Documents executed in solemn form, interpretation of—Courts, duty of, in interpreting—Gift—Subsequent acts, whether relevant.*

There is no widespread and persistent usage and practice among Anglo-Indians in Burma of transferring land *benami* without any intention of transferring the beneficial ownership in the way there is amongst Hindus and Muhammadans. [p. 690, col. 1.]

The presumption of advancement arises in the case of a transfer of land made by a registered deed by an Anglo-Indian husband to his Anglo-Indian wife. [*ibid.*]

In cases of transfers of land to wives or children without any intention of conferring on them the beneficial ownership, not only race, place of birth, domicile or residence have to be taken into consideration, but widespread and persistent usages and practices of executing such documents have also to be depended upon. [p. 690, col. 2.]

It is necessary that Courts should regard documents executed in a solemn form as primarily expressing the intention of the executant according to their tenor and evidence of strong motive should be forthcoming for acting with an intention contrary to that which the document indicates. [p. 690, col. 2.]

It is not only acts and conduct at or about the time of a deed of gift that are relevant but the evidence of subsequent act and conduct is also admissible. [p. 691, col. 1.]

Appeal against the judgment and decree of the High Court (Rutledge, J.,) passed in its Original Civil Jurisdiction, in C. R. S. No. 172 of 1923.

Mr. *Ormiston*, for the Appellant.

Messrs. *Higinbotham* and *Villa*, for the Respondent.

JUDGMENT.—This was a suit brought by the plaintiff-respondent, Mrs. Lecun, against her husband defendant-appellant for possession of a house which had been gifted to her by her husband in 1908. It is necessary for the purposes of our decision to set out the facts in some detail.

Appellant was originally in the Public Works Department, but owing to his superior not approving certain measures

ments in a contract which he had passed, he was dismissed and set up a business on his own account. He obtained a valuable contract from the Burma Rice and Trading Company to erect for them a mill at Bassein. In 1904 he bought a piece of land in Rangoon and for the purchase price or part of it he executed a mortgage on the land in favour of the vendor. In the year 1906-1907 he built a house on part of this land. In the latter year he paid off the vendor's mortgage borrowing money from one Ma Ma Gyi to do so. To her he gave a mortgage on the house and land. He had a dispute with one of his sub-contractors, and on the 6th April 1907 this man filed a suit against him for Rs. 16,000 odd. Appellant then paid into Court Rs. 5,749 and joined issue as to the balance. The sub-contractor attached the money due to him by the Burma Rice and Trading Company; but appellant gave security and got the attachment removed. While that suit was pending he married the respondent on the 3rd of June 1908. He alleges that acting under advice he paid off Ma Ma Gyi's mortgage with money that he had, and fearing that the same sub-contractor in execution of the decree that he was likely to get might attach this house, he decided to put it in his wife's name; and to that end in order to save his property from the risk of attachment he executed a deed of gift dated the 23rd of June 1908 in favour of his wife. The parties lived in this house and have done so all along until the disputes arose which led to a separation and to the bringing of the present suit. On the 4th of September 1908 part of the site originally bought was sold to Sir A. Jamal by Exhibit C for Rs. 7,500. The deed of sale was executed by the respondent as vendor. Both parties claimed to have taken the purchase money. Two other bits of this land were sold in the same or the next year to Messrs. Burjorjee and Vertannes; but the deeds of conveyance have not been produced; nor have any certified copies of them. It has not been proved whether these two sales took place before the marriage or after, though it seems more than probable that they were after the marriage. There was in 1911 a boundary dispute between Messrs. Lecun and Burjorjee. Appellant naturally negotiated the sales and gave instructions in respect of the boundary dispute. Judgment was delivered in the sub-contractor's suit on the 8th of March 1909 and a decree passed for Rs. 595 and costs in his favour in addition to the sum paid into Court by appellant. The decree was confirmed on appeal, and the 20th of March 1911 appellant paid the decretal amount. To do this he raised money from his wife's uncle who had been his Counsel in this case. The title deeds of the property were handed over to him and pro-notes executed by both the husband and wife for the amount advanced. Those pro-notes had been renewed from time to time; they were last renewed on the 25th of October 1921 for Rs. 13,500.

After living happily together until 1922 various differences arose between the husband and wife. She found letters of a compromising character written by a lady, who had been living with them, to her husband. Appellant had apparently been told by this lady that his wife was misconducting herself with one Lambert and he taxed her with it. She strenuously denied it and brought a counter-charge against him with reference to the other lady. On the 26th of July 1922 she left him and went to her mother's house. On the 27th of July there was a meeting between the husband and wife. There appears to have been some sort of settlement arrived at by which appellant was to take his wife back, and she was to execute a document transferring to her children this house or a document by which she was to be trustee for her children. However, on the next day her husband sent Lambert to the house having heard from him a confession of his misconduct with the respondent. He followed and confronted his wife with Lambert. Lambert admitted the misconduct, but his wife denied it, and there was evidently a

stormy interview. On the 29th of July respondent wrote a letter to appellant expressing her disappointment that he had not come the previous day and taken her back as he had promised to do on certain conditions, the chief of which was that the children were to have shares in the house. Appellant had had a document prepared for execution by his wife which sets out that the husband was absolutely entitled to the land and buildings the subject of the gift of the 23rd of June 1908 in favour of the wife, and that the property had been held by her in trust for her husband during his life time and upon his death for the benefit of his children. The document then declares the trust as set out above in favour of the husband and three children who were named. . . . . these three to take the property after the husband's death in such shares as may be directed by the Will of her husband. Respondent refused to execute such a document. She would not apparently agree to the allegation that she had all along held the property in trust for her husband and she did not approve of the house going to the three children then living as she was in the family way, and that child ought also to share. Apparently appellant was not satisfied that he was the father of that child; but, whatever the reasons may be, all these negotiations fell through. On the 17th of August appellant's Counsel wrote to her a letter calling upon her to acknowledge that she was merely a *benamidar* in respect of the property in suit and requesting her to fix a date when she would execute a reconveyance of the property in favour of her husband. No answer was sent to this letter, and on the 7th of February 1923 respondent wrote through her Counsel calling upon appellant to deliver possession of the house to her. The present suit was then filed by the wife for possession by ejectment, if necessary, and for mesne profits. Plaintiff-respondent bases her claim on the deed of gift of the 23rd June 1908. She had been in possession of the house, living there with her husband ever since; and it is urged on her behalf that the parties being Anglo-Indians, the same exception to the general rule as regards resulting trusts applied in this case as it would in the case of Europeans under the law as administered by the Court of Chancery at Home. It is urged that the *prima facie* presumption is that this property was gifted to her by way of advancement; and that the onus lies on the appellant to establish that that was not his intention at the time the deed was executed.

For the appellant it is urged that the general law in India is the same as the general law in England as regards resulting trusts; and that, having regard to the facts as regards the nationality or race, domicile and residence of the parties, the presumption of advancement does not apply; but that, on the contrary, the primary presumption is that the gift was made *benami* without any intention of transferring the beneficial ownership to the respondent.

Reliance is placed on the facts set out at the beginning of this judgment which occurred at the time the deed was executed. Further, reliance is placed on the facts that throughout appellant has been dealing with the property as owner exercising all those rights that he would exercise if he had never ceased to be the beneficial owner of it. Lastly, reliance is placed on the happening on the 26th of July 1922 and the following days.

There is little doubt as to the law in respect of resulting trusts and the presumption of advancement in India. As regards Hindus, the law has been laid down in the case of *Gopeekrist Gosain* v. *Gungapersaud Gosain* (1); and in respect of Muhammadans in the case of *Moulvie Sayyud Uzhur Ali* v. *Beebee Ultaf Fatima* (2). The same rules have been held to apply in the case of Burmans in *Meeyappa Chetty* v. *Maung Ba Bu* (3).

(1) 6 M. I. A. 53; 4 W. R. P. C. 46; 1 Sar. P. C. J. 493; 2 Suth. P. C. J. 13; 19 E. R. 20.
(2) 13 M. I. A. 232; 13 W. R. P. C. 1; 4 B. L. R. P. C. 1; 2 Sar. P. C. J. 522; 20 E. R. 538.
(3) 8 Ind. Cas. 450; 3 Bur. L. T. 62.

As regards this last case we desire to express no opinion at present. It may be necessary to give this question of law further consideration in the case of Burman Buddhists; but the two former cases are decisions by their Lordships of the Privy Council. In the case of Europeans who had been born and had a permanent residence in India, the law has also been laid down by their Lordships of the Privy Council in *Kerwick* v. *Kerwick* (4). Lord Atkinson in delivering the judgment of their Lordships said: "The general rule and principle of the Indian Law as to resulting trusts differs but little, if at all, from the general rule of English Law upon the same subject, but in their Lordships' view it has been established by the decisions in the case of *Gopeekrsit Gosain* v. *Gungapersaud Gosain* (1) and *Maulvi Sayyad Uzhur Ali* v. *Ultaf Fatima* (2) that owing to the widespread and persistent practice which prevails amongst the natives of India, whether Muhammadans or Hindus, for owners of property to make grants and transfers of it *benami* for no obvious reason or apparent purpose, without the slightest intention of vesting in the donee any beneficial interest in the property granted or transferred, as well as the usages which these natives have adopted and which have been protected by Statute, no exception has ever been engrafted on the general law of India negativing the presumption of the resulting trust in favour of the person providing the purchase money, such as has, by the Courts of Chancery in the exercise of their equitable jurisdiction, been engrafted on the corresponding law in England in those cases where a husband or father pays the money and the purchase is taken in the name of a wife or child. In such a case there is, under the general law in India, no presumption of an intended advancement as there is in England. The question which of the two principles of law is to be applied to a transaction such as the present which takes place between two persons, born in India of British parents, and who have resided practically all their lives in India is of general importance." It was further stated: "It is a mistake to suppose that according to the cases already cited in determining which rule of law is in any given case to apply in India entirely depended on race, place of birth, domicile or residence. These were not to be treated as constituting *per se* as decisive. What were treated as infinitely more important were the widespread and persistent usages and practices of the native inhabitants." Their Lordships then held that the presumption of advancement did apply in the case with which they were dealing. In that case the parties were of pure European descent, though both had been born in India and had resided in the East ever since. Whether the same presumption arises in the case of Anglo-Indians of the descent of the parties in this suit is the first point we have to decide. It is clear that race, place of birth, domicile or residence are all matters to be taken into consideration; but they are not the only grounds on which a decision must be based and indeed the more important grounds are widespread and persistent usages and practices of executing documents *benami* to transfer lands to wives or children without any intention of conferring on them the beneficial ownership. Even if the presumption be held to arise, it would be open to the party against whom that presumption is made to rebut it and show what the intention of the donor or transferor was at the time the transfer was made. In *Kerwick* v. *Kerwick* (4) after examining the facts which are all of the same character as those we have before us in this case, their Lordships held that the husband had rebutted the presumption, and the decision is of the utmost value in dealing with the facts that arise in the present suit.

Appellant's father was a Frenchman and his mother an Anglo-Indian lady; her father was an Anglo-Indian and her

(4) 57 Ind. Cas. 834; 48 C. 260; 10 L. B. R. 335; (1920) M. W. N. 738; 39 M. L. J. 296; 28 M. L. T. 194; 47 I. A. 275; 32 C. L. J. 490; 2 U. P. L. R. (P. C.) 153; 13 L. W. 455; 23 Bom. L. R. 730 (P. C.).

mother a Burmese lady. Respondent's father was an Englishman; her mother an Anglo-Indian; and her maternal grandmother a Shan lady. So far, therefore, as the respondent is concerned, and so far as descent governs the matter there is good reason for holding that the presumption of advancement will arise. Appellant must be described as an Anglo-Indian. Both appellant and respondent were born in Burma; they have always lived here; they were educated here; and they are by religion Raman Catholic. They follow English customs as regards dress and manner of living. No evidence has been given, and we are not prepared to hold that there is any widespread and persistent usage and practice amongst Anglo-Indians in Burma of transferring lands *benami* in the way there is amongst Hindus and Muhammadans. Some of them may at times resort to such a practice with a fraudulent attempt to save property from the hands of creditors; but we have no ground for holding that there is any such common practice prevailing as a common rule for all general purposes. The rule, therefore, which, in our opinion, is to be applied in the present case, is that the presumption of advancement arises in this suit. It is a rule which, having regard, to the status of the parties, would be, in our opinion, a rule of equity and good conscience.

This being our finding the further question remains whether the appellant has succeeded in establishing that, at the time he made this deed of gift in favour of his wife, he had no intention of parting with the beneficial ownership, and that he intended her to be merely a trustee for himself. His own bare statement that this was his intention advances his case little, if at all. It is a statement which he was bound to make and which so vitally affects his interests that it must be received with the utmost caution, and all the more so, as the appellant has shown that he is not the person whose allegations and motives can be readily accepted. Such a statement was held by their Lordships in *Kerwick* v. *Kerwick* (4) to be of little avail, unless he establishes at the same time with reasonable clearness that he had other and different motives for the action he took.

At the time this deed of gift was made appellant had but one creditor, the sub-contractor, to whom he had to pay at most Rs. 5,000 over and above the amount he had already paid into Court. He had at that time apparently some Rs. 18,000 in cash. The property was mortgaged for an amount practically equal to that sum, and that, when he had to pay the decretal amount, he was able without difficulty to borrow the money from a relation shows that he could have had but little fear of the attachment and sale of the house, if he had still kept it in his own name. This is further shown by the fact that he preferred to use his ready money in redeeming the mortgage. Appellant was at that time a man of about 35 years of age or so. It is clear that he fell much in love with respondent who was then 18 or 19. He gave her jewellery worth, it is said, Rs. 5,000 or thereabouts, but it is urged, that by this deed of gift he deprived himself of every scrap of property he possessed in the world. He had this contract, and he knew that the use and benefit of the house would still be his even if he transferred the real ownership to his wife. It is necessary that the Courts should regard documents executed in a solemn form as primarily expressing the intention of the executant according to their tenor, and it is, therefore, clearly necessary that ordinarily speaking, evidence should be forthcoming of a strong motive for acting with an intentien contrary to that which the document indicates; and in addition to that there is in this particular case a presumption of advancement. We are unable, therefore, to hold that any such strong motive has been established in this case, as it must be established, if we are to go against the express terms of the document. Moreover, all fear of any action on the part of the sub-contractor had passed away when his decree was satisfied on the 20th of March 1911. It is not shown that thereafter appellant was in any fear of creditors, or had any motive in allowing the position created by the deed of gift to continue; and yet he never sought for 11 years to alter that position

in the slightest degree; and it was not until the trouble arose between his wife and himself that he ever put forward any claim or contested the validity of the deed of gift. It was not an unnatural act on the part of a man marrying a girl very much younger than himself with whom he was infatuated, and it was a right and proper thing for him to have done to make provision for his wife at an early date in their married life. This, we hold, was the motive which led him to execute the deed of gift.

It has been urged that he sold the various strips of land and took the purchase price for his own use, although the money really belonged to his wife. It is urged that he spent a large sum of money, according to him some Rs. 26,000 on additions, improvements and repairs to the house. It is said that he always paid the rates and taxes; that he installed electric light at his own expense; and that he has throughout exercised acts of ownership, whereas the wife has never done so. In reply, it is urged that it is only acts and conduct at or about the time of the deed of gift that are relevant and that evidence of subsequent acts and conduct is inadmissible. That may be so in England, but we do not think that this evidence is inadmissible in India, and similar acts were considered by their Lordships in *Kerwick* v. *Kerwick* (4) but we do not think that any of these acts avail to any extent to establish the proposition, the burden of which is on the appellant. He was living happily with his wife in this house, and he spent large sums in repairs and improvements. The ordinary presumption as to those would be that, if the gift had been by way of advancement, these expenditures would also have been by way of advancement. His negotiation of the sales of the lands is referred to, but the transfers were executed by his wife; and it is to be noted that, when money was borrowed to pay off the decree from her uncle, she also executed the promissory-note in his favour. Lastly, the events that occurred after she had left appellant's house are relied on. At that time the feelings of the parties towards each other were very embittered, and we are unable to see in their acts and conduct at that time anything that lends great support to the appellant's case. She was charged with adultery, and the alleged adulterer was admitting misconduct. She was anxious to be reconciled to her husband on this account and for the sake of the children. The parties were Roman Catholics and their religion forbade a divorce. She might well agree to execute a document transferring this property for the benefit of the children without being taken thereby, to admit that she had never had any ownership in it. When Exhibit 4 was put to her, a document whereby her rights in the property were denied, she strenuously refused to execute it.

On a consideration of all the facts and circumstances in this case we hold that the presumption of advancement arises and that the appellant has failed to rebut that presumption. The decree of the Court below was correct and will be confirmed, and this appeal will stand dismissed with costs throughout. We certify for two Counsels. We further direct that this decree be not executed for one month on the appellant undertaking to vacate the premises within that time and provided further that he pays into Court the Rs. 200 per mensem, he was ordered to pay as rent which he has not yet done, within one week.

S. D. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 54 AND 55 OF 1921.

August 1, 1924.

Present:—Mr. Kendall, A. J. C., and Mr. Pullan, A. J. C.

Rani ABADI BEGAM AND OTHERS —PLAINTIFFS—APPELLANTS

versus

Mirza AHMAD MIRZA BEG AND OTHERS—DEFENDANTS—RESPONDENTS.

Oudh Estates Act (I of 1869), ss. 15, 22—Taluk-

dari *estate—Primogeniture, entry of—Estate taken out of Act—Custom of primogeniture—Succession, how governed*—Gaddi-nashini—*Females, succession of—Muhammadan Law—Ancestral and self-acquired property, whether distinguished—Criminal Procedure Code (Act V of 1898), s. 145—Limitation Act (IX of 1908), Sch. I, Art. 47—Proceedings under s. 145, nature of—Breach of peace, likelihood of—"Parties concerned in dispute," meaning of—Compromise by some parties—Magistrate, jurisdiction of, to deliver possession—Civil suit—Limitation—Want of jurisdiction—Error—Vice affecting whole proceedings—Mutation order, effect of.*

Where a *talukdari* estate governed by the Oudh Estates Act, and recorded in list II of the Act, as an estate ordinarily devolving upon a single heir, is, by operation of section 15 of the Act, taken out of the provisions of the Act, the incident of single heir succession attached to the estate does not come to an end, if the estate was subject to a custom of single heir succession prior to its coming under the operation of the Act. [p. 695, col. 2; p. 696, col. 2.]

Thakurain Balraj Kunwar v. *Rae Jagatpal Singh*, 7 O. C. 248; 26 A. 393; 8 C. W. N. 699; 31 I. A. 132; 1 A. L. J. 384; 11 Bom. L. R. 516; 8 Sar. P. C. J. 639 (P. C.), explained and distinguished.

Succession to an estate removed from the operation of the Oudh Estates Act is governed by personal law as modified by custom of the family. [p. 696, col 2.]

A family custom may be set up in regard to a property even though it has been withdrawn from the scope of the Oudh Estates Act. [p. 697, col. 1.]

The whole idea of *gaddi-nashini* in Oudh pre-supposes inheritance by a male and not by a female. [p. 698, col. 2.]

There is no distinction in Muhammadan Law between self-acquired and ancestral property. [p. 698, col. 1.]

Murtaza Husain Khan v. *Mohammad Yasin Ali Khan*, 36 Ind. Cas. 299; 38 A. 552; 20 M. L. T. 362; 14 A. L. J. 1083; 18 Bom. L. R. 884; 31 M. L. J. 804; (1916) 2 M. W. N. 555; 25 C. L. J. 1; 19 O. C. 290; 1 P. L. W. 122; 21 C. W. N. 410; 4 O. L. J. 8; 4 L. W. 538; 43 I. A. 239 (P. C.), referred to.

The words "parties concerned in such dispute" in section 145, Criminal Procedure Code, are intended to include all persons claiming to be in possession, and proceedings under the section are not without jurisdiction merely because some of those parties are not likely to cause a breach of the peace. [p. 694, cols. 1 & 2.]

Krishna Kamini v. *Abdul Jabbar*, 30 C. 155; 6 C. W. N. 737 (F. B.), referred to.

The mere fact that in proceedings under section 145, Criminal Procedure Code, a compromise is filed by some of the parties does not preclude the Magistrate from putting such parties into possession, although it may be that if all the parties filed a compromise the jurisdiction of the Magistrate would cease and he could only cancel the proceedings under clause (5) of the section. [p. 695, col. 1.]

In questioning the effect of proceedings under section 145, Criminal Procedure Code, as regards limitation, for the civil suit under Art. 47 of Schedule I to the Limitation Act, the proceedings must be shown to be without jurisdiction in the strictest sense of the term. It is not every error which would make the result invalid, and before want of jurisdiction can be established, a vice must be clearly established which infects the whole proceedings. [p. 695, cols. 1 & 2.]

Yar Mohammad Saha v. *Hayat Muhammad Saha*, 42 Ind. Cas. 768; 22 C. W. N. 342; 18 Cr. L. J. 1024, relied on.

An order in mutation proceedings is not a final decision as to ownership and has no effect whatsoever on an order passed by a Magistrate in proceedings under section 145, Criminal Procedure Code, in so far as that order limits the period within which a civil suit may be brought by any of the parties. [p. 695, col. 2.]

Appeal against a decree of the Sub-Judge, Sitapur, dated the 15th June 1921.

Messrs. *A. P. Sen* and *H. K. Ghose*, for the Appellants.

Messrs. *Bishambhar Nath Srivastava*, *Haider Husain*, *Chand Narain Harkauli* and *Ram Bharose Lal*, for the Respondents.

JUDGMENT.

Pullan, A. J. C.—These two appeals arise from a dispute as to the succession to the property of one Muhammad Ali Beg who died in the year 1908. At the time of the annexation of Oudh in 1856, this property, which is known as the Aurangabad *taluka* was in the possession of Ali Bahadur with whom the first summary settlement was made by the British Government. During the Mutiny, Ali Bahadur died, and the second summary settlement in 1859 was made with his nephew, Agha Jan. It was the policy of the British Government to confirm the so-called *talukdars* in possession of their estates and to establish as far as possible the rule of single heir succession. Letters were issued to all the *talukdars* who were asked to confirm in writing their family customs and in accordance with their replies the lists which form part of Act I of 1896 were compiled. Agha Jan declared that in his family there was a custom of *gaddi-nashini*, that the estate was impartible and that the eldest son succeeded. Accordingly Agha Jan's name was entered in lists Nos. 1 and 2 prepared under clause (8) of Act 1 of

1869 and he also received what was known as a primogeniture *sanad*. Agha Jan's eldest son died five days before his father on the 13th of June 1875. Under section 22 of Act I of 1869 Agha Jan should have been succeeded by his grandson Hamid Mirza who was then a boy of eight. Muhammad Ali Beg who has the eldest surviving son of Agha Jan took possession of the property and was confirmed in his possession by Government. When many years later a suit was brought by Hamid Mirza Beg it was held by a Bench of this Court that Muhammad Ali Beg was entitled to the property in virtue of the declaration made by his father that his eldest son should succeed in accordance with the family custom. The Judicial Commissioners held that this declaration of Agha Jan must be construed as a Will in favour of Muhammad Ali Beg which had the effect of transferring the estate. In 1908 Muhammad Ali Beg died. Five persons claimed to be in possession of the property and applied for mutation. These were Ahmad Mirza brother of Muhammad Ali Beg, Abadi Begam his daughter, Achchi Begam his widow and Amir Mirza and Hamid Mirza his brother's sons. In the course of the proceedings Ahmad Mirza, Amir Mirza and Hamid Mirza came to an agreement and mutation was effected in their favour. Simultaneously an order was passed by a Criminal Court, which had cognizance of the dispute under section 145 of the Code of Criminal Procedure putting these persons in possession and directing the other parties to have recourse to the Civil Courts. Subsequently Abadi Begam has fought out two suits with Ahmad Mirza, one for her dower debt and one for possession of the property which she inherited from her mother. She did not, however, lay claim to the estate left by Muhammad Ali Beg until August 1918 when she filed the present suit. Abadi Begam claims in the alternative either that the property should be dealt with under Muhammadan Law in which case she is entitled to one half or that the property should be held to be an impartible estate and that she as the nearest heir of her father is entitled to the whole. *Musammat* Akbari Begam, the sister of Muhammad Ali Beg, and, therefore, the aunt as well as the mother-in-law of Abadi Begam merely claims her one-sixth share under the Muhammadan Law.

The Subordinate Judge found that the suit of Abadi Begam was barred by limitation, as under Art. 47, Schedule I of the the Limitation Act it should have been filed within three years of the Magistrate's order passed in the proceedings under section 145 of the Code of Criminal Procedure on the 14th of July 1909. He has also found that the property left by Muhammed Ali Beg is governed by Muhammadan Law subject to a family custom of single heir succession and that there is a further family custom excluding females from inheritance.

The burden of proving that the case of Abadi Begam was barred by limitation was laid by the lower Court on the defendants. This decision is contested but the reasons given by the lower Court are sound. The plaintiff stated that her claim was within the twelve years period of limitation allowed for such suits and it was no part of her case that there was any decision by a Criminal or other Court which could in any way affect her claim. This case was set up by the defendants in their written statements and it was primarily for them to show that there was a decision of a Criminal Court which brought the plaintiff's claim under any other rule of limitation than that on which the plaintiff relied. It is now conceded that Abadi Begam was a party to certain proceedings taken under section 145 of the Code of Criminal Procedure after her father's death, and that the Magistrate concluded those proceedings by passing an order putting Ahmad Mirza, Hamid Mirza and Amir Mirza into possession of the property and directing Abadi Begam to go to the Civil Court. *Prima facie* these facts bear out the defendant's plea that Art. 47, Schedule I of the Limitation Act applies to the claim of Abadi Begam and that it is, therefore, barred by time. The appellant has

endeavoured to show that for certain reasons the Magistrate's order is not binding upon her. This can only be done by showing that the proceedings or at any rate the final order, were without jurisdiction, and so it has been argued first that the proceedings were not properly initiated and secondly that the finding was invalid. Many of the rulings on which the learned Counsel for the appellant relies are those of Courts sitting on the criminal side and such rulings must be followed with caution by a Civil Court which is only considering the effect of certain proceedings on the question of limitation. As to the initiation of proceedings it is clear that in the first instance the Police reported that there was danger of a breach of the peace between the three male claimants to the estate, but when the Magisfrate took up the case he decided that it was rather a case for section 145 of the Code of Criminal Procedure than section 107 and finding that Abadi Begam and her step-mother Achchi Begam were also claiming the property he included them in the proceedings. Whether he considered that these ladies were likely to commit a breach of the peace or not does not appear from the record which has been weeded. There are no doubt rulings of the Calcutta High Court on the criminal side to the effect that an apprehension of a breach of the peace is essential before a Court has jurisdiction to take proceedings under section 105 of the Code of Criminal Procedure and that where such apprehension ceases jurisdiction also ceases. I refer to the rulings reported as *Siv Narayan Mukherjee* v. *Satish Chandra Ghosal* (1), *Muhammad Khandu Sarkar* v. *Sadaq Ali Sheikh*, (2). On the other hand it was laid down in a Full Bench ruling of the Calcutta High Court, *Krishna Kamini* v. *Abdul Jabbar* (3), that the words "parties concerned in such dispute" are intended to indicate all persons claiming to be in possession and that the proceedings are not without jurisdiction merely because some of those parties are not likely to cause a breach of the peace. The Magistrate, therefore, acted within jurisdiction when he made the two ladies parties. It is also contended that he committed a formal irregularity in the matter of drawing up the order required by section 145 (1) but the bulk of authority shows that such formal defect would not affect the Magistrate's jurisdiction, and as a matter of fact there is nothing to show that the Magistrate failed to issue proper orders to any of the parties.

The appellant's main argument attacks the Magistrate's final order. The chief objections taken to that order are that it was passed (1) in favour of three persons, (2) when there was no longer any fear of a breach of the peace, and (3) that the order was passed on a compromise and not after an inquiry as required by the Code of Criminal Procedure. Certain rulings have been shown to us to the effect that a Magistrate has no jurisdiction under section 145 of the Code of Criminal Procedure in a case of joint possession or when joint owners claim exclusive possession or when partners fight among themselves for managership. But none of these rulings apply to the case before us. When the Magistrate passed his final orders there were five distinct parties three of them agreed to come to terms and they asserted that there was no longer any fear of a breach of the peace, but it was held by the Calcutta High Court in ruling reported as *Ranoda Ranjan Bhattacharjee* v. *Bharat Chandra Saha* (4) that mere allegations of the parties that no breach of the peace is likely do not go to the root of the Magistrate's jurisdiction. No doubt the three parties who filed the compromise agreed among themselves that if the Magistrate accepted their compromise they would not fight among themselves, but they made no statement as to the other contesting parties, and we have no reason to believe that the Magistrate

(1) 57 Ind. Cas. 161; 24 C. W. N. 621; 31 C. L. J. 369; 21 Cr. L. J. 593.
(2) 76 Ind. Cas. 963; 38 C. L. J. 284; (1923) A. I. R. (C.) 577; 25 Cr. L. J. 291.
(3) 30 C. 155; 6 C. W. N. 737 (F. B.).
(4) 62 Ind. Cas. 180; 25 C. W. N. 215; 33 C. L. J. 69; 22 Cr. L. J. 484.

when he passed his final order was of opinion that without such an order putting certain parties in possession there was no fear of a breach of the peace. We have been asked to find that an order in favour of three parties is on the face of it illegal as being contrary to the wording of the Code. No relevant ruling has been cited in this connection, and in my opinion it would be straining the meaning of the Act to forbid a Magistrate to put into temporary possession two parties, who have come to terms. It is by no means clear that the words in clause (6) of section 145 confine the Magistrate's powers to placing only one of the original parties in possession if he is satisfied that two or more of these parties have become one for the purpose of the dispute before him. Nor would it be proper to hold that the Magistrate's order was invalid because it is merely based on a compromise. Had the compromise been filed by all the parties and had there been no longer any dispute it might be held that the Magistrate's jurisdiction had ceased, and that he was only empowered to cancel the proceedings under clause (5) of section 145, but in this case the Magistrate recorded evidence and based his opinion upon that evidence and not only upon the compromise drawn up by some of the parties. An order under section 145 clause (6) must be passed if there is still a dispute likely to lead to a breach of the peace and the very fact that the Magistrate passed such an order and directed Abadi Begam and Achchi Begam to take their claim to the Civil Court shows that in his opinion the dispute had not come to an end, and it was not a case in which he could merely cancel the order under section 145, clause (5). In dealing with a case of this kind it is not right to hold that the Magistrate's proceedings were without jurisdiction in any but the strictest sense of the term. As held by the Calcutta High Court in a civil suit dealing with the application of Art. 47, Schedule I of the Limitation Act, it is not every error which makes the result invalid. Before want of jurisdiction can be established in such a case a vice must be clearly established which infects the whole proceedings. *Yar Mohammad Sahay. Hayat Mohammad Saha* (5). Two minor points have been raised one that the mutation order has the effect of superseding the Magisterial order, and the other that the claim put forward by Abadi Begam at that time was not the same claim as that which she is making now. As to the first of these objections an order in mutation proceedings is not a final decision as to ownership and has no effect whatsoever on the order passed by the Magistrate in so far as that order limits the period within which a civil suit may be brought by any of the parties. The second point is not seriously pressed for one of the alternative claims made by Abadi Begam is to the whole property left by her father, and that is the identical property which gave rise to the dispute in 1908. In my opinion the order of the Magistrate was binding on Abadi Begam and her suit not having been brought within three years of that order is barred by limitation.

This decision on the point of limitation only affects the case of Abadi Begam and it is necessary, therefore, to consider at length the second plea put forward by both appellants that the inheritance to the property left by Muhammad Ali Beg should be governed by Muhammadan Law as apart from any custom which may be shown to have been attached to that property in the time of Agha Jan. It is not necessary to go at length into the history of the *taluqdari* properties in Oudh or to discuss all the rulings of this Court or of the Privy Council in similar suits. There is no question that the estate of Agha Jan became under Act I of 1869 a *taluqdari* estate of the class recorded in list II. Therefore, under section 10 read with section 8 of the Act this Court is bound to hold that it was an estate ordinarily devolving upon a single heir. The custom of the family was twice declared by Agha Jan himself to be a custom of *gaddi nashini* by

(5) 42 Ind. Cas. 768; 22 C. W. N. 342; 18 Cr. L. J. 1024.

which the eldest son succeeded to the property and the younger sons received maintenance. Under the circumstances it seems hardly proper to consider whether Agha Jan rightly described the custom of his family or not. It is argued on behalf of the appellants that this statement was induced partly by the fear of the Government and partly by the fear of a claim set up by his uncle's widow Mehdi Begam. The history of the estate goes back to the time of an Arabian soldier of fortune Bahadur Beg and it is contained with some discrepancies in the Record of Rights of the Aurangabad estate itself and the Qutubnagar estate which was carved out of it. There is nothing to show that since the Qutubnagar estate was given to a younger son there has been any division of the Aurangabad estate or that it has ever descended to any but the eldest surviving son. It is, therefore, proved beyond all reasonable doubt that when Agha Jan died his estate was subject to a custom of single heir succession in the person of the eldest son. Further proof of the custom, if any is needed, is to be found in the fact that Muhammad Ali Beg succeeded to his father as being the eldest surviving son, and his right to do so was upheld by a decision of a Bench of this Court. The appellants' contention is that under section 15 of Act I of 1869 the succesion of Muhammad Ali Beg was contrary to the order of succession laid down in section 22 and that, therefore, the estate ceased to be governed by the Act and any custom which may have appertained to the estate previously came to an end. The chief authority on which reliance is placed is the judgment of their Lordships of the Privy Council in *Thakurain Balraj Kunwar* v. *Rae Jagatpal Singh* (6). In this judgment their Lordships laid down for the first time that section 15 of Act I of 1869 comes into force when an estate is transferred to any person outside the direct order of succession, and their Lordships say that in such cases it seems not unreasonable that the fetter of the entail such as it is, should no longer apply to the estate. These words have been interpreted to mean that if any person other than the next heir, under section 22, of a *taluqdar* succeeds to an estate, he will be bound by no rules applying to such an estate whether they be rules of law or rules of custom, and that in future succession will be according to the law of his tribe or religion. It is, however, doubtful whether the words "fetters of the entail" mean any more than that the property so inherited will be no longer governed by the Act, and, therefore, the rules of intestate succession as laid down in section 22 will cease to apply. As a matter of fact this interpretation of section 15 by their Lordships created a state of affairs which was not contemplated by the framers of the Act, and in 1910 the law was amended accordingly, but as far as Muhammad Ali Beg and his father were concerned the Act of 1869 applies and the decision of the Privy Council cited by the appellants is binding. In that case, however, there was no reference to family custom and it is only in later rulings that this question and also the further question as to the effect of a *sanad* has been put forward. Thus in the *Dandikanch case* [*Balraj Kuar* v. *Mahadeo Pal Singh* (7)] one of the Judges gave his opinion that succession to an estate removed from the provisions of the Act by section 15 would be governed by *sanad* as restricting or qualifying personal law. In 1919 in the *Kalakankar case* [*Narain Singh* v. *Deputy Commissioner of Partabgarh* (8)] the view was taken that the person succeeding under the bar of section 15 would be governed by the personal law modified by the custom to which he was subject although he would not be bound by a custom of succession prevailing in the *taluqa*, that is to say, the custom on which the succession is based, must be his own family custom and not a custom attached to the property as such. This leads to the last decision of their Lord-

(6) 7 O. C. 248; 26 A. 393; 8 C. W. N. 699; 31 I. A. 132; 1 A. L. J. 384; 11 Bom. L. R. 516; 8 Sar. P. C. J. 639 (P. C.).

(7) 44 Ind. Cas. 59; 20 O. C. 360; 4 O. L. J. 589.

(8) 55 Ind. Cas. 896; 7 O. L. J. 93.

ships of the Privy Council in *Sitla Bakhsh Singh* v. *Sital Singh* (9). In this case all the previous decisions of the Privy Council were reviewed, and it was definitely ruled, that in that case the property would be descendible according to the ordinary Hindu Law (in this case Muhammadan Law) unless a particular custom of the religion or tribe be proved. Now it had already been held by the Privy Council in the *Deogaon case* [*Murtaza Husain Khan* v. *Mohammad Yasin Ali Khan* (10)] that a family custom follows the custom of the *taluqa* and so we find that a Bench of this Court in the *Bhilwal case* [*Zarif-un-nisa* v. *Shafiq-uz-Zaman* (11)] goes so far as to find that a custom broken by transfer outside the family may come back into existence when the property returns to the family in which the custom previously prevailed. The general trend of these decisions is to show that family custom may be set up in regard to a property even though it has been withdrawn from the scope of Act I of 1869, and that property of this nature may still, be held to be governed by a family custom of single heir succession, although it is no longer an estate within the meaning of Act I of 1869.

Against this the point taken by the appellants is that Muhammad Ali Beg being a younger son could not claim that he was governed by the family custom attaching to the estate in the time of his father, and that the defendants should have proved that there was another custom in the family by which younger sons who acquired property left an impartible estate. Now it is clearly impossible to prove any such custom. Nothing is known about younger sons in this family or whether they left any property and if so what customs, if any, were attached to their properties. But in this case Muhammad Ali Beg did not succeed as a younger son. He succeeded according to his father's assertion of family custom as the eldest surviving son. He did not succeed to a younger son's portion but to the whole property of his father, and this was the very property which had carried with it the family custom. Moreover he appears to have scrupulously carried out the instructions laid down by Agha Jan as to younger sons, by giving to the other members of the family villages for their maintenance, *vide* Exhibit C19 printed at page 68 of Part III of the Record. The so-called Will by which Muhammad Ali Beg made good in Court his title to the estate was really a declaration of family custom and it was not a custom which belonged to him personally as a younger son but a custom which he inherited as his father's heir.

Some doubt has been raised as to the exact meaning of the custom asserted by Agha Jan, but the mian facts are perfectly clear. In February 1860 Agha Jan made an application that after his death the *ilaqa* should continue intact in his family without being partitioned and should be governed by the rule of *gaddinashini*. To this he added subsequently the words "It may also be mentioned that after my death among my sons the eldest son shall according to the old custom obtaining in the family ascend the *gaddi*" and again on the 5th of September 1861, in reply to a further letter from the Chief Commissioner, he wrote: "In my family after my death my estate shall remain intact and undivided governed by the rule of *rajgaddi* and my eldest son shall sit on the *gaddi*." There is no doubt that these words mean at least that there is in the family a custom of single heir succession by the eldest son. The law of primogeniture as it is understood in England never applied to India, and although Agha Jan had received what is known as a primogeniture *sanad* there is no reason to suppose that either he or the Government at the time interpreted this to mean that the eldest son meant the first born son and his descend-

(9) 60 Ind. Cas. 548; 24 O. C. 107; 19 A. L. J. 337; 40 M. L. J. 449; 8 O. L. J. 214; 25 C. W. N. 721; 33 C. L. J. 520; 43 A. 245.

(10) 36 Ind. Cas. 299; 38 A. 552; 20 M. L. T. 362; 14 A. L. J. 1033; 18 Bom. L. R. 884; 31 M. L. J. 804; (1916) 2 M. W. N. 555; 25 C. L. J. 1; 19 O. C. 290; 1 P. L. W. 122; 21 C. W. N. 410; 4 O. L. J. 8; 4 L. W. 538; 43 I. A. 269 (P. C.).

(11) 75 Ind. Cas. 626; 26 O. C. 133; (1923) A. I. R. (O.) 185; 10 O. L. J. 535.

ants rather than the eldest surviving son. This point, however, hardly arises in the present case for the Bench decision already referred to expressly found that in this case primogeniture meant succession by the eldest surviving son, and no distinction was drawn between the meaning of the so-called Will and the *sanad*. The fact is that Muhammad Ali Beg actually succeeded by virtue of the family custom as interpreted to mean succession to the whole estate by the eldest surviving son, and although the unfortunate wording of section 15 of Act I of 1869 had the effect of excluding the estate from the Act on account of the succession of the second born son of Agha Jan, the fact of his succession is a very strong proof that the family custom set up by Agha Jan survived in the person of his son. This custom did not come into existence with the Act or cease when the estate was technically excluded from the Act, and I am of opinion that the plaintiffs-appellants have entirely failed to prove that on the death of Muhammad Ali Beg this property came under the rules of intestate succession laid down by the Muhammadan Law. On the contrary I am of opinion that there was in this family a custom of single heir succession appertaining to the family property both before it became an estate under the Act and after it ceased to be such an estate and that the plaintiffs-appellants have, therefore, no claim to the shares to which they would have been entitled under ordinary Muhmmadan Law. This finding applied not only to the property actually inherited from Agha Jan, and which formed the original *taluqdari* estate but also to the property subsequently acquired by Muhammad Ali Beg as an accretion to that estate. Under Muhammadan Law there is no distinction between ancestral property and property otherwise acquired, as has been laid down by the Privy Council in the *Deogaon case* [*Murtaza Husain Khan* v. *Mohammad Yasin Ali Khan* (10)]. Both appellants, therefore, have failed to establish any claim to any part of the property under Muhammadan Law.

Thus the appeal in the case brought by Akbari Begam, and carried after her death by her transferees fails, and I have already found that the suit of Abadi Begam is barred by limitation. It is, however, proper to consider the claim of the latter to succeed to her father's estate even if it is an impartible estate governed by the custom of single heir succession. On this point also the appellant is, in my opinion, unsuccessful. No doubt there is nothing in the meaning of the terms impartible estate or single heir succession which precludes a female from claiming such an estate by inheritance, but in this family at least there is a custom of *gaddi nashini* as well as a custom of inheritance by the eldest son. There is no instance in which a female has succeeded to any portion of this estate, and the only person who has made a claim to do so, namely, Mehdi Begam the mother of Agha Jan was unsuccessful. Nor is there any parallel case in other Oudh families where a female has succeeded as heir to a *gaddi* and it is quite certain from the papers quoted in Mr. Sykes Compendium of Taluqdari Law that the whole idea of the *gaddi* in Oudh presupposes inheritance by a male and not by a female. This is further borne out by the terms of the *sanad* granted to Agha Jan. The only point on which the appellant relies is found in a suit brought by Ahmad Mirza Beg defendant No. 1 in the present suit against Abadi Begam to recover certain villages which Abadi Begam claimed to have inherited from her mother. This property did not belong to the family of Agha Jan and was as a matter of fact bequeathed to Abadi Begam by a Will. In the course of the hearing of the appeal by a Bench of this Court it appeared necessary to remand an issue as to whether there was any custom in the family of Muhammad Ali Beg by which daughters are excluded from succession. The finding of the lower Court was in the negative and this finding was accepted in appeal. Even against Ahmad Mirza Beg no question of *res judicata* can arise, for it is perfectly clear

that the suit was decided on the finding that Abadi Begam obtained the property by Will, and no finding as to exclusion of females was necessary. Moreover, as pointed out by the learned Subordinate Judge the property belonged to another family and the custom which was relevant was rather the custom of the family of Shambhar Bahadur who was the original owner of the property than that of his son-in-law Muhammad Ali Beg. Under the circumstances the finding has not even any great value as evidence, and the plaintiff-appellant has produced no evidence to support her claim to succeed as a daughter merely because she is next of kin in view of the definite evidence that this family is governed by the rule of *gaddi nashini* which in Oudh at least has always been taken to mean succession in the male line.

The plaintiffs, therefore, have failed to make good their case in appeal on any of the pleas raised. There is, however, one minor point in which the plaintiff Abadi Begam should succeed and that is on the question of costs. Abadi Begam has obtained a decree against the present defendants in the suit for dower debt and the property now in suit was attached in execution of her decree and placed in the hands of the Deputy Commissioner of Sitapur as Receiver. The receivership is now at an end but in the lower Court the Receiver was represented by Counsel and was allowed separate costs. The defence put forward by the Receiver was practically the same as that put forward by the other defendants and the Counsel engaged by the Receiver stated that he represented the three main defendants also and produced evidence on their behalf. Where co-defendants produced substantially the same defence separate costs should not be allowed except for special reasons to be given by the Judge trying the case. No such reasons have been given in the judgment before us and the defence of the Receiver is substantially the same as that of the other defendants. Under the circumstances separate costs should not have been allowed and the decree for costs will, therefore, be reduced by the amount of Rs. 3,000 which was the Pleader's fee allowed to the Receiver by the lower Courts.

Kendall, A. J. C.—I need add little to the judgment of my learned colleague with whose conculsions I am in ganeral agreement. I am, however, by no means convinced that the lower Court was right in laying the burden of proving that the case of Rani Abadi Begam was barred by limitation on the defendants. The plaintiffs stated that their claim was within the twelve years period of limitation, and this was met in the written statement by the plea that Rani Abadi Begam had been a party to the proceedings under section 145, Criminal Procedure Code, and that as she had instituted no suit within three years she was barred by Art. 47, Schedule I of the Limitation Act. In her replication the plaintiff stated that the orders issued under section 145, Criminal Procedure Code, were wrong, invalid, *ultra vires*, etc. The question of the burden of proof is a technical one, as evidence has been recorded on both sides, and no dubt it is a fact that the onus is constantly shifting, but at the time when the issues were struck that order under section 145 was on the file, and it was one which was ostensibly passed against Abadi Begum, and by which she appeared to be bound for it ordered her to file a suit in a Civil Court. The ordinary period for one who is bound by an order under section 145, Criminal Procedure Code, is three years and until she could prove that she was not bound by that order, I am of opinion, that Abadi Begam must be held to have been barred by the Statute of Limitation. The question of whether the proceedings under section 145, Criminal Procedure Code, were *ultra vires* or not has been discussed at inordinate length in the judgment of the lower Court. Unfortunately we have very little knowledge of what the details of those proceedings were. We know, however, that they were instituted by a Police report under

section 107, Criminal Procedure Code, against Ahmad Mirza, Hamid Mirza and Ameer Mirza, and that the Magistrate subsequently altered them into proceedings under section 145, Criminal Procedure Code. We have not been shown that there was anything irregular in this, nor have we been shown that the Magistrate was acting beyond his powers in making Abadi Begam and her step-mother parties to those proceedings and sending them notices under that section. We have no copy of the notices sent but we have a copy of the order of the Court directing that notices should be sent, and we must, therefore, assume that they were sent. There was an application under section 526, Criminal Procedure Code to the Court of the Judicial Commissioner, made by Ameer Mirza, in which Abadi Begam and her step-mother were made parties. This was an application for a transfer of the proceedings on the ground that a fair and impartial trial could not be obtained in the Court of that particular Deputy Magistrate. So far as we can judge from the order passed, it was not suggested that the proceedings of the Magistrate were *ultra vires*. We cannot possibly assume that the Magistrate knew perfectly well that the ladies were not contemplating a breach of the peace, and his order is one that appears on the face of it to bind the ladies. The other parties were put in possession, and the ladies were kept out and referred to the Civil Court. I agree entirely with my learned colleague's remarks about the final order, and the result is that Abadi Begam's suit must be held to be barred by limitation.

The main contention of the plaintiffs was that succession to the property in suit must be according to Muhammadan Law and not according to any custom of single heir succession, but in the second place it was claimed that if the defendants were able to prove such a custom, there was no custom excluding females from succession. The property concerned consisted of (*a*) the estate known as the Aurangabad estate in Sitapur District entered in List I; (*b*) self-acquired landed property, and (*c*) self-acquired houses, etc., of the original *taluqdar* Mirza Agha Jan whose name was entered in List II. The first property having been devised by Agha Jan in a document which has been conclusively held to be a Will to his second son (the eldest surviving son) Muhammad Ali Beg, and not to the heir under section 22 of the Oudh Estates Act, it is clear that section 15 of that Act comes into force. So far there is no contest between the parties. The main argument on behalf of the appellants is that the effect of section 15 of the Act is to abrogate the custom in the family by which the estates devolved upon a single heir. There is nothing in the section itself to suggest that it has such a drastic effect. All that it states is that the property bequeathed (*i. e.*, in this case to Muhammad Ali Beg) shall be regulated by the rules which would govern the transfer of and succession to such property if the transferee or legatee had bought the same from person not being a *taluqdar* or grantee. There is no reason so far as I am aware why a person who is not a *taluqdar* or grantee should not be subject to a family custom by which the estates devolve upon a single heir. The appellants have placed chief reliance on the Privy Council ruling in *Thakurain Balraj Kunwar* v. *Rae Jagatpal Singh* (6), but that was a case in which the question of custom does not appear to have been raised at all, and there is nothing beyond the words quoted to show that in using the expression "fetter of the entail" their Lordships had in mind anything beyond the fetter of the entail imposed by the Act itself. In *Umatul Fatima* v. *Asghar Ali Khan* (12) on which the appellants have also relied, the plaintiff claimed to be the heir under section 6 of the Act, and to be entitled to oust the defendants, who were the successors-in-interest of the youngest of four half brothers of the original *taluqdar*. The decision following *Thakurain Balraj Kunwar* v. *Rae Jagatpal Singh* (6) was that the plaintiff had no case under the Act and he tried to fall back on the *sanad*, but was not allowed to set up a new case at that late stage. It does not appear that he ever attempted

(12) 8 O. C. 45.

to set up the case that the estates must descend to a signle heir by the faimly custom, as apparently he might have done, and we, therefore, do not know what the learned Judges would have decided on such a point, though they appear from some remarks on page 53 to have considered that it might have been necessary to enquire into the family custom if they had allowed the plaintiff to fall back on the *sanad*. At any rate it is clear that the reason for their decision was not that they believed that section 15 in itself freed the estate from the fetter either of the *sanad* or of a family custom. Another case in which the effect of section 15 was considered by a Bench of this Court is reported as *Balraj Kuar* v. *Mahadeo Pal Singh* (7) but this again contains no real support for the appellants. It is true that Mr. Justice Lindsay was of opinion that where section 15 applied the estate would not be subject to the fetter of the *sanad*, but from this view Mr. Justice Kanhaya Lal dissented as he believed that section 15 could only cut the fetter of the Act, and not that imposed by any other rule. It is not by any means clear that Mr. Justice Lindsay would have considered that the effect of section 15 would have been to abrogate a family custom, for it appears that he believed that the words "neither a *taluqdar* nor a grantee" under section 15 are to be taken to mean "a person without a *sanad*" a *sanad* being so to speak the absence of a *taluqdar's* estate but this is not by any means the same thing as a person without a family custom of single heir succession. On the other hand it has been admitted by Mr. Sen on behalf of the appellants that there have been cases in which section 15 has been held not to abrogate the family custom, and the dictum of their Lordships of the Privy Council in *Sitla Bakhsh Singh* v. *Sital Singh* (9) seems to me to settle the point definitely. I may add that very recently a Bench of this Court has held that although a family custom of impartibility would cease to govern an estate which had passed out of the family of the *taluqdar*, yet if the estate were to return to the family, there would still be a presumption as to the custom of impartibility, though it would be a rebuttable and not a conclusive presumption. This finding appears to be perfectly consistent with the one in *Murtaza Husain Khan* v *Mohammad Yasin Ali Khan* (10) in which it was held that the presumption applicable to an estate entered in List II (*i. e.*, the estate of a *taluqdar* entered in List II) would also apply to the personal property of a Muhammadan *taluqdar* not so entered, but in regard to the latter the presumption would not be conclusive. In fact there appear to be two elements which have to be considered. There is in the first place the family custom, and in the second place there is the estate. So long as the estate devolves according to the Act, both elements come in and the custom is conclusively presumed. If the estate is transferred or bequeathed not in accordance with the Act, so that section 15 comes into operation the law will not allow a conclusive presumption because one of the elements has disappeared, *i. e.*, the estate is no longer an estate within the definition of the Act. It cannot be, however, that the family custom has been abrogated by a single transfer or bequest, and consequenly if the property returns to the family, the custom, which has remained unaffected, may be presumed to apply to the returning property in the same way as it would apply to any other non-*taluqdari* property which should accrue to the estate.

There is, therefore, a presumption in favour of a family custom of impartibility in regard to the property of Muhammad Ali Beg, *i. e.*, not only in regard to what is called the *taluqdari* property but also to the self-acquired property. It is, however, a rebuttable presumption but there has been no rebuttal worth the name, the appellants having relied almost entirely on section 15 of the Act Beyond the fact that the estate has ordinarily devolved on a single heir, we have no very clear evidence as to the nature of the custom beyond the statement of Agha Jan himself but that fortunately is supported by a decision of a Bench of this Court to which

my learned colleague has already referred. The custom being one of succession to the eldest surviving son, and there being no surviving son of Muhammad Ali Beg, it has been argued that the succession should go to the daughter. It was part of Abadi Begam's case that if a custom of single heir succession or impartibility should be held to exist, she, as a daughter, should be preferred to the brother and nephews on the assumption that the exclusion of females could not be proved. *Musammat* Abadi Begam's suit, however, has been barred by limitation and there is no need to consider it further. It has not been suggested that the appellant in the other suit, who is the sister of Muhammad Ali Beg has any claim to the full estate, but only that she is entitled to a 1-6th share in it if the succession is to be governed by the ordinary rules of Muhammadan Law. Her appeal also, therefore, fails.

By the Court.—The appeals are dismissed with the exception of the reduction of the costs allowed in the Court below. Costs in this Court are allowed to the parties in proportion to their success.

N. H. *Appeals dismissed.*

RANGOON HIGH COURT.

INSOLVENCY CASE No. 233 OF 1923.

March 20, 1924

Present:—Mr. Justice Rutledge.

In re A. V. JOSEPH—INSOLVENT.

Presidency Towns Insolvency Act (III of 1909), ss. 7, 52 (ii) (c)—Mercantile document—General words following specified words—Construction— Ejusdem generis, *doctrine of.*

In mercantile documents where there are general words following particular and specific words, the general words must be confined to the things of the same kind as those specified. [p. 703, col. 1.]

The doctrine of *ejusdem generis* does not apply unless there is a genus or class or category. [*ibid.*]

In a hypothecation instrument where there is a distinct category dealing with various kinds of timber which constituted the stock-in-trade of the mortgagor who was a timber trader and a saw mill owner, the words "goods, chattels, and stock-in-trade" must be read *ejusdem generis* with the preceding words so as not to include cargo boats. [p. 703, cols. 1 & 2.]

Mr. *Paget*, for the Petitioners.
Mr. *Keith*, for the Respondent.
Mr. *J. Ali*, for the Insolvent.

JUDGMENT.—In this case the Bank claims that *inter alia* by their mortgage or hypothecation deed, dated the 12th May 1922, they have security over two cargo boats which bore the license Nos. 667 and 668 respectively of 1923, and over which the respondents have a mortgage dated the 23rd May 1923.

The case turned upon the construction to be put on certain words in the petitioners' hypothecation instrument of the 12th May 1922.—"The mortgagor doth hereby hypothecate unto the Bank all and singular the logs, squares, planks posts, scantlings, battens, shingles and all other sawn and unsawn timber and all other goods, chattels and stock-in-trade of the mortgagor which are now or hereafter shall be in or about the saw mill and premises known as A. V. Joseph's Saw Mill at Botataung, Rangoon or in any other place whatever including timber in the course of transit to the mortgagor or to his orders and including any goods, chattels and stock-trade which may hereafter be added to or substituted for those now in existence."

No inventory of the goods hypothecated was added to the deed, and towards the end of the deed the mortgagor covenants that he will, whenever required so to do, produce to the Bank a full and true account of his goods, chattels and stock-in-trade and the values thereof.

It is admitted that in the accounts which he furnished to the Bank under this covenant he never included the cargo boats, nor was any exception taken to his not doing so. It is, I think, also clear that, if the words "goods, chattels and stock-in-trade" were not limited by the preceding words, they are sufficiently wide to cover cargo boats. The question then is—Does the doctrine of *ejusdem generis* apply ?

For the petitioners it is urged that the doctrine of *ejusdem generis* must be applied with caution, and that the Court is bound, if possible, to give a meaning to the words used; and reliance is placed upon certain cases on the construction of Wills set out in Jarman on Wills, 6th Edition, at pages 1024 and 1028.

The rule is stated in its widest form by Lord Campbell in *Reg.* v. *Edmundson* (1) "I accede," said he, "to the principle laid down in all the cases which have been cited, that, where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified."

The doctrine is well stated by Farewell, L. J., in *Tillmanns & Co.* v. *S. S. Kuntsrford* (2). He said: "It is perhaps not desirable, when dealing with the construction of Statutes and mercantile documents, to cite authorities on the construction of Wills, because a testator is of his own bounty doing what he pleases and there is no presumption that he will not be capricious. In a mercantile document or a Statute there is a presumption that business men do not intend to do anything absurd, which is some slight guide; but in all cases it is a question of construction Now there is no room for the application of the *ejusdem generis* doctrine unless there is a genus or class or category—perhaps category is the better word, as 'class gift' has a technical meaning in Wills, and its employment might lead to confusion. Unless you can find a category there is no room for the application of the *ejusdem generis* doctrine." In the result their Lordships construed the words "or any other cause" *ejusdem generis* with the preceding words "In consequence of war or disturbance." Applying this decision to the present case, one has here a mercantile document in which there is a distinct category dealing with the various types of timber which constituted the stock-in-trade of the mortgagor who was a timber trader and saw mill owner; and I am consequently of opinion that the words "goods, chattels and stock-in-trade" must be read *ejusdem generis* with the preceding words.

The respondents rely upon another argument, *viz.*, that the cargo boats were in the possession of the insolvent at the commencement of the insolvency by the consent and permission of the true owner under such circumstances that he is the reputed owner thereof. The petitioners rely on a recent decision in the case of the *Official Assignee* v. *Mohamed E. Naikwarah* (3). But I do not think that this argument avails the respondents very much. If my construction of the words in the hypothecation deed is correct, then (apart from?) the petitioners' demand followed by a suit, the mortgagor's goods, chattels and stock-in-trade must be taken as limited to the mortgagor's timber stock-in-trade. If I am wrong in that construction, and the general words include the cargo boats, then the demand followed by a suit would be sufficient in my opinion under the decision already quoted in the case of the *Official Assignee* v. *Mohamed E. Naikwarah* (3) to take the case out of the operation of section 52 (*ii*) (*c*) of the Presidency Towns Insolvency Act.

For these reasons I hold under section 7 that the petitioners' hypothecation deed does not apply to cargo boats. Petitioners pay respondent's costs five gold *mohurs*.

S. D. *Order accordingly.*

(1) (1859) 28 L. J. M. C. 213; 2 El. & El. 77; 5 Jur. (N. S.) 1351; 7 W. R. 565; 8 Cox. C. C. 212; 121 E. R. 30; 33 L. T. (O. S.) 237; 119 R. R. 631.

(2) (1908) 2 K. B. 385 at p. 402.

(3) 74 Ind. Cas. 919; 1 R. 153; 2 Bur. L. J. 248; (1924) A. I. R. (R.) 27.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER NO. 29 OF 1923.

June 19, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Graham.

Chowdhuri DINA NATH PATI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Chowdhuri UPENDRA NANDAN DAS MAHAPATRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. V, r. 17.

DINA NATH PATI *v.* UPENDRA NANDAN DAS MAHAPATRA.

—*Service to be personal—Substituted service, when allowed—Process-server, duty of.*

The service of a summons should be personal unless there is an agent empowered to accept service and it is only when personal service cannot be effected that a process-server is justified in proceeding in accordance with the other provisions of O. V, r. 17, Civil Procedure Code.

When, therefore, the notice of an appeal was sent to a village S, but the peon on arriving at S did not find the plaintiffs there, or any other male member of the family upon whom the service could be effected, and was told that they had gone to village J, some two or three miles distant from S, but instead of proceeding to J, the peon purported to effect service by affixing the notice at the entrance of the house at S and the appeal was heard *ex parte*:

Held, (1) that the service was not good service under the provisions of the Civil Procedure Code;

(2) that it was the duty of the peon to endeavour to effect personal service upon the plaintiffs either by proceeding to J or returning to the Court and stating the facts in order that fresh notice should issue.

Appeal against an order of the Second Additional District Judge, Midnapur, dated the 12th September 1922.

Babu *Santosh Kumar Pal*, for the Appellants.

Babus *Gunada Charan Sen* and *Someswar Prasad Mukerjee*, for the Respondents.

JUDGMENT.

Greaves, J.—We think that this appeal must succeed as there has not been a proper service of notice of the appeal on the appellants before us. The suit was commenced by the plaintiffs against their tenants for the recovery of rent. The First Court decreed the suit. Against this decree the defendants preferred an appeal. In the plaint the plaintiffs have described themselves as residing at a village called Samsara. Accordingly, the notice of the appeal was sent for service to Samsara. The peon on arriving at Samsara did not find the plaintiffs there or any male member of their family upon whom the service could be effected. He found there a servant of the plaintiffs and the peon was told the plaintiffs were at that time living at their own *bari* at village Janki, some two or three miles distant from Samsara. The peon thereupon purported to effect service by affixing the notice at the entrance of the house at Samsara. This is shown by the receipt which is the first document in the paper-book and also by the peon's return. The appeal was heard *ex parte* and was decreed in favour of the defendants in the suit. The plaintiffs thereupon applied for the re-hearing of the appeal which was refused and against this refusal the present appeal has been preferred to this Court. As I have already stated, in my opinion, the service was not good service under the provisions of the Code. When the peon was told that the plaintiffs, whom he was seeking to serve, were not living at that time at Samasara but at their own *bari* in village Janki, in my opinion, it was his duty, to endeavour to effect personal service upon them either by proceeding to Janki or returning to the Court from which he came and stating the facts in order that fresh notice should issue for service on the plaintiff at Janki. It seems to me idle to say that the provisions of O. V, r. 17 have been complied with by the peon in doing what he did in this case. In my opinion, he did not use due and reasonable diligence. The service, if possible, should be personal unless there is an agent empowered to accept service and it is only if you cannot effect personal service that you are justified in proceeding in accordance with the other provisions of O. V, r. 17. In the present case, in my opinion, there was nothing to prevent personal service which could have easily been effected had due and reasonable diligence been observed.

The result is that the appeal succeeds and the appeal will be re-heard by the lower Court in the presence of the present appellants before us.

There will be no order as to costs in this appeal.

Costs in the lower Court will abide the result.

Graham, J.—I agree.

K. S. D. *Appeal allowed.*

EMPEROR *v.* CHITAR SINGH.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 853 OF 1923.
October 31, 1923.

Present :—Sir Grimwood Mears, KT., Chief Justice, and Mr. Justice Piggott.

EMPEROR—APPELLANT
versus
CHITAR SINGH—ACCUSED—RESPONDENT.

U. P. Excise Act (IV of 1910), ss. 3 (2), 10—"Excise Officer", meaning of—Police Officer specially invested with powers.

Under section 10 of the U. P. Excise Act the Local Government has authority to empower, not only a Sub-Inspector of Police, but any Police Officer, to perform duties and exercise powers under that Act, including the conferment of authority to make a report or complaint. [p. 706, col. 1.]

A Sub-Inspector of Police who has been invested with powers under the Excise Act by the Government is an "Excise Officer" within the meaning of the Act and is competent to make a complaint or report to a Magistrate under section 71 (*a*) of the Act. [p. 706, col. 2.]

Criminal appeal, by the Local Government, against an order of the Sessions Judge, Bulandshahr, dated the 14th July 1923.

The Government Advocate, for the Crown.

Mr. *Shabd Saran*, for the Accused.

JUDGMENT.—This is an appeal by the Local Government, presenting some peculiar features. The case itself was a simple one. Sub-Inspector Mohan Lal, Officer-in-charge of Aurangabad Police Station, received information that Chitar Singh, a petty shop-keeper of a village called Saidpura, was selling liquor at his shop, which he kept ostensibly for the sale of groceries. Chitar Singh had no license for the sale of intoxicating liquor. The Sub-Inspector raided the shop. He says, and he is corroborated by at any rate two witnesses, that Chitar Singh was sitting outside his shop as the Police Officer and those with him approached, and that he thereupon ran away. The shop being searched, there were found inside seven bottles of country spirit and a barrel of the same, together with a vessel used for filling bottles from the barrel. The expert evidence of Babu Girwar Singh, Excise Inspector, shows that the liquor was of abnormal strength, being more powerful than what is permitted to be issued from Government Distilleries. The accused was not found for some days. He was eventually arrested and the Magistrate took cognizance of the case on the report submitted to him by the Sub-Inspector.

The accused's defence was that the shop was raided in his absence, at the instigation of some enemy of his, and that the same enemy must have planted the liquor in the shop.

In view of the quantity found, this is a very improbable suggestion. We have examined the evidence in detail and we do not think there is any force in the accused's defence. Such evidence as he called in his defence was fragmentary and contradictory. We are satisfied that on the facts the Magistrate was justified in convicting Chitar Singh, as he did, of an offence punishable under section 60, clause (*a*), of the Excise Act. He did not think it necessary to record an opinion whether the accused had also been guilty of a further offence, that of selling country spirit, punishable under section 60 clause (*a*).

Chitar Singh appealed to the Sessions Judge. His memorandum of appeal challenges the decision of the Trial Court on all questions of fact. It suggests that the conduct of the Police in making the search was irregular. There is a plea that the Sub-Inspector ought to have reported the matter to the Magistrate more promptly than he did. But, apart from a general plea that the conviction is contrary to law, there is no suggestion in the petition of appeal that the Trying Magistrate had no jurisdiction to take cognizance of the offence on the report of the Sub-Inspector. Before the learned Sessions Judge, however, this plea was orally taken, and he allowed it to be argued without insisting on any amendment of the memorandum of appeal. Chitar Singh was accordingly acquitted upon the mere finding that, by reason of the provisions of section 71 (*a*) of the Excise Act, the Magistrate had acted without jurisdiction, in that he took cognizance of the offence, not having before him the complaint or report of any Excise Officer.

If the learned Sessions Judge had insisted on this plea being formally taken in writing, it is probale that the Government Pleader would have found an answer to it, and much trouble and expenditure of judicial time would have been saved.

Curiously enough, however, the Local Government in filing this appeal have duplicated the very same mistake. The appeal comes before us on a general plea, that the order of acquittal is against the weight of evidence on the record. We have refused to enterain the appeal on that ground, which obviously is not an arguable one ; but we have permitted the learned Government Advocate, who is himself not responsible for the drafting of the Government's memorandum of appeal, to amend the same by adding a further plea. This is to the effect that, in view of a Government order of the 13th of July 1910, the Sub-Inspector, being a Police Officer invested with certain powers under the authority exercisable by the Local Government by virtue of section 10 of the Excise Act, he was by definition an "Excise Officer", and. therefore, a person competent to make a complaint or report to a Magistrate under section 71 (*a*) already referred to. The appeal has been argued on this basis, and Counsel has been engaged to represent the accused Chitar Singh, who has also appeared in person.

There can be no doubt that under section 10 of the Excise Act the Local Government had authority to empower, not only a Sub-Inspector of Police, but any Police Officer, to perform duties and exercise powers under that Act, including the conferment of authority to make a report or complaint. Now the Local Government has in express terms authorised any Police Officer to arrest and to make searches in connection with a number of offences, including the offence of being in illicit possession of intoxicating liquor of which Chitar Singh has been convicted. It would certainly be anomalous if the Sub-Inspector had authority to arrest Chitar Singh and to search his shop, and was moreover required by law to produce Chitar Singh before a competent Magistrate within 24 hours of his arrest, but could not by reporting the facts to the Magistrate give that Magistrate authority to take cognizance of the alleged offence. We think that this anomaly has been avoided by the very wide definition of the words "Excise Officer" contained in sub-clause (2) of section 3 of the Excise Act. Acording to that definition, an "Excise Officer" means not merely a Collector, or other officer appointed as such, but also an officer, or person invested with powers under the Act by a Government order lawfully issued under the provisions of section 10. The Sub-Inspector as a Police Officer has been invested with powers under that section. This is sufficient to constitute an Excise Officer within the meaning of the definition, wherever the words "Excise Officer" occur in the Act. It was, therefore, unnecessary, and would have complicated matters, for the Local Government, to issue a further notification authorising persons on whom it had already conferred powers for the purposes of the Act to do something which the Act says any "Excise Officer" may do. The learned Sessions Judge, therefore, was mistaken in the ground on which he has acquitted Chitar Singh.

We set aside his order of acquittal and in lieu thereof we restore the conviction recorded by the Trying Magistrate. We have given careful attention to the question of sentence. In view of all the circumstances and of the amount and strength of the liquor seized, we do not think the Trying Magistrate was in error in imposing the sentence of three months' rigorous imprisonment. We restore that sentence, with effect from the date on which it was passed :—that is to say, any period of imprisonment already served by Chitar Singh since the date of his original conviction will be reckoned towards the period of imprisonment which he has been ordered to serve. The accused will be taken into custody and arrangements made for conveying him to the Bulandshahr District to serve out his sentence.

K. S. D.
N. H.

Appeal accepted;
Acquittal set aside.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 351 OF 1924.
June 18, 1924.

Present:—Sir H. Scott-Smith, KT., Acting Chief Justice.

HAZARA SINGH AND OTHERS—ACCUSED APPELLANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 337—Evidence Act (I of 1872), s. 114, illus. (b)—*Accomplice—Evidence whether worthy of credit—Corroboration, necessity of—Sufficient corroboration—Discovery list, whether evidence.*

The evidence of an accomplice may be deemed to be unworthy of credit unless it is corroborated in material particulars. [p. 709, col. 1.]

The mere fact that the accused were seen with the approver a few days before the dacoity is not material corroboration of the evidence of the approver to the effect that the accused joined him in the dacoity. [p. 707, col. 2.]

Lists of discovery of stolen property can no doubt be used by the persons who actually wrote them in order to refresh their memory at the time of giving evidence, but they are not themselves evidence. [*ibid.*]

Appeal from an order of the Sessions Judge, Hoshiarpur, dated the 28th February 1924.

Dr. *Nand Lal*, for the Appellants.

Mr. *Abdul Rashid*, for the Government Advocate, for the Respondent.

JUDGMENT.—This is a joint appeal from the order of the Sessions Judge of Hoshiarpur convicting Hazara Singh, Partap Singh I of Littar, Thakar and Partap II of Fatehpur, of dacoity under section 395, Indian Penal Code, and sentencing each of them to eight years' rigorous imprisonment. The dacoity was committed in the shop of Kanshi at Bassi Jalal on the night between 14th-15th August 1923 and a large amount of property was said to have been stolen. According to Kanshi, jewellery worth Rs. 200, cloth worth Rs. 1,750 and cash to the amount of Rs, 525 were stolen. The evidence upon which the convictions are based is that of Teku approver, corroborated by evidence of association and by the alleged production of certain articles out of the stolen property by each of the appellants. I have not the least doubt and it is admitted by Counsel for the appellants, that a dacoity was committed in the shop of Kanshi as described by him and other eye witnesses. I also do not think that there can be any doubt that Teku approver was one of the dacoits, but the point which has to be decided is whether his statement is materially corroborated as against each of the appellants by other evidence upon the record.

The learned Sessions Judge has divided the story of the approver into various sections. He relies upon the evidence of Mehr Singh and Waryam Singh (P. W. Nos. 10 and 12) as corroborating incidents *B.* and *E.* and upon the evidence of Puran Singh (P. W. No. 18) as corroborating incident *D.* Now, as regards *B* and *E* the evidence is that Hazara Singh, Teku and Partap Singh of Fatehpur were going about together some three days before the dacoity. The evidence of Puran Singh is to the effect, that Partap Singh, Teku and the two absconders, Banta Singh and Waryam Singh, were together on the day preceding the dacoity. Now, even assuming that the evidence of these witnesses is true, it does not at all follow that the persons named all took part in the dacoity along with Teku. In full the evidence shows that Teku's companions were constantly changing and even if these persons were with him a few days before the dacoity, it does not follow that they remained with him and along with him committed the dacoity in question. I, therefore, cannot regard this evidence as any material corroboration of the evidence of the approver to the effect that any of the appellants joined him in the dacoity.

There remains the evidence as to the production of certain articles alleged to have been stolen from the shop of Kanshi at the time of the dacoity. The evidence of respectable witnesses is to the effect that each of the accused took the Police to various places not in their exclusive possession, and dug up or produced articles which at the time Sundar, the brother of Kanshi, identified as part of the

stolen property. The evidence of witnesses to the effect that Sundar identified these articles is, of course, in admissible as being hearsay. This only evidence admissible would be evidence given in Court by Sundar himself to the effect that any or all of the appellants gave information which led to the recovery of articles of stolen property. When Sundar came into Court the various articles had, it appears, all been mixed together and he was quite unable at that time to identify them or to say which accused had produced which article. Again, there was evidence, that as each appellant produced articles a list was prepared by a Police Officer and signed by respectable persons. The latter have given evidence to the effect that they signed these lists and the lists themselves appear to have been used by the learned Sessions Judge as substantive evidence in the case. There seems to be a general impression among the subordinate Courts that lists of this sort are themselves evidence, but this is an erroneous view of the law. Such lists could no doubt be used by the persons who actually wrote them in order to refresh their memory at the time of giving evidence, but this is not the way in which they have been used in the present case. There is thus no admissible evidence in this case to show what articles of stolen property, if any, were produced by each of the appellants.

In order to corroborate the evidence of the approver it was necessary to prove that a certain accused person produced certain property which property was identified at the trial as having been stolen in the course of the dacoity. These facts, however, have not been proved by any admissible evidence upon the record. There is, however, one exception and that is in regard to Exhibits 65 and 66, a ring and a *tandiri* which were said to have been in a box produced by Thakar accused and which have been identified in Court by Kanshi. It would, however, in my opinion be unsafe to consider this evidence as a sufficient corroboration of the statement of the approver especially as the articles were, as admitted by the learned Sessions Judge, not found in the exclusive possession of Thakar.

There are various other matters which need to be noticed. Kanshi states that prior to the dacoity he knew Hazara Singh, Partap Singh of Littar and Thakar appellants who often came to his shop. This being so it is remarkable that he failed to identify any of them at the time of the dacoity even though their faces were wrapped up in *mundassas*. Sundar has gone so far as to say that he identified Thakar and Partap Singh of Littar after the lamp was lighted by the dacoits, but his evidence in this respect is unworthy of credit seeing that their names were not mentioned in the First Information Report. The greater part of the property which has been recovered consists of cloth said to be parts of whole *thans* stolen in the dacoity. It is remarkable, however, that cloth stolen was worth Rs. 1,750 but that recovered is valued only at Rs. 370. It was urged on behalf of the defence that the cloth recovered was really cloth belonging to Kanshi which had been left behind by the dacoits and that there were no real recoveries at all at the instance of the appellants. The suggestion was that the Investigating Officer had hidden the various articles in the places from which they were subsequently said to have been produced by the appellants. There certainly is the possibility that the productions were not genuine though I see no reason to disbelieve the evidence of respectable persons who gave evidence in support of the recoveries. Again it is remarkable that though jewellery of large value is said to have been stolen from Kanshi, the amount stolen, according to the approver, was quite small. There are other serious discrepancies between the statement of the approver and that of Kanshi and there cannot be the least doubt that Kanshi has very largely exaggerated his loss. In the absence of any admissible evidence to show what stolen property was produced by any one of the appellants, it is impossible to regard the evidence of production as

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material corroboration of that of the approver. The evidence of association has already been dismissed and I have held that it also does not in any way connect any of the appellants with the dacoity. The only clear evidence then which connects the appellants with the dacoity is that of the approver Teku and it certainly would not in this case be safe to depart from the general rule that the evidence of an accomplice may be deemed to be unworthy of credit unless it is corroborated in material particulars.

I, therefore, accept the appeal, set aside the convictions and the sentences and acquit all the appellants, and direct that they be forthwith released from custody.

K. S. D. *Appeal accepted.*

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 637 OF 1922.
January 15, 1923.

Present :—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

HANMAPPA RUDRAPPA AND OTHERS —ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 201, 302—Murder, charge of—Alternative charge of causing evidence of offence to disappear—Prejudice—Test.

It is not illegal to charge an accused person first, with having committed a murder, and secondly, in the alternative, if the evidence does not show that he committed the murder, of having been guilty of causing evidence of the offence to disappear, with the intention of screening the offender. The real test is, whether the accused has been prejudiced by the alternative charge made in one trial. [p. 709, col. 1; p. 710, col. 1.]

Bucha v. *Emperor*, 1 P. R. 1904 Cr.; 30 P. L. R. 1904; 1 Cr. L. J. 113, *Queen-Empress* v. *Limbya*, Rat. Un. Cr. C. 799; Cr. Rg. No. 56 of 1895, *Teprinessa* v. *Emperor*, 47 Ind. Cas. 275; 46 C. 427; 19 Cr. L. J. 903, relied on.

Appeal from an order of the Sessions Judge, Bijapur.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.—The three accused were tried before the Sessions Judge of Bijapur on a charge of murder as well as on an additional charge framed by the Sessions Court under section 201, Indian Penal Code, of causing disappearance of evidence of the commission of the offence of murder in order to screen the culprits. The second and third accused were acquitted on both charges. The first accused was acquitted on the charge of murder, but convicted under section 201, Indian Penal Code. It was argued for the accused that a conviction under section 201, Indian Penal Code, could not be legal as he was suspected to be one of the murderers. I do not see myself any reason why a person should not be charged first with having committed a murder; secondly, in the alternative, if the evidence does not show that he has committed the murder, that he has been guilty of causing evidence to disappear with the intention of screening the offender; in other words, of having been an accessory after the fact.

In *Bucha* v. *King-Emperor* (1) it was held that when an accused person has been acquitted of a charge of committing a crime, the fact that he had been suspected and tried of the principal offence would not prevent his conviction under section 201, Indian Penal Code, if there is clear proof that he has caused evidence to disappear in order to screen some unknown offender from legal punishment. In that case the appellants were charged only under section 302, Indian Penal Code; but the Sessions Judge having acquitted them of the offence of murder convicted them under section 201, Indian Penal Code. In appeal the learned Judges very carefully discussed all the authorities on this point, and we need say no more than that we agree with the conclusions at which they arrived as set out at page 6 of the report:—

"The evidence was, however, held to be sufficient to prove that a murder had been committed. The evidence against two, the appellants, was held to be sufficient to establish an offence under section 201 to have been committed by them, in respect of the murder. We see

(1) 1 P. R. 1904 Cr.; 30 P. L. R. 1904; 1 Cr. L. J. 113.

nothing in the law, or in any of the rulings we have discussed, which lays down that such a conviction as the present is not a proper one, provided always that the prisoner has not been prejudiced in his defence. The appellants were charged only under section 302, but the evidence they had to meet clearly included the concealment of the body of the murdered man, and we think that they have been in no way prejudiced, that the case is covered by section 237 of the Criminal Procedure Code, and that the appellants have been properly convicted."

In *Queen-Empress* v. *Limbya* (2) it was held that a conviction on a charge of having been an accessory to an offence under section 201, Indian Penal Code, is not illegal merely because it is suspected, but not proved or admitted, that the accused committed, or was one of the several persons who committed, the principal offence.

In this case, the mere fact that it was believed at first that the first accused was concerned in the actual murder would not debar the Court from excluding all the evidence against the accused on the charge of murder, and convicting him of the charge under section 201, Indian Penal Code.

To the same effect is the decision of the Calcutta High Court in *Teprinessa* v. *Emperor* (3) where it was held that although there might be circumstances of grave suspicion that a person was the murder, his conviction under section 201, Indian Penal Code, would not be vitiated by the existence of such circumstances.

If the accused had been charged with murder alone and had been acquitted, there would be no legal obstacle in the way of his being charged again with an offence under section 201, Indian Penal Code. As pointed out by the learned Judges of the Chief Court of the Punjab the real test is whether the accused has been prejudiced by the alternative charge made in one trial. I do not think in his case there was any such prejudice and, therefore, the appeal will be dismissed.

W. C. A. *Appeal dismissed.*

(2) Rat. Un. Cr. C. 799; Cr. Rg. No. 56 of 1895.
(3) 47 Ind. Cas. 275; 46 C. 427; 19 Cr. L. J. 903.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 176 OF 1924.
July 8, 1924.
Present:—Sir H. Scott-Smith, KT., Acting Chief Justice, and Mr. Justice Malan.

JAHANGIR—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 193—Application to refer case to Jirga *under Frontier Crimes Regulations—Summary enquiry—Proceedings whether judicial—Magistrate whether can administer oath—Giving false evidence, charge of, whether can be sustained.*

A applied to the District Magistrate stating that his son had been murdered by certain persons and asking that the case be referred to a Council of Elders under the Frontier Crimes Regulations of 1901. The District Magistrate directed the Magistrate *Ilaqa* to make a summary enquiry into the case and the Magistrate *Ilaqa* thereupon took the statement on oath of the applicant and his four witnesses. The applicant's story having been found to be false, complaints were framed against him and his witnesses under section 193, Penal Code:

Held, that as the statements of the accused were not taken by the Magistrate in the course of any judicial proceeding and as he had no authority to administer an oath, the accused could not be convicted of giving false evidence under section 193, Penal Code. [p. 712, col. 1.]

Fatteh Ali v. *Empress*, 15 P. R. 1894 Cr., followed.

Appeal from an order of the Sessions Judge, Mianwali, dated the 11th February 1924.

Mr. *Sagar Chand* and Lala *Nawal Kishore* for Mr. *M. Shah Nawaz*, for the Appellant.

The Government Advocate, for the Respondent.

JUDGMENT.—This judgment disposes of the appeals of four persons, Jahangir, Sher Khan, Shah Jahan and Gulaya, who have been convicted by the Sessions Judge of Mianwali of offences under section 193 of the Indian Penal Code, and also the four appeals by the Local Government which ask that they should be convicted instead of offences under section 194 of the Code. The facts are briefly as follows:—On the 25th June 1923, Abdul Qadir made a complaint to the District Magistrate, Mianwali, under section 302-118 of the Indian Penal Code against Alam Khan and others to the effect that they

had murdered his son Hamid Ullah Khan on the 17th June 1923 and had thrown his body first into a pond and later into the river Indus. The District Magistrate sent this complaint to the Superintendent of Police for enquiry under section 202 of the Criminal Procedure Code. Whilst it was being investigated by the Police, Abdul Qadir, on the 10th July 1923, made a further application to the District Magistrate in which he repeated his previous story and said that nothing was being done by the Police owing to the influence of a certain Honorary Magistrate whom he named and asked accordingly that the District Magistrate should refer the case to a Council of Elders under section 11 of the Frontier Crimes Regulations of 1901. On this the District Magistrate passed the following order:—"Magistrate *Ilaqa*: Kindly make a summary enquiry into this case. A complaint has been made to the Police which they are investigating." The Megistrate *Ilaqa*, Pir Haider Shah took the statement of Abdul Qadir on the 19th July and those of the four appellants as witnesses on subsequent dates. These witnesses supported the allegations against the accused persons in regard to the murder of Hamid Ullah Khan. On the 25th August, the Magistrate reported that the murder had been committed, but the District Magistrate on the 14th September ordered the Police to make a further enquiry. On the 17th September the Superintendent of Police reported that the complainant wanted the case to be sent to a *Jirga*. On the 22nd September Hamid Ullah Khan, who was alleged to have been murdered, turned up alive. In consequence of this complaints were framed against Abdul Qadir and the four present appellants. Abdul Qadir was acquitted and the appellants were convicted as already stated.

It is contended on behalf of the appellants that the application of the 10th July 1923 was not a complaint within the meaning of the Criminal Procedure Code, and that it was not sent to the Magistrate *Ilaqa* for enquiry under the provisions of section 202 of the Criminal Procedure Code. It is further pointed out that the District Magistrate in fact merely directed a Subordinate Magistrate to make an informal and extra-judicial enquiry in order to enable him to decide whether or not he should take action under section 11 of the Frontier Crimes Regulations. It is contended that the Magistrate *Ilaqa* in making this enquiry has not acted in his judicial capacity as no judicial proceedings were before him and he was, therefore, not empowered to examine the witnesses on oath, and that, therefore, they could not be prosecuted for false evidence in regard to their statements under section 193, Indian Penal Code.

The learned Government Advocate admits that the application of the 10th July 1923 is not a complaint, for it was not an allegation made to the Magistrate with a view to his taking action under the Code of Criminal Procedure. The object of the informant was that action should be taken under section 11 of the Frontier Crimes Regulations. The Government Advocate, however, contends that a complaint had already been lodged on the 25th June which had been sent to the Police for investigation and that the application of the 10th July was merely in continuation thereof. In our opinion the application of the 10th July was quite distinct from the complaint of the 25th June 1923. Action had already been taken on the latter, but the complainant being afraid that the accused would not be prosecuted made a further application that the District Magistrate should take action and refer the case to a *Jirga* under section 11 of the Frontier Crimes Regulations. The District Magistrate though he referred in his order to a previous complaint, and did not treat the application as in continuation thereof. He directed the Magistrate *Ilaqa* to make a summary enquiry, and having regard to the prayer in the application, it is clear to us that his object was to ascertain whether there were sufficient grounds for taking the action which the complainant asked should be taken. Under these circumstances we

consider that the enquiry made by Pr Haidar Shah was clearly an extra-judicial one and was rather of an executive character. The case reported as *Fateh Ali* v. *Empress* (1) has been referred to by Counsel for the appellants and appears to us to be in point. That was a case in which the District Magistrate had received a demi-official communication from the Secretariate regarding publication of a certain pamphlet. He ordered enquiries to be made, and it was held that there having been no complaint before the District Magistrate, section 202 of the Code of Criminal Procedure was inapplicable and that the Magistrate had no lawful authority to administer an oath to accused on the occasion in question, *i. e.*, when he was examined as a witness, inasmuch as the proceedings, though taken by a Magistrate, were not magisterial proceedings taken in pursuance of any authority given by the Code of Criminal Procedure. The present case, in our opinion, is very similar. The statements of the appellants were no doubt taken by a Magistrate, but they were not taken by him in the course of any judicial proceeding, and he had no more authority to administer an oath to them than a private individual would have had. We, therefore, hold that the appellants cannot be convicted of giving false evidence under section 193, Indian Penal Code, and we accept their appeals, set aside the convictions and sentences and acquit them and direct that they be released from custody. The appeals filed at instance of the Local Government are dismissed.

K. S. D. *Appeals accepted.*

(1) 15 P. R. 1894 Cr.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS No. 1 OF 1924.

March 17, 1924.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice May Oung.

In the matter of A PLEADER.

Legal Practitioners Act (XVIII of 1879), s. 13—Legal Practitioner—Professional misconduct—Leaving client undefended—Pleaders, duties of.

When in pursuance of a resolution of the Bar Association to boycott a Magistrate's Court, a Pleader throws out his client's brief and leaves him in the lurch without first obtaining his consent, he is guilty of professional misconduct and an arrangement made with his client subsequent to his failure to appear would not absolve him from the liability. [p. 714, cols. 1 & 2.]

Pleaders have duties and obligations to their clients in respect of the suits and matters entrusted to them which are pending in different Courts, in addition to their duties to co-operate with the Court in the orderly and pure administration of justice. [p. 714, col. 2.]

Report of professional misconduct against a Pleader.

JUDGMENT.—This is a report made after enquiry charging a Pleader with unprofessional conduct submitted to this Court for confirmation and the passing of such order as may be appropriate.

The facts of the case are practically undisputed and are as follows:—

The members of the local Bar appeared to have taken a dislike to the Special Power Magistrate on the ground, it is alleged, that he was in the habit of dismissing their cases because Counsel did not appear immediately the case was called on. We do not know the details of this matter, or what justification there is for the opinions formed by the members of the Bar. It is clear that the Pleaders were in the habit of behaving in Court in a manner to which the Special Power Magistrate took grave exception. It is said that they were in the habit of sitting on the table or leaning over the rails of the Bench in addressing the Court, and addressing the Court as "you" instead of "your honour." On one occasion the Special Power Magistrate took exception to this mode of address by a Pleader, and administered a stern rebuke to him in open Court. He apparently asked the Pleader what his nationality was, the necessary implication being that he was ignorant of good manners and the proper mode of addressing the Court. The Special Power Magistrate told him not to address the Court as "you," but as "your honour." This Pleader reported the circumstances to the local Bar Association. The Special Power Magistrate further passed an order to the effect that he noticed with regret that some of the Pleaders appearing in

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that Court had been lacking in courtesy (*a*) by sitting on the table or resting their hands on the rails of the Bench when addressing the Court, and (*b*) addressing him as "you" instead of "your honour." The order goes on—"Personally I am indifferent; but as a Judge and Magistrate I feel it my duty to point out the disrespect to the Bench and must warn all concerned to desist from the practice." There is a note on the order to the Head Clerk to hang it upon the Bench for a fortnight.

Now it is perfectly clear that these acts, which are not denied, were grossly improper. They were lacking in respect to the Court—a respect which it was the bounden duty of the members of the profession to show, and which is invariably shown by them. It is also perfectly clear that, as the Counsel did not behave becomingly when addressing the Court, he should have been severely reprimanded for his conduct; and that it was the duty of the Judge to put a stop to it. The order was a perfectly proper one, and the only exception that can be taken to it is that the Special Power Magistrate would perhaps have shown more tact if he had sent the order to the President of the Bar Association for the information of the members instead of hanging it up in open Court, which is apparently what the Pleaders principally objected to.

The Bar Association held a meeting on the 2nd March, at which they considered these two questions. As regards the order, the resolution is "that while this Association does not deny some of accusations contained in the so-called order, such as putting the arm on the rails of the Bench and using the second personal pronoun to the Judge instead of repeating "your honour" every time the pronoun has to be used, it emphatically disowns all intention to offer thereby any slight to that officer, and states that the incidents are so insignificant that nothing short of a fanciful and highly exaggerated notion of office dignity could cavil or take offence at them." We are glad to notice that there was no intention to offer any slight to the presiding officer of the Court; but it must have been known to the members of this Association that such behaviour in open Court is not to be brushed aside as insignificant, and that it was not a mere fanciful notion of office dignity, but a proper sense of duty which led the Magistrate to issue the order he did.

On the complaint of a Pleader of what is called an insult in open Court we would point out that the Magistrate was perfectly right in taking exception to that Pleader's mode of address. It is unfortunate that he used language which might have been misunderstood; but to point out lack of respect and the proper mode of addressing the Court is not insulting, and the rebuke was the result of that Pleader's own conduct. He brought it on himself, and he deserved it. The resolution passed was "that the members should suspend their practice in that officer's Court until such time when a suitable apology is tendered by him." There is a proviso to the resolution—"A member who has pending cases before that officer may appear in the cases thus pending, if he cannot obtain a release from his responsibilities in respect of those cases."

The next day the Pleader now before us wrote a letter to the Superintendent of the Jail, in which his client was in custody, asking the Superintendent to inform the under-trial prisoner "that I shall not be able to defend him at the next hearing of his case before the Special Power Magistrate of Ma-ubin on account of the latter's bellicose attitude towards the lawyers generally. The fees given to me by the prisoner's relations will be returned to them." The Pleader then obtained the signature of his client to a petition to the District Magistrate for transfer of the case. In that petition it is stated that the Pleader had written to say that he would not appear before the present Special Power Magistrate to defend the petitioner at the next hearing on account of the said Special Power Magistrate's haughty and insulting demeanour towards the lawyers who appeared before him. It goes on—"Thereupon the petitioner's relations had been to the local lawyers from door to door but none

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agreed to accept brief in the Special Power Magistrate's Court."

The case came on for hearing before the Special Power Magistrate, and the prisoner was undefended. He was convicted on the 6th March. An appeal was filed, and it was argued by the Pleader now before us. The prisoner was acquitted. The learned Sessions Judge points out that the appellant had unfortunately been left in the lurch by his Pleader in the middle of the case, and he expresses the opinion that, if that Pleader had put forward his case before the Trial Magistrate as he had done in that Court, the conclusion arrived at would have been different. The judgment in appeal was passed on the 5th April, so that the result of leaving his client in the lurch was that he had to remain in custody for a month longer than was necessary.

After writing the letter to the Superintendent of the Jail, the Pleader interviewed the prisoner's employer who had originally engaged him on the prisoner's behalf, and it is clear that permission was given to him to throw up his brief, and arrangement was made that he would not appear before the Magistrate, but that he would file and conduct the appeal for the same fee.

The resolution of the Bar Association to boycott the Special Power Magistrate was recalled, but the Pleader before us still supported the original resolution and would not agree to its being rescinded. The charge framed in this case was that the Pleader had been guilty of grossly improper conduct in the discharge of his professional duty in that he was engaged to defend under trial prisoner, Po Taik; that he accepted a fee and appeared by proxy at one hearing when the cross-examination of the prosecution witnesses was reserved; that the case was then adjourned to the 6th March, but that meanwhile on the 3rd he wrote to the Chief Jailor asking him to inform Po Taik that he would not be able to defend him at the next hearing of the case; and that he did not, in fact, appear at the next hearing or any subsequent hearing of the case either personallly or by proxy.

It is argued that, having obtained a release from his obligation to defend the prisoner, he was clearly not guilty of the charge that had been framed against him. There can be no question that, in the first instance, the Pleader obtained no consent to his throwing up his brief. He wrote to the prisoner saying that he would not appear, and he so wrote obviously because of the resolution passed the previous day to boycott this particular Magistrate. It may be that, subsequently seeing that the position he had taken up was dangerous, he arranged for a consent on certain terms and conditions with a view to protecting himself from any such proceedings as these. But it is also clear that he has known throughout these proceedings the seriousness of the charge that he acted, as he did, in pursuance of this resolution to boycott the Magistrate; and that that was the motive that led him so to act.

In a case very similar to the present one, in which members of the local Bar passed a similar resolution boycotting a Court, the matter was considered by a Bench of three Judges of the Calcutta High Court—[*Emperor* v. *Tarini Mohan Barari* (1)]. In the course of his judgment the learned Chief Justice said: "It must not be assumed that the Court regards the action of the Pleaders as a matter of little importance. On the contrary we regard it as a very serious matter. The Pleader deliberately abstained from attending the Subordinate Judge's Court and took part in a concerted movement to boycott the learned Judge's Court, a course of conduct which cannot be justified or tolerated. The Pleaders had duties and obligations to their clients in respect of the suits and matters entrusted to them, which were pending in the Court of the learned Subordinate Judge. There was a further and equally important duty and obligation upon them, *viz.*, to cooperate with the Court in the orderly and pure administration of justice. By the course which they adopted, the Pleaders violated and neglected their duties

(1) 69 Ind. Cas. 209; 26 C. W. N. 580; 35 C. L. J. 403; (1923) A. I. R. (C.) 212.

and obligations in both these respects. We desire to make it clear that such conduct cannot and will not be tolerated." With those remarks we entirely agree. This boycott resolution, had it not been withdrawn, would have called for serious notice of the Court, and we desire to point out that the conduct on the part of the members of the profession, such as has been mentioned and admitted in the course of this matter was conduct which the Special Power Magistrate was not only justified in taking notice of, but which he was bound to take notice of. We have no doubt that it was by reason of this resolution that the Pleader threw over his client, and that the subsequent consent was obtained merely because he saw that his position could not be justified.

The conduct in Court, which is brought out in this case, was most reprehensible. The conduct in passing this boycott resolution would have called for the severest punishment. We trust that this strong expression of our opinion will serve as a warning, and that we shall not be called upon to deal with such conduct in future.

This enqiry, however, has had an unfortunate course. The matter was first taken up by the District Magistrate, and it was pointed out to him that any such enqiry must be held in the Magistrate's Court. An enquiry was thereupon held by the Magistrate, but, as he had framed no charge, we set aside that enquiry and directed a fresh enquiry by his successor.

The matter has now been pending for a very long time, and though we think that there is no real substance in the defence the matter of the boycott resolution was not contained in the charge and he was not called upon to meet it and, therefore, we do not consider that it would be proper to pass any order of suspension. We trust that the warning that has been given and the fact that it is known that such resolutions of boycott are grossly improper and that, if repeated, they will be severely dealt with, will be sufficient. The Rule will, therefore, be discharged.

S. D. *Rule discharged.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 207 OF 1923.
March 10, 1924.
Present:—Mr. Kotval, A. J. C., and Mr. Prideaux, A. J. C.
GANGARAM AND OTHERS—ACCUSED—APPELLANTS
versus
EMPEROR—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), as amended by (Act XVIII of 1923), ss. 339, 339 (2)—Approver, proceedings against—Certificate of public prosecutor, whether essential—Provision, whether retrospective—"Statements" in s. 339 (2), whether include statements before pardoning Magistrate—Approver not examined about such statements—Use against him whether legal.

Under section 339, Criminal Procedure Code, 1898, as amended in 1923, the certificate by the Public Prosecutor that in his opinion the approver has not complied with the conditions on which the tender of pardon was made, is a condition precedent to the validity of trial of the approver. But this does not apply to a case in which the pardon had been declared forfeited by the Magistrate and the proceedings against the approver, after the forfeiture, commenced before the amended section came into force. [p. 716, cols. 1 & 2.]

The words "the statement made by a person who has accepted the tender of pardon" in subsection (2) of section 339 of the Code are wide enough to cover a statement before the pardoning Magistrate. [p. 716, col. 2.]

It is not, however, fair to use such statements of approver against him unless they are put to him in his examination as accused person and he is asked if he has any explanation to offer regarding them. [*ibid.*]

Appeal against the judgment of the Sessions Judge, Raipur, in Sessions Trial No. 23 of 1923, dated the 11th December 1923.

Mr. *N. G. Sarkar*, R.B., for the Appellant.
Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—The mother, wife and two daughters of Chhattu Nai, a resident of *Mouza* Bandabra in the Janjgir *Tahsil* of the Bilaspur District were murdered by a number of villagers about midnight between the 11th and 12th September 1922. A third daughter Punai survived the murderous assault. Seven persons were convicted of the murder and attempt to murder and were sentenced in Sessions Trial No. 36 of 1923. The case came up in appeal to this Court and the convictions were upheld. The present ap-

pellants Gangaram and Bastiram were approvers in that case. They were examined by the Magistrate who tendered the pardon on the 3rd October 1922 when they implicated themselves and other persons in the murders. When examined by the Committing Magistrate they stated that they knew nothing and the Magistrate having held that they had forfeited their pardon put them on trial with the accused in the case on the 20th November 1922 and later committed them to the Sessions Court. On a reference to the Additional Sessions Judge this Court quashed that commitment and directed them to be examined as witnesses in the Sessions trial. They adhered to their retracting statement before the Committing Magistrate. They have now been separately tried for the offences of murder and attempt to murder and convicted and sentenced to death and transportation for life for the two offences.

It has been rightly found by the Sessions Judge that the two appellants have forfeited their pardon. The only question now is whether the appellants took part in the murders. The only eye-witnesses of the offence were Chhattu Nai and Punai. Chhattu was murdered about eight days after he was examined as a witness in the previous Sessions trial. His depositions before the Committing Magistrate and the Sessions Court have been admitted in evidence by the Sessions Judge under section 33 of the Evidence Act. Punai is the only eye-witness examined at this trial.

Before dealing with the merits of the evidence three objections in law urged on behalf of the appellants have to be considered.

The first is that in the absence of a certificate by the Public Prosecutor that in his opinion the appellants have not complied with the conditions on which the tender of pardon was made the trial is without jurisdiction. The Counsel for the Crown contends that such certificate is, under section 339, Criminal Procedure Code, not a condition precedent to the validity of the trial. We are of opinion that, as the section is worded, the certificate is essential to the validity of the trial, but we think that it does not apply to a case in which the pardon had been declared forfeited by the Magistrate and the proceedings against the approver after the forfeiture commenced before the section came into force. Here the section came into force on the 1st September 1923 and the proceedings against the approvers began on the 19th March 1923. This objection, therefore, fails.

The second objection is that the statements of the approvers before the pardoning Magistrate are not admissible against them in the trial. It is urged that the statement referred to in section 339 (2) is only the statement made before the Committing Magistrate. We think that the words "the statement made by a person who has accepted the tender of pardon" in sub-section (2) are wide enough to cover a statement before the pardoning Magistrate. In fact the statement before the pardoning Magistrate is likely to be the only statement of any use against the approver where the retraction has begun in the Committing Magistrate's Court. In the present case, however, we do not think it fair to use the appellants' statements against them for the reason that the statements were not put to them in their examination as accused persons and they were not asked if they had any explanation to offer regarding them.

The third objection is that Chhattu's statement is not admissible under section 33 of the Evidence Act, the appellants not being parties to the proceedings in which they were made. This objection must be sustained with regard to Chhattu's statement at the previous trial in the Sessions Court where the appellants were only witnesses. But in the Committing Magistrate's Court where Chhattu was examined as a witness the appellants were, as a matter of fact, parties, though wrongly made such, and had the right and opportunity of cross-examining the witnesses. We, therefore, think that Chhattu's statement before the Committing Magistrate is admissible against the appellants.

We now come to the merits of the evidence. This consists of the deposition of Punai and the statement of Chhattu before the Committing Magistrate. Punai's evidence is attacked on the ground that there is a possibility of her having been tutored before she made her first statament to the Sub-Inspector of Police, and that there are discrepancies in the statements made by her at various times. Punai was one of the persons who were attacked and was in a position to have witnessed what occurred. The Police appear to have visited her while in hospital to take her statement and probably Chhattu also visited her there. But we have no grounds for believing that she was tutored either by Chhattu or any of the Police. Her story does not bear marks of tutoring. There are a few discrepancies in the various statements made by her, but these are immate rial, and they indicate an absence of tutoring. Tutoring in the case of a child of her age would scarcely be effective. Possibly it would have led to discrepancies more material than appear in her statements. We agree with the Sessions Judge in accepting her statement as to the presence of the two appellants among the men who entered the room where she was sleeping with her mother and sisters.

Chhattu stated before the Committing Magistrate that he saw the two appellants with others go into his house.

Both the appellants denied that they had gone to Chhattu's house and had taken part in the offences. Bastiram further pleaded an *alibi*. Gangaram produced no evidence in defence. Bastiram examined four witnesses to prove that he was in Malda on the day of the murder. The evidence of the first three witnesses is, as the Sessions Judge observes, too vague to be accepted. The fourth witness does not even try to support the *alibi*.

We are satisfied that the appellants were among the persons who entered Chhattu's house and committed the murders. As regards the punishment, considering the length of time that has elapsed between the commission of the offences and the trial, and the fact that there is no corroboration of the evidence of Punai as to the actual part taken by the appellants in the murders, we alter the sentence to one of transportation for life.

G. R. D. *Sentence altered.*
N. H.

PATNA HIGH COURT.

CRIMINAL REVISION No. 282 OF 1924.
June 9, 1924.
Present:—Mr. Justice Kulwant Sahay.
PANCHAM SAO—ACCUSED—APPELLANT
versus
EMPEROR—RESPONDENT.

Punishment—Continuing offence—Daily fine—Order, legality of.

It is bad in law to impose a daily fine in anticipation of the commission of an offence. [p. 718, col. 1]

Ram Krishna Biswas v. *Mohendra Nath Mozumdar*, 27 C. 565; 14 Ind. Dec. (N. S.) 371, *Nilmani Ghatak* v. *Emperor*, 7 Ind. Cas. 931; 37 C. 671; 11 Cr. L. J. 540 and *In re Limbaji Tulsiram*, 22 B. 766; 11 Ind. Dec. (N. S.) 1094, followed.

Criminal revision from an order of the Additional District Magistrate, Patna, affirming that of the Sub-Deputy Magistrate, Dinapore, dated the 27th October, 1924.

Mr. *S. N. Banerji*, for the Petitioner.

JUDGMENT.—The petitioner was convicted by the Sub-Deputy Magistrate of Dinapore under section 2, clause (2) of the Bye-laws framed by the District Board of Patna which provides that whoever makes any encroachment or causes obstruction by means of a building wall, *chabutra* or fencing or by planting trees or cultivating crops, or in any other way on any road, shall on conviction, be liable to a fine not exceeding Rs. 20 and to further penalty not exceeding Rs. 2 each day after the imposition of the fine for the continu-

ance of the encroachment, obstruction or nuisance. The offence with which the petitioner has been charged is that he has constructed a house on a portion of the District Board road. The learned Sub-Deputy Magistrate has found it as a fact and in fact it was admitted before him that there was a slight encroachment on the District Board road. He accordingly imposed a fine of Rs. 15 under section 2, clause (2) of the Bye-laws. In so far as the fine of Rs. 15 is concerned, the petitioner has no grievance; but the learned Sub-Deputy Magistrate proceeded to impose a further fine of Rs. 2 per day till the encroachment continued. The petitioner objects to the fine of Rs. 2 per day for the period during which the encroachment continued. He contends that the Magistrate had not jurisdiction to impose a fine for an offence which had not been committed at the time the charge was laid against him and the sentence was passed. In other words, he says that the conviction in so far as it relates to a future offence of continuing the encroachment is bad in law.

To my mind the contention is sound. The learned Sub-Deputy Magistrate allowed the petitioner one month's time to remove the encroachment and he ordered that if the petitioner failed to remove the encroachment within a month, he would be liable to pay a fine of Rs. 2 per day till the encroachment continued. It has been stated on behalf of the petitioner that within the month allowed by the Sub-Deputy Magistrate, he approached the District Board authorities for a settlement of the portion of the road encroached upon and the District Board authorities, as a matter of fact, have settled this portion of the road with him on a certain rental per year. The letter of the District Board Engineer on the record supports this contention of the petitioner. As authority for the proposition that it is bad in law to impose a daily fine in anticipation of the commission of the offence, reference has been made to *Ram Krishna Bishwas* v. *Mohendra Nath Mozumdar* (1), *Nilmani Ghatak* v. *Emperor* (2) and *In re Limbaji Tulsiram* (3). These cases support the contention of the learned Vakil for the petitioner.

The sentence of fine of Rs. 2 per day imposed by the learned Sub-Deputy Magistrate for the continuation of the encroachment is, therefore, bad in law and must be set aside. The fine of Rs. 15 imposed by him under clause (2) of section 2 for the encroachment will stand. The additional fine of Rs. 2 per day has already been realised. This will be refunded.

K. S. D. *Order accordingly.*

(1) 27 C. 565; 14 Ind. Dec. (N. S.) 371.
(2) 7 Ind. Cas. 931; 37 C. 671; 11 Cr. L. J. 540.
(3) 22 B. 766; 11 Ind. Dec. (N. S. 1094.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 192 OF 1923.
February 11, 1924.

Present:—Mr. Rupchand Bilaram, A. J. C.

X—ACCUSED—APPELLANT

versus

EMPEROR—OPPONENT.

Penal Code (Act XLV of 1860), ss. 182, 211, distinction between—Ingredients of offences.

To constitute an offence under section 182, Penal Code, the information given to a public servant should not only be false in fact but it must be false to the *knowledge* or to the *belief* of the informant and it is not sufficient that the accused had reasons to believe it to be false; whereas, under section 211 it is sufficient if the accused makes his complaint without any just grounds and when he acts without due care or caution. [p. 720, cols. 1 & 2.]

Emperor v. *Ram Chandra Yeshwant Adukar*, 31 B. 204; 9 Bom. L. R. 33; 5 Cr. L. J. 105 and *Rayan Kutti* v. *Emperor*, 26 M. 640; 2 Weir 704, relied upon.

Appeal against the judgment of the Additional City Magistrate, Karachi, dated the 15th October 1923.

Mr. *C. M. Lobo*, for the Appellant.

Mr. *Kimatrai Bhojraj*, for the Opponent.

JUDGMENT.—In this case the appellant a clerk in the Commissioner's Office, Karachi, has been convicted by the Additional City Magistrate, Karachi, under section 182 of the Indian Penal Code and sentenced to pay a fine of Rs. 200.

On the 26th of April 1922 the appellant with five other persons sent a petition to the District Superintendent of Police, Karachi, *inter alia* stating that "there is a house bearing No. 427 tenanted by Mr. *Y* a Jew. He has two grown up daughters who are apparently immoral women and carry on the profession of prostitution." Kadirbux Sub-Inspector who was deputed to investigate into the complaint reported after a certain perfunctory inquiry that the allegations contained in the petition were true, and the City Police Inspector forwarded the same to the City Magistrate, Karachi, for necessary action.

In answer to a notice issued by the City Magistrate calling upon the appellant to file a formal information before him enabling him to take action under section 41 of the District Police Act, the appellant in his reply dated 24th July 1922 demurred to his doing so on the ground that he was only one of the signatories to the petition and that the Police who had subsequently investigated into the matter should take action and that he and the other signatories should be called as witnesses. The City Magistrate thereupon required the Police to lodge a complaint against *Y* if the nuisance still continued. This led to a further investigation of the Police which was however entrusted to a different Sub-Inspector by name Murijmal. He reported that the allegations made by the signatories in their petition of the 26th April 1922 were groundless, and that the appellant had filed this petition out of enmity, there being a dispute between one *A* and one *B* over a house and that the appellant who was a partisan of *A* had requested *Y* to file a prosecution against *B* which *Y* had refused to do, thereby making *X* his enemy. On the 11th of September 1922, the appellant filed another petition before the City Magistrate challenging the report of Murijmal and asked for a magisterial inquiry urging *inter alia* as follows: "To this end I request that in addition to the signatories of the application the gentlemen shown in the attached list might be summoned. If required, I shall on being summoned by the Court, file the information. I might however state further that since the former Sub-Inspector made inquiries into the matter there has been considerable improvement in the condition, the evil complained of having diminished considerably. But the house remains undoubtedly a sort of epidemic into the quarter which might at any time carry infection to a young heart and ruin it for ever. There are already two living examples wherein the victims of this disease are misery to the unhappy families to which they belong and it is the knowledge of this fact alone which prompts me to remain unabashed in my efforts to have the germs of this disease exterminated from the quarter altogether." In the annexed list he mentioned names of nineteen witnesses one of whom was *C* a clerk in the G. P. O. Karachi (Naushahro). This vehement protest resulted in a magisterial inquiry against *Y*'s daughters in which the appellant was examined as a witness. The learned Magistrate however disbelieved the appellant and his witnesses and found that the allegations contained in the application were false and that the appellant was the prime mover in the complaint. The District Superintendent of Police thereafter sanctioned the prosecution of the appellant under section 182, Indian Penal Code. The charge framed against the appellant is however limited to the statement contained in the petition that "the daughters of *Y* were apparently leading an immoral life." It has been found by the learned Trying Magistrate on the evidence recorded before him that *Y* earns Rs. 125 per mensem, that his two daughters work as school mistresses earning Rs.30 and Rs. 35 respectively and that he supplements his income by keeping fouls and selling eggs. His family which consists of himself, his wife, two daughters and one son, are of respectable Jew family and being Jews, his daughters do not observe *pardah*. Mr. Lobo has not seriously contested the findings of the lower Court on these points, though he has disputed the

X *v.* EMPEROR.

finding of the lower Court that the *Y* girls themselves are respectable girls. For the purposes of this appeal, he has however conceded that it may be that the girls are respectable girls and that the allegation contained in the report of *X* is false. I have gone through the record carefully and I cannot but come to the conclusion that the *Y* girls themselves are respectable and not with standings the denial of Mr. Lobo on behalf of the appellant the allegation made against them is absolutely false. Mr. Lobo has however rightly pointed out that the learned Additional City Magistrate had not before his mind clearly the distinction between the ingredients constituting an offence under section 182, Indian Penal Code and section 211, Indian Penal Code. One of the grounds urged on behalf of the appellant was that the appellant was under a belief that one *C* a cousin of his had been spoiled by one of the *Y* girls. While commenting on the evidence of *C* the learned Magistrate has observed that "*C* is a thorough scoundrel and it is just possible that he tried to cultivate the friendship of the boy (the brother of the girls) in order to be able to go to their house and get acquainted with the girls. It is also possible that he might have, like a rake, boasted of his friendship with the girls from which his relation *X* jumped to the conclusion that the girls were immoral and called them prostitutes." The learned Magistrate was of opinion that the only point for him to consider was whether the appellant made the allegation complained of in good faith, that is, with due care and attention. Section 182 of the Indian Penal Code which deals with giving information to a public servant as opposed to lodging a complaint in Court requires that the information given by the accused should not only be false in fact but it must be false to the *knowledge* or to the *belief* of the informant. It is not sufficient that the accused has reasons to believe it to be false, but he must know or believe it to be false. Section 211, Indian Penal Code, however, on the other hand does not require that the accused should know or believe his complaint to be false. It is sufficient if he makes his complaint without any just grounds and when he acts without due care or caution he comes under this section; under section 182, Indian Penal Code, there must be positive and constructive knowledge on his part in order to sustain the charge. See *Emperor* v. *Ramchandra Yeshwant Adukar* (1) and *Rayan Kutti* v. *Emperor* (2).

C was not examined as a witness in the magisterial inquiry against *Y* but it does appear from the application dated 26th April 1922 referred to above that the appellant had in view two boys of whom was in every probability *C*, whom he had referred to as a witness in the annexed list. There is no doubt, in my mind, that the appellant has been reckless in making unfounded, highly defamatory and false allegations against the two young girls which has resulted in their annoyance. The accused has further attempted to support his reckless allegation in this trial by calling several witnesses whose evidence is not at all convincing and appears to be interested. I am however not satisfied on the record that it has been conclusively proved that the appellant *knew* or *believed* the information to be false. It has also not been shown that the appellant had a strong motive to make this allegation knowing or believing it to be false. The refusal of *Y* to file a prosecution against *B* on the desire of the accused to secure the house, even if true, would not, in my opinion, be sufficient to induce the accused to make the petition or to insist on a magisterial inquiry, I think on the whole he is entitled to the benefit of doubt, and I, therefore, set aside the conviction and sentence and acquit him.

The fine, if paid, should be refunded to him.

P. B. A. *Appeal allowed.*

(1) 31 B. 204; 9 Bom. L. R. 33; 5 Cr. L. J. 105
(2) 26 M. 640; 2 Weir 704.

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL No. 41 OF 1923.

April 7, 1924.

Present:—Mr. Justice Young and Mr. Justice Heald.

SAYA BYA AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MAUNG KYAW SHUN—PLAINTIFF—RESPONDENT.

Practice—Counter-claim—Specific performance of contract—Temporary sale.

Though there is no provision relating to counter-claims in the Civil Procedure Code, there is nothing to prevent a Judge treating a properly stamped counter-claim as the plaint in a cross-suit and hearing the two together.

The equitable and discretionary relief of specific performance cannot be granted where the transaction is described as a temporary and not as an outright sale.

Second appeal against a decree of the Divisional Court, Myaungmya, in Civil Appeal No. 10 of 1922.

Mr. *Clark*, for the Appellants.

Mr. *Barnabas*, for the Respondent.

JUDGMENT.—In this suit the plaintiff seeks to recover possession of two plots of lands, relying on their title. The defendants plead that they were put in possession of the same in exchange for the cancellation of a debt of Rs. 1,850 and for the payment of a further sum of Rs. 50 that it was an outright sale, and that it would be inequitable to eject them. They say that the plaintiff promised to give them a registered deed whenever they wanted it, but put them off from time to time.

They accordingly counter-claimed for specific performance of the alleged agreement. The Trial Court dismissed the plaintiff's suit and allowed the defendants' counter-claim.

The Appellate Court modified the decree and allowed the plaintiff to recover possession on payment of Rs. 1,900.

The defendants appeal.

The respondent urged that the counter-claim was a form of suit unknown to the Code of Civil Procedure and would not lie.

This is strictly speaking correct, but there is nothing to prevent a Judge treating the counter-claim as the plaint in a cross-suit and hearing the two together if he is so disposed and if the counter-claim is properly stamped. The learned Trial Judge did so exercise his option, and heard the two suits together and there is nothing to prevent him from adopting this course.

With regard to the appeal, it appeared that the appellants who seek to have their counter-claim allowed and a decree passed for the specific performance of the alleged contract to sell the land outright, had themselves put in evidence extracts from Register No. 1, in which the transaction was described as a temporary and not an outright sale and did not call the Revenue Surveyor to explain how such an entry came to be made.

This alone would prevent us from granting the appellants the equitable and discretionary relief of specific performance of an alleged contract of outright sale.

We confirm the decree of the lower Appellate Court and dismiss the appeal with costs.

S. D. *Appeal dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1130 AND 1131 OF 1921.

March 27, 1924.

Present:—Mr. Justice Wallace.

IN S. A. No. 1130 OF 1921

SUNDARAMMAL—PLAINTIFF No. 2—APPELLANT

versus

Sri Mahant PRAYAGA DOSJEE VARU AND OTHERS—DEFENDANTS Nos. 1 AND 2 AND 4 TO 8—RESPONDENTS.

IN S. A. No. 1131 OF 1921

PACHALLA DORAISWAMI IYENGAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Sri Mahant PRAYAGA DOSJEE VARU—PLAINTIFF—RESPONDENT.

Madras Estates Land Act (I of 1908), s. 125—Rent sale of holding—Encumbrances, whether operative—

SUNDARAMMAL v. PRAYAGA DOSJEE VARU.

Decree on mortgage of occupancy holding—Subsequent rent sale—Purchase by landlord—Occupancy rights not determined by legal proceedings—Execution of mortgage-decree—Mortgagee, rights of.

Under section 125 of the Madras Estates Land Act, under a sale for arrears of rent, the purchaser takes subject to any encumbrance created before the passing of the Act. [p. 722, col. 2.]

Where under a mortgage of occupancy rights, created before the Madras Estates Land Act, the mortgagee obtains a decree, and subsequently the landlord brings the holding to sale under a rent-decree, but does not put an end to the occupancy rights of the defaulter by any real and legal proceedings under his rent sale, and the occupancy tenancy is still in the holding and possession of the defaulter when the mortgagee executes his decree and obtains possession, his rights under the Court sale cannot be interfered with by the landlord's rights under the rent sale. [p. 723, cols. 1 & 2.]

Second appeals against the decrees of the Court of the Subordinate Judge, Chittoor, in A. S. Nos. 26 and 32 of 1920 (A. S. Nos. 132 and 155 of 1919, District Court, Chittoor), presented against the decrees of the Court of the District Munsif, Sholinghur, in O. S. Nos. 464 and 444 of 1918 respectively.

Mr. *K. S. Chanipakesa Ayyangar*, for the Appellants.

Mr. *T. Kumaraswamiah*, for the Respondents.

JUDGMENT.—The facts necessary for the disposal of this appeal are as follows:—One Sellappa Asari was an occupancy tenant in the 1st defendant's estate. On 4th May 1901, he mortgaged the five items of the plaint property. The mortgagee sued to recover his money and obtained a decree for sale of mortgaged property on 4th June 1912. It became final on 9th January 1913 and the property was sold in execution of the decree on 15th November 1915. The plaintiff purchased all the five items on 7th June 1916 from the auction-purchaser and got delivery through Court on 31st January 1917. In the meantime on 22nd March 1913 items Nos. 3 and 4 of the plaint property were sold by the landlord the 1st defendant for the arrears of rent on the holding by Sellappa Asari and the 1st defendant alleges that he bought in these properties for eight annas and got delivery of them on 25th October 1915 and that he sold them again to defendants Nos. 2 to 8. The question at issue was whether the plaintiff's purchase on the footing of the mortgage decree prevails against the 1st defendant's purchase in the rent sale. The lower Appellate Court has held that the plaintiff's title did not prevail against the 1st defendant's rent sale title, and therefore, dismissed the suit and the plaintiff appeals.

I cannot see why the plaintiff was not given at least a decree for items Nos. 1, 2 and 5. The 1st defendant puts forward no claim to items Nos. 1 and 2 nor do any of the other defendants; and as regards item No. 5, although the 1st defendant claims that he bought that also in the rent sale, his sale certificates, Exhibits I and II, show that that was not so.

As regards item No. 3, a garden with an indigo *vat* and item No. 4 *nanjai*, it is not quite easy to say definitely what field numbers they correspond to, but, so far as I can ascertain from the documents filed in this case, item No. 4 seems to correspond to *nanja* Nos. 200 and 201, while the garden in item No. 3 appears to be described under Nos. 240 and 244 with an area of 10 acres and 3 cents, and the *vat* appears under Nos. 240 and 241 with an area of 1 acre and 8 cents.

Under section 125 of the Madras Estates Land Act, under a sale for arrears of rent, the purchaser takes subject to any encumbrance created before the passing of the Act. The encumbrance in this case was created in 1901. *Prima facie* then the rent sale is subject to it; but the contesting defendants contend that the mortgage was extinguished when the decree was passed and that, as 1st defendent was not a party to the mortgage suit, the decree in it will not bind him. The lower Appellate Court has accepted both these contentions, but it has wholly misunderstood one crucial fact in the case, and that is that the 1st defendant never put an end, under cover of his rent sale, to the occupancy right of the defaulter. The rent sale was on 22nd March 1913. Under Exhibit D (1) dated 15th February 1915 the 1st defendant had issued a *patta* for *Fasli* 1324 to the defaulter for Nos. 200 and

201 (1 acre and 8 cents), and 240 (10 acres and 3 cents) *i. e.*, for the whole of items Nos. 3 and 4; so that, for this *Fasli* the 1st defendant issued *pattas* to the defaulter for all that he ostensibly bought in under his rent sale. The *patta* for the previous *Fasli* 1323 is not filed, but there is no presumption that it will be anything different from the *patta* for *Fasli* 1324. Prior to Exhibit D (1) but subsequent to the rent sale, is a notice Exhibit D dated 23rd June 1914 by 1st defendant to the defaulter informing him that arrears are due on the indigo *vat* and that, unless they were paid up, the holding would be sold. This was the holding already sold for arrears of rent on 22nd March 1913 and alleged to have been bought in. The sale was apparently a sham.

First defendant alleged a sort of delivery through Court on 25th October 1915 of the items sold at rent sale on 22nd March 1913. There is no documentary evidence of this delivery and that it was a sham is clear from the facts that the sale itself appears to have been a sham and that on 2nd May 1916 1st defendant again issued *patta* for *Fasli* 1326 to the defaulter for Nos. 240 and 241, area 1 acre and 8 cents, the indigo *vat*, and followed it up by a similar *patta* Exhibit D-3 on 25th May 1918 for *Fasli* 1327. On 28th January 1917 and 30th October 1917 he accepted rent from plaintiff for the indigo *vat* on behalf of the registered *pattadar*, Sellappa Asari, *i. e.*, the defaulter (see Exhibits D-4 and D-5). On even date with Exhibit D-3 is Exhibit VI a *patta* for *Fasli* 1327 to 2nd defendant for item No. 3 (garden) and No. 4. This is the first issue of a *patta* to any one else but the defaulter.

There is absolutely no evidence that the occupancy tenancy of the defaulter had ever been terminated by any real and proper legal proceedings on, or before 15th November 1915 the date of the sale in execution of the mortgage-decree. It was in the holding and possession of the defaulter and was his property on the date of that sale. This is the property which has passed to that plaintiff, of which he got delivery on 31st January 1917, and of which 1st defendant never got delivery. First defendant, therefore, could not convey it to any one else. He never enforced his rights under the alleged rent sale and never terminated the defaulter's occupancy right, which in consequence of his inaction, passed to plaintiff, beyond the reach of 1st defendant, long before the date of *patta* to 2nd defendant. It is impossible, therefore, to see how the plaintiff's right on the footing of the Court sale could possibly be interfered with by the 1st defendant's right under his rent sale. The ruling in *Vemanna Venkatachella Naidu* v. *Ethirajammal* (1) relied on by the Subordinate Judge has no application to this case since there no *patta* was issued after the sale for arrears of rent and the occupancy right of the tenant had obviously been terminated by the rent sale.

I must, therefore, reverse the decree of the lower Appellate Court and restore that of the District Munsif with costs to the plaintiff from defendants Nos. 1 and 2 here and in the lower Appellate Court.

Second Appeal No. 1131 of 1921 follows the decision in this case and the lower Appellate Court's decree must be reversed and the suit dismissed with costs throughout.

V. N. V. *Appeal allowed.*

N. H.

(1) 60 Ind. Cas. 192; 13 L. W. 61; 39 M. L. J. 597; (1921) M. W. N. 189; 44 M. 220.

RANGOON HIGH COURT.

CIVIL REGULAR No. 186 OF 1923.

April 28, 1924.

Present:—Mr. Justice Beasley.

C. R. COWIE & Co.—PLAINTIFFS

versus

E. M. H. PATEL BROTHERS—DEFENDANTS.

Trade mark—Exclusive use of imported article with particular trade mark—Infringement.

An importer who by advertising and pushing the sale of goods under a particular mark secures a wide popularity for the mark in relation to the goods sold by him is entitled to the protection of the Court for that mark in the country of importation even against the producer of the goods. [p. 725, col. 2.]

COWIE & CO. *v.* PATEL BROTHERS.

Mr. *McDonnell*, for the Plaintiffs.

Mr. *Leach*, for the Defendants.

JUDGMENT.—This is an application on behalf of the defendants for the issue of a commission to Scotland to take the evidence of John C. Wright, the Managing Director of the Burnbank Foundry Company, Limited, Falkirk, Scotland, and of the other Directors and servants of the same Company, and the circumstances upon which this application is based are as follows:—

This is a suit to restrain the defendants from importing iron panels bearing certain designs which the plaintiffs claim to be their trade mark.

The plaintiffs' case, according to the plaint, is that for over 20 years they have adopted the mark of a horse and of a peacock or two peacocks to distinguish their goods, and that they have for the past 20 years and upwards imported into Burma iron panels bearing as their trade-mark the representation of a horse and iron panels bearing the representation of one peacock or two peacocks, and the plaintiffs accordingly claim that they have had the exclusive use of these marks in Burma for more than 20 years, that they are used exclusively by them to denote that the panels bearing either one or the other of the said marks are their own importation, and that the marks have acquired a reputation and are well known among buyers; the plaintiffs claim to be entitled to restrain all other persons from importing or selling in Burma iron panels under such marks or under imitation thereof, and allege that during the month of February they for the first time became aware that the defendants were importing iron panels bearing marks which are an infringement of, and likely to be confused with the plaintiffs' marks. One of the defendants' marks consists of an exact representation of the plaintiffs' horse mark, and another of the defendants' marks is a representation of two peacocks on an iron panel, and the plaintiffs claim that the use by the defendants of these marks on the iron panels is an infringement of the plaintiffs' rights to import and sell iron panels under such trade-marks.

The defendants in their written statement admit having imported the iron panels, with the designs complained of but deny that such representations have been used or understood as an indication that the goods of such designs were the goods of, or imported by, the plaintiffs, and they deny that such representations are trade-marks, and say that if there is any proprietary right in any of such representations which they deny, they believe that such rights are vested in the manufacturers of the goods displaying them, and they say that they have imported (as they lawfully might) cast-iron panels from England, the design of which is one of the stock designs of the manufacturers in England and is similar to the designs on iron panels imported by the plaintiffs, and it is, therefore, upon the latter issue that they desire the evidence to be taken on commission.

In the affidavit of Esoof Mahomed Hoosain Patel, a partner of the defendant firm, it is stated in support of this application that the panels imported by the defendants are manufactured by the Burnbank Foundry Company, Limited, of Falkirk, Scotland, and that the defendants contend that if there are any proprietary rights in the said designs, such rights are vested in the manufacturers, and it is stated that it is essential for the defendant's case that the evidence sought to be taken on commission should be taken.

In opposition to this application the plaintiffs contend that such evidence as is sought to be taken on commission is wholly irrelevant, because, even assuming the statements in the written statement and in the affidavit in support of this application to be correct, it would be no defence to the suit, because an importer of an article can claim a mark even in opposition to its manufacturer, and the plaintiffs claim that they have used this mark in Burma and have acquired a reputation here for the mark by using it for a period longer than any other importer or its manufacturer has. If it is sought by the defendants to prove that the mark had acquired a reputation here before

the use of it by the plaintiffs, the plaintiffs say that this fact can only be proved by local evidence, and not by the evidence of the manufacturers in Scotland. In support of the plaintiffs' contention, I was referred to some authorities, and the first of them which, in my view, I ought to consider, is *Ebrahim Currim* v. *Essa Abbu Sait* (1). The facts and the contentions in that case were that the plaintiff claimed to have been for many years the sole importer into Bombay and Madras of umbrellas bearing certain trade-mark. The defendant had recently commenced importing and selling in Madras umbrellas which the plaintiff contended bore a trade-mark so similar as to be calculated to deceive purchasers so as to induce them to buy the defendant's umbrellas under the belief that they were buying plaintiff's. The defendant denied that the plaintiff had been the sole importer of umbrellas bearing the trade-mark in question, or that he was the owner or entitled to the exclusive use of that trade-mark, or that umbrellas bearing that trade-mark had come to be known as umbrellas imported and sold by the plaintiff alone. It was contended that the trade-mark belonged to and had since 1884 been used by a Glasgow firm which manufactured the umbrellas and supplied them to the defendant through another firm. For the purpose of the case it was assumed that the trade-mark in question had been used by the Glasgow firm before it was used by the plaintiff in India, and that it had never been used by the Glasgow firm in India before the plaintiff so used it. The contention of the defendant was that, inasmuch as the trade-mark had originally belonged to the Glasgow firm, it should not be lawfully used or claimed by the plaintiff notwithstanding that the Glasgow firm had never used it or imported umbrellas bearing it into India. It was held, however, that the defendant's contention was not sound. Mr. Justice Shephard in the course of his judgment says: "The question I have to determine is whether the allegation made by the defendant that the stag trade-mark used on umbrellas is the trade-mark of McIntosh Ferguson & Company, who carry on business in Glasgow, is relevant by way of defence to this suit. For the purpose of the argument it must be taken that the stag mark was used by the Glasgow firm before it was used by the plaintiff in India and that it was never used by that firm in this country before the plaintiff had begun to use it in his trade, and on this assumption it is contended that since the trade-mark originally belonged to McIntosh and Ferguson it cannot be lawfully used or claimed by the plaintiff notwithstanding that the Scotch firm have never used the mark in India or imported umbrellas bearing it into this country. In my opinion this contention is not sound and the prior use in Scotland would not justify the Scotch firm and the defendant in saying that the plaintiff's user of the trade-mark is illegal or otherwise than an exclusive user." And he concludes his judgment with the following words:—"The protection which the law affords to traders using a trade-mark in this country would be seriously diminished if immunity from action were secured to rival traders, who, having brought goods into the market with the same mark, were able to prove that in some other quarter of the globe some other trader had been in the habit of using the mark for a period longer than that alleged by the plaintiff."

The next case is the *West End Watch Company* v. *Berna Watch Company* (2), in which in the course of his judgment Sir Basil Scott, C. J., states: "The importer, who by advertising and pushing the sale of goods under a particular mark secures a wide popularity for the mark in relation to the goods sold by him, is entitled to the protection of the Court for that mark in the country of importation even against the producer of the goods." This has been recognised by this Court in the unreported case of *Damodar Ruttonsey* v. *Hormasji Adarji*

(1) 24 M. 163.

(2) 10 Ind. Cas. 805; 35 B. 425; 13 Bom. L. R. 212.

and by the Madras High Court in *Lavergne* v. *Hooper* (3)."

In 13 Calcutta Weekly Notes, at page 82, is the report of an appeal from the Supreme Court of Hongkong to His Majesty in Council, namely, *Ullaman & Co.* v. *Cesar Leuba* (4), in which, *inter alia*, it was held by the Privy Council that an action for breach of trade-mark does not lie at the instance of the manufacturer who supplies articles when another firm carries on the actual business with the articles supplied. Lord Robertson in delivering the judgment of the Court says: "The action is for breach of trade-mark in Hongkong, and the trade-marks founded on originated with persons named Bovet, and were used by them in their business at Hongkong as dealers in watches. That Hongkong business of selling watches to the public belongs now not to the respondents but to a certain Madame Bovet, and the relation in which the respondents stand to Madame Bovet is simply that of manufacturers to a customer. Accordingly, the only watches which they sell at Hongkong they sell to Madame Bovet, and with those sales to her their business in Hongkong begins and ends. It results that the only person who could be deceived, so far as they are concerned, is Madame Bovet, and that it is not their case at all. Their case consists in ignoring the contractual relation (of manufacturers to dealer) by which they are connected with, and are separated from, Madame Bovet, and identifying themselves with the trade which belongs to her and with which, by family as well as by business interest, they are connected." In conclusion he states: "It was in the end courageously maintained for the respondents that they, in their quality of manufacturers, had sufficient interest to sue on the action. No authority supports this contention and it is against principle. It is quite true that the respondents are interested in the success of Madame Bovet's business, but this can never put them in her shoes in vindicating her rights against wrong-doers."

(3) 8 M. 149; 3 Ind. Dec. (N. S.) 104.
(4) 4 Ind. Cas. 318; 13 C. W. N. 82 (P. C.).

This last mentioned case seems to me to be an authority directly confirmatory of the law as stated in the other two cases already referred to, for it decides that the manufacturers cannot themselves sue when the dealer complains of an infringement abroad of the mark that the dealer has been in the habit of using. This must mean that as against every one including the manufacturers themselves, the dealer abroad has a right to claim the mark used by him in that country and the remedies for its infringement. In my view, therefore, the question of whether the manufacturers in Scotland have or have not used the trade-mark in Scotland or in England or elsewhere than in Burma can have no bearing whatever upon this case. On this part of the defendants' case the only question can be whether the manufacturers themselves used this trade-mark in Burma before the plaintiffs had begun to use it in their trade (an allegation which does not appear to be made by the defendants in their written statement), or whether the defendants themselves have done so. These questions seem to me to be the questions to be settled solely by local evidence. Even in the absence of the before-mentioned decision of the Privy Council in Hongkong case, I should be in complete agreement with the statements as to the law made by Mr. Justice Shephard in *Ebrahim Currim* v. *Essa Abbu Sait* (1) and Sir Basil Scott, C. J., in the *West End Watch Company* v. *Berna Watch Company* (2). But as it is, there is this decision of the Privy Council which is, of course, binding on this Court and which further strengthens the decisions of the Madras and the Bombay High Courts already referred to. I must accordingly dismiss this application with costs—Advocate's fee two gold *mohurs*.

S. D. *Application dismissed.*

PANDURANG *v.* JAIRAMDAS.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 188-B OF 1923.

April 23, 1924.

Present:—Mr. Kinkhede, A. J. C.

PANDURANG—PLAINTIFF—APPLICANT

versus

JAIRAMDAS—DEFENDANT—NON-APPLICANT.

Master and servant—Neglect of duty—Incompetence—Dismissal without notice.

It is open to a master, before the expiry of the full term of service and without serving any notice beforehand, to dispense with the services of a skilled servant employed for a particular work, on the ground that he found him unfit for t. [p. 727, col 2.]

Case-law referred to.

There is no difference in principle between a dismissal for incompetency or for negligence or misconduct. There is no fixed rule of law defining the degree of misconduct which will justify a dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal. Similarly even a single act of negligence may, in some circumstances, justify a dismissal. In both cases the question is one of fact and degree depending on the circumstances of each particular case. [p. 728, col. 2.]

Where a skilled labourer, artizan or artist is employed there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes—"*Spondes peritiam artis*". [p. 729. col. 1.]

Harmer v. *Cornelius*, (1858) 116 R. R. 654; 5 C. B. (N. S.) 236; 28 L. J. C. P. 85; 4 Jur. (N. S.) 1110; 6 W. R. 749; 141 E. R. 94, relied on.

If a master can show that he has a good cause for dismissing his servant, he may dismiss him notwithstanding that the contract or agreement between them is for a fixed period, and it is not necessary for him to go through the form of suing for the cancelment of the engagement. [p. 729, col. 2.]

Revision against the decree of the Judge, Small Cause Court, Amraoti, in Civil Suit No. 1485 of 1923, dated the 31st August 1923.

Mr. *R. R. Jaiwant*, for the Applicant.

Mr. *A. V. Khare*, for the Non-Applicant.

ORDER.—The plaintiff was employed by defendant as a Manager and Engineer for his Ginning and Pressing Factory for a period of one year commencing from 29th October 1922 on a salary of Rs. 801 for the year. He worked for 7 months and got payment for that period. His services were dispensed with with effect from 1st June 1923. Being thus thrown out of employment before the expiry of the one year's period and without any reasonable notice he claims compensation from the defendant for his wrongful dismissal without notice and assesses such compensation at the loss of the remaining five months' salary, which come to Rs. 331-8-6. He also claims Rs. 6-10-0 on account of interest thereon at 2 per cent. per mensem. The suit was instituted on 11th July 1923 that is before the expiry of the one year's period counted from 29th October 1922. The defendant pleaded that the plaintiff was found unfit for the discharge of his duties as Manager and Engineer and that he had, therefore, to be dismissed from service without notice. The Court of Small Causes held on the evidence that plaintiff was not entitled to claim any salary for the period subsequent to 1st June 1923. It came to the conclusion that plaintiff was negligent in the discharge of his duties as Manager and Engineer and that the defendant was perfectly justified in dismissing him from service. In this view of the case the plaintiff's claim was dismissed with costs. He, therefore, comes up in revision to this Court, and urges that the claim ought to have been decreed as the defendant was guilty of breach of the contract of the service and was bound to pay for the full period of one year.

The point for consideration is, is it open to a master, before the expiry of the full term of service and without serving any notice beforehand, to dispense with the services of a skilled servant employed for a particular work, on the ground that he found him unfit for it?

Before me exception is taken to the findings of the lower Court, and it is urged that they as also the evidence on which they are based, are not warranted by the pleadings; the defendant's plea was one of unfitness for the work while the evidence adduced was of neglect of duty and not of unfitness on plaintiff's part. It is argued on the strength of *Munchershaw Bezonji* v. *The New Dhurmsey Spinning and Weaving*

Co. (1) that the proof of neglect of duty must be confined to the specific acts of negligence pleaded, and that proof of negligence ought not to have been allowed to be given to support a general or vague plea of unfitness. It is pointed out that unfitness or incompetency is a disqualification which could not be said to have been brought home to the plaintiff by merely offering to prove negligence, which was never pleaded. The distinction is no doubt very fine, but I think the objection on the ground of improper proof appears to have been taken at the stage of trial. It would, no doubt, have been very desirable for the lower Court to have asked the defendant to amplify his plea of unfitness or incompetency by specifying the instances in which he found him unfit. It is just possible that the unfitness may be due equally to his want of qualifications necessary for the due discharge of his duties as a Manager and Engineer, as to his neglect of such duty or it may be due to both.

Under the English Law, if a servant willfully disobeys, or habitually neglects the lawful commands of his master, is grossly incompetent, absents himself from service, is guilty of gross misconduct, or otherwise acts in a manner incompatible with the due and faithful discharge of his duty, he may be dismissed by the master without notice or compensation. If a servant's wage is payable at fixed periods, the servant is not entitled to payment of any portion of an instalment, which has not become due at the time of dismissal. As regards the objection based on the absence of notice it is sufficient to say that the plaintiff has neither alleged nor proved that any stipulation as to notice existed in the terms of his engagement, or that there was any custom requiring such notice. In an action of wrongful dismissal it is a sufficient defence if the master can show that a good ground for dismissal did at the time of such dismissal exist, even though the master may have alleged another ground of dismissal, or may have been unaware that such ground of dismissal existed. Jenks' Digest of English Civil Law, paragraphs 473 and 476, and cases cited in Halsbury's Laws of England, Volume XX, paragraphs 185-198, and 214-218. It could be safely laid down that there is no difference in principle between a dismissal for incompetency or for negligence or misconduct. There is no fixed rule of law defining the degree of misconduct which will justify a dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal. Similarly even a single act of negligence may, in some circumstances, justify a dismissal. In both the question is one of fact and degree depending on the circumstances of each particular case. In *Baster* v. *London & County Printing Works* (2) it was held that the master was justified in dismissiug a servant for his neglectful management of a printing press on one occasion by which serious damage was caused to the machine. What circumstances will put a servant into the position of not being able to perform in a due manner his duties, or of not being able to perform his duty in a faithful manner it is impossible to enumerate. In an action by the acting manager of a Covent Garden Theatre for wrongful dismissal from his situation to which amongst other pleas the defendant pleaded that the plaintiff's conduct was calculated to prejudice the interest of the Theatre. Vaughan, J., said "It is a question of fact whether the plaintiff was so conducting himself as that it would have been injurious to the interest of the theatre to have kept him. If he was, I should have no difficulty in saying that it would be good ground for dismissal." *Lacy* v. *Osbaldiston* (3) quoted in Smith's Law of Master and Servant, 7th Edition

(1) 4 B. 576; 5 Ind. Jur. 482; 2 Ind. Dec. (N. S.) 891.

(2) (1899) 1 Q. B. 901; 68 L. J. Q. B. 622; 63 J. P. 439; 47 W. R. 639; 80 L. T. 757; 15 T. L. R. 331.

(3) (1837) 8 Car. & P. 80.

at page 79. Pollock, C. B., in *Lomax* v. *Arding* (4) said : "Suppose the plaintiff had conducted himself on all occasions in a negligent and lazy spirit, there may be insuperable difficulty in a legal definition of the plaintiff's conduct, and yet the defendant would be justified in discharging him from his service. It would be a question of evidence."

As regards the servant's incompetency the question is similarly one of fact. Where a skilled labourer, artizan or artist is employed there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes—"*Spondes peritiam artis*;" *Harmer* v. *Cornelius* (5).

In the case before us the defendant had engaged plaintiff to manage a Ginning and Pressing Factory, as its Manager and Engineer. Supposing that the skill and competency of plaintiff are tested by the employment and he is found to be utterly incompetent, is the employer bound, nevertheless, to go on employing him to the end of the term for which he is engaged, notwithstanding his incompetency? It seems very unreasonable that an employer should be compelled to go on employing the man who having represented himself to be incompetent turns out to be incompetent. Suppose an Engineer is retained by a Railway Company to drive an Express train for a year and is found to be utterly unskilful or incompetent to drive or regulate the Locomotive, are the Railway Company still bound under pain of an action to entrust the lives of thousands to his dangerous and demonstrated incapacity? Similarly where a clerk is retained for a year to keep a merchant's books, and it turns out that he is ignorant not only of book keeping but of Arithmetic, is the merchant bound to continue him in his employment? Misconduct in a servant is according to every day's experience a justification of a discharge. The failure to afford the requisite skill which had been expressly or impliedly promised is a breach of legal duty and, therefore, misconduct. The rule of the Civil law, "*Imperitia adnumeratur*" applies. So in *Spain* v. *Arnott* (6) Lord Ellenborough, speaking of a servant who had refused to perform his duty says: "The master is not bound to keep him on as a burdensome and useless servant to the end of the year." And it appears that there is no material difference between a servant who will not and a servant who cannot perform the duty for which he was hired (Smith's Law of Master and Servant, 7th Edition, page 83).

It will thus be seen that if the master discovers in the course of the employment that his servant is either incompetent and, therefore, cannot perform his duty, or does not or will not perform and thus neglects to discharge his duty, with that degree of skill and tact of management which is ordinarily expected of a servant skilled in the branch for which he is employed, it ought to be a sufficient justification to support a dismissal of the servant without notice even before the end of the term. The Trial Judge who heard the witnesses including the plaintiff and the defendant's agent, has held that the plaintiff was neglectful of his duty, and that there was ample justification for the defendant his master to dismiss him for that reason. This finding is supported by the evidence on record and is a good finding on a question of fact. In *Issur Chunder Mookherjee* v. *Puddo Lochun Goopta* (7) it was held that if the master can show that he has a good cause for dismissing his servant, he may dismiss him notwithstanding that the contract or agreement between them is for a fixed period, and that it was not necessary for him to go through the form of suing for the cancelment of the engagement. The defendant has established to the satisfaction of the Trial Judge that he had ample justification for dismissing the plaintiff without notice and before the expiry of the full term. One need only read plaintiff's own deposition to be convinced of his incompetency or

(4) (1855) 10 Exch. 734; 156 E. R. 636; 24 L. J. Ex. 80; 102 R. R. 799.

(5) (1858) 116 R. R. 654; 5 C. B. (N. S.) 236; 28 L. J. C. P. 85; 4 Jur. (N. S.) 1110; 6 W. R. 749; 141 E. R. 94.

(6) (1817) 2 Stark 256; 19 R. R. 715.

(7) 5 W. R. 18 Mis.

neglect of duty, or failure to perform his duty with that degree of skill and tact of management which is to be ordinarily expected of Manager and Engineer of a Ginning and Pressing Factory. Judging the facts of this case in the light of the decided cases I hold that there was enough material before the Trial Court to show that the plaintiff did not discharge his duties as Manager and Engineer as satisfactorily as he ought to have done and that he was rightly dismissed without notice before the expiry of the term of one year. It would not serve any useful purpose for me to enter into any detailed discussion as to how far each of the acts or omissions or failures proved in the case supports the charge of unfitness which covers incompetency, negligence or even misconduct on plaintiff's part. It is sufficient to say that on the evidence before it, it was open to the Trial Court to come to the conclusion to which it did come, and that I do not see any good reason to interfere with the decision which appears to me to be in accordance with law.

The suit was rightly dismissed by the Small Cause Court Judge and consequently I reject this petition of revision with costs. The costs in the Court below will be paid as already ordered.

N. H. *Revision rejected.*

SIND JUDICIAL COMMISSIONER'S COURT.

SUIT No. 300 OF 1919.
December 13, 1920.
Present:—Mr. Kemp, A. J. C.
MESSRS. KODUMAL KALUMAL—PLAINTIFFS
versus
THE KARACHI BANK LTD.—DEFENDANTS.

Negotiable Instruments Act (XXVI of 1881), ss. 9, 58—Forged endorsement of instrument, effect of—Holder, whether holder in due course—Negligence of true owner—Contract Act (IX of 1872), s. 178—War Bonds, purchase of, through broker—Broker pledging bonds with Bank by forged endorsement—Pledge, validity of—Conversion.

A forged endorsement of an instrument is a nullity and conveys no title to endorsee. It is as much a nullity as a forged cheque or a forged *hundi*, provided there has been no negligence on the part of the true owner in allowing the instrument to come into the hands of the forger. A holder under a forged endorsement is not a holder in due course. [p. 731, col. 2; p. 732, col. 1]

Banku Behari Sikdar v. *Secretary of State for India in Council*, 1 Ind. Cas. 929; 36 C. 239, *Jai Narin* v. *Mahbub Bakhsh*, 28 A. 428; 3 A. L. J. 203; A. W. N. (1906) 77, *Hunsraj Purmanand* v. *Ruttonji Malji*, 21 B. 65; 1 Bom. L. R. 734; 12 Ind. Dec. (N. S.) 581, *Chandra Kali Dabee* v. *E. P. Chapman*, 32 C. 799; 9 C. W. N. 443, followed.

Where a share and insurance broker purchases War Bonds for a customer, but pledges them to secure a personal loan after forging endorsements in his own favour, the true owner cannot be said to be guilty of negligence if he relies upon the statement of the forger to the effect that the instruments are not ready for issue, and takes prompt measures to notify the fraud and recover the instruments when he comes to know of the forgery. [p. 732, col. 1.]

Possession of War Bonds by a share and insurance broker which come to him in the course of business for handing them over to a customer and which he pledges to a Bank for his personal loan after forging endorsements in his favour, is not such juridical possession as will under section 178, Contract Act, give the Bank any title to the bonds as against the customer. In such a case, the Bank cannot hold the bonds against the true owner, and the Bank by accepting them as security for the advance and by resisting the demand of the true owner, is guilty of conversion. [p. 732, col. 2.]

Mr. *Srikrishandas Harbhagwandas Lilla*, for the Plaintiffs.

Mr. *E. Castellino*, for the Defendants.

JUDGMENT.—The main point in this suit is as to the effect of a forged endorsement. The facts of the case are connected with the exploits of C. S. Advani who absconded from Karachi on 2nd December 1918. Advani was formerly the Manager of the Central Bank and at the time when the incidents in question arose he had left the Bank and was carrying on the business of a share and insurance broker. In 1918 he was in the course of his business engaged in obtaining subscribers to the 5 per cent. War loan re-payable in 1918. Some of these facts are controverted but I hold them proved by the evidence and do not propose to set out my reasons for so holding at length.

Plaintiffs are Indian merchants trading in this town and defendant Bank has its principal office here. On 14th August 1918 plaintiffs paid Advani Rs. 2,500 for the purchase of War Bonds. There was a shortage of War bonds here for the number and amount desired by the plaintiffs. The Bank of

Bombay, therefore, had to send to Bombay for them and they were not finally issued to Advani who had made application for them until about 23rd October 1918. The bonds were payable to order and were endorsed over by the Bank of Bombay to plaintiffs. They were two Bonds for Rs. 1,000 each Nos. G 022232 and G 022233 and one for Rs. 500 No. F 008712. It is with the two former we are concerned.

On 23rd October 1918 *i.e.*, at or about the time he received the Bonds from the Bank of Bombay, Advani pledged them with two Banks the two for Rs. 1,000 each with the defendant Bank along with other Bonds of the face value of Rs. 10,000 to cover a loan to himself on them of Rs. 9,000 and the 3rd for Rs. 500 to the Punjab Bank. The two Bonds in suit were transferred to the defendant Bank by an endorsement which plaintiffs alleged to have been forged, *viz.*, "pay to C. S. Advani, Kodumal Kalumal" and by Advani's own endorsement in favour of the defendant Bank. The Bond for 500 was handed over to the Punjab Bank without endorsement and on Advani's insolvency and disappearance from Karachi was after some correspondence, handed by that Bank to the Official Receiver of Advani's estate without demur. On 2nd December 1918 Advani absconded. On 29th January 1919 plaintiffs after inquiries elsewhere intimated the defendant Bank that Advani had no authority to pledge the two Bonds in suit with the Bank and claimed their return. No trace of Advani has been obtained and there is evidence of frauds practised by him on other clients of his and his disappearance from Karachi when criminal warrants were out against him lends further strong colour to the allegation that he has absconded to escape criminal liability for his actions.

Before dealing with the legal aspect of the case I deem it necessary to decide one point that has been raised by the defendant Bank in this case. The defendants say that plaintiffs authorised Advani to pledge these Bonds in suit. I have not the slightest doubt in deciding that point in favour of the plaintiffs. That Advani had no authority to pledge the Bonds is clear from the fact that Advani has absconded which he would be unlikely to do if he had authority from the plaintiffs to effect this pledge and by the oral and documentary evidence produced by plaintiffs showing that they did not authorise the pledge and that from a pecuniary point of view there was no reason why they should then desire to raise money. They have produced their cash book and Bank pass books showing they had large cash balances in September and October 1918. They also swear they had in addition Rs. 10,000 worth of War Bonds which they did not pledge to raise money. I believe plaintiff's evidence on this point and I further believe the endorsements on the two War Bonds in favour of Advani to be forged. The plaintiffs' specimen Bank signature shows they write their name "Kodoomal Kaloomal" (Exhibit 16) whilst the endorsement spells the name "Kodumal Kaloomal". Moreover, if plaintiffs wrote or signed the endorsement in Advani's favour on the two Bonds in suit why did they not also do so with regard to the 3rd Bond for Rs. 500? Moreover two the only member of plaintiff's firm who can sign in English is Pursram who only received a power-of-attorney from the plaintiffs' firm on 16th August 1919 (Exhibit 19). I think it is unnecessary to discuss the evidence on this point further. I have no doubt and I, therefore, hold that the endorsements on the two War Bonds in suit in favour of Advani were forged by him.

Under the circumstances, it becomes necessary to consider the legal position. These Bonds are transferable by endorsement being payable to order. I have held the endorsements to be forged. Now a forged endorsement is a nullity and conveys no title to the endorsee. In my opinion, it is as much a nullity as a forged cheque or a forged *hundi* provided there has been no negligence on the part of the true owner in allowing the instrument to come into the hands of the forger. I am prepared to follow the reasoning adopted in the decisions in *Banku Behari Sikdar* v.

Secretary of State for India in Council (1), *Jai Narain* v. *Mahbub Bakhsh* (2) and *Hunsraj Purmanand* v. *Ruttonji Malji* (3), in preference to the "*obiter dicta*" of Stephen, J., in *Chandra Kali Dabee* v. *E. P. Chapman* (4). A holder under such a forged endorsement is not a holder in due course. The defendant Bank, therefore, can acquire no title under the forged endorsement.

Nor do I consider that there was any negligence on the plaintiffs' part nor any estoppel nor any adoption by them of the endorsements. I believe plaintiffs when they say Advani put them off from time to time by saying the Bonds were not ready for issue and I think they were not negligent in relying on such statements and that when they discovered the truth they took prompt measures to notify the fraud and recover the Bonds. I hold this proved on the oral evidence and the correspondence which I do not think is necessary to discuss at length. Apparently, the Official Receiver has recognised plaintiffs' claim to the Bond for Rs. 500 because he has handed it over to plaintiffs without demur and although there is no endorsement at all on that Bond his action and that of the Punjab Bank shows that neither of them supported any claim to that Bond based on the assertion of a right under any lien which the Punjab Bank might possess from the pledge of an unendorsed Bond payable to order as security for an advance.

Now a Bank takes a risk in accepting as security for an advance a negotiable security *payable to order* because it may always be met with a claim by the true owner that the endorsement is forged. If it could be pleaded against the owner that "*malgre*" the forged endorsement the transaction between the forger and the Bank gave the latter an equitable lien on the security, the answer to that, to my mind, would be that Advani was entrusted with the War Bonds in this case for a specific purpose and not as a mercantile agent for sale. I do not think he had the juridical possession required by section 178 of the Contract Act as to which there is a long current of authority ending with the case of *Nandlal Thakersey* v. *The Bank of Bombay* (5) in the Bombay High Court.

In my opinion, the Bank by dealing with these War Bonds in the way they have done and purporting to accept them as security for an advance to Advani and resisting the plaintiffs' demand to them are guilty of conversion of the Bonds.

I answer the issues :—

(1) *Yes*

(2) *Yes*

(3) Negative.

(4) In the plaintiffs.

(5) They were forged endorsements and Advani was the forger. They are a nullity and convey no title to the Bank.

(6) Advani purported to pledge the Bonds by forged endorsements for an advance to himself. He had no such possession as would under section 178, Contract Act, give the Bank any title to the Bonds as against the plaintiffs. The Bank took the Bonds without notice, that the endorsements were forged.

(7) See my answer to issue (6).

(8) Bank cannot hold the Bonds against the plaintiffs and are guilty of conversion.

(9) *Yes*

(10) Decree as prayed for in the plaint with costs and in the event of the War Bonds not being returned to the plaintiffs, with interest on Rs. 2,000-0-0 from suit to payment.

N. H. *Suit decreed.*

(1) 1 Ind. Cas. 929; 36 C. 239

(2) 28 A. 428; 3 A. L. J. 203; A. W. N. (1906) 77.

(3) 24 B. 65; 1 Bom. L. R. 734; 12 Ind. Dec. (N. S.) 581.

(4) 32 C. 799; 9 C. W. N. 443.

(5) 5 Ind. Cas. 457; 12 Bom. L. R. 316.

SRINIVASA AYYANGAR *v.* ANNATHANAM AYYAR.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 870 OF 1922.

November 9, 1923.

Present :—Mr. Justice Krishnan.

SRINIVASA AYYANGAR AND ANOTHER—RESPONDENTS Nos. 2 AND 3 —PETITIONERS

versus

ANNATHANAM AYYAR AND ANOTHER—PETITIONER AND RESPONDENT No. 1—OPPOSITE PARTY.

Charitable and Religious Trusts Act (XIV of 1920), ss. 3, 5—Temple trust—Administration application by worshipper—Some only of trustees made parties—Order, whether binding on remaining trustees.

In an application by a worshipper, under section 3 of the Charitable and Religious Trusts Act, in respect of the administration of a temple trust, which is managed by the vote of the majority of the trustees, all the trustees must be made parties, and where some only of the trustees are made parties, an order passed on the application is not binding on the remaining trustees.

Petition, under section 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise an order, dated the 5th September 1922 of the District Court of Trichinopoly, in O. P. No. 12 of 1922.

Messrs. *T. R. Ramachandra Iyer* and *N. A. Krishna Iyer*, for the Petitioners.

Mr. *T. V. Ramanada Iyer*, for the Opposite Party.

JUDGMENT.—This is a revision petition under sections 115, Civil Procedure Code and 107 of the Government of India Act, against an order passed by the District Judge of Trichinopoly on an application made by one worshipper in a temple called Gunaseelam in the Trichinopoly District under the Charitable and Religious Trusts Act XIV of 1920. The application was made under section 3 of the Act to direct the trustees of the temple to furnish the petitioner through the Court with particulars of the value and condition of the jewels, vessels, and other articles belonging to the deity, to direct the accounts of the temple for the last three years to be examined and audited, to order the respondents to produce all documents relating to the temple and its properties and to appoint a Commissioner to take the keys and prepare an inventory of all the jewels, vessels and other articles, belonging to the deity. To this application there were only three respondents added, and it was stated in the petition that the respondents were the chief *archakas* of the temple. It would appear, however, that there are 21 *archakas* of this temple who are all in the position of trustees of the temple and that the temple is managed by the vote of the majority of this body of 21. The learned District Judge before sending notice appointed a Commissioner and directed an inventory of the articles to be taken and had an inventory so taken. The accounts have also been produced in Court without any objection on the part of the three respondents, but they have not been examined or audited yet. The District Judge also passed an order directing regular accounts to be kept of all the income and expenditure connected with the temple and ordered the money Rs. 4 to be paid by the parties performing marriages in this temple in respect of each marriage, to be entered in a special register after obtaining the signature of the persons paying in such register and he also ordered the donations and gifts that might be made to the diety by the worshippers and pilgrims to be so entered. He also directed that the *archaka* in charge for the time being should account for and be responsible for the safe custody and preservation of the existing properties belonging to the diety. He further directed the accounts kept by the respondents to be filed every year in Court on the first Monday in January of the succeeding year and stated that the Court would appoint an auditor to audit the accounts if it was thought necessary to do so, the remuneration being paid out of the trust funds. These orders are said to have been passed by the consent of the three respondents who were made parties to this petition but the order goes very much further than to bind these respondents, for it purports to bind all the *archakas* in the temple. The great defect in the order is that unfortunately the other *archakas* have not been made parties and their objections have not been heard. As already stated above

the management of the temple is by the vote of the majority of the 21 *archakas*, and in such a case it is absolutely necessary under section 5 (1), for the petitioner to have made all the 21 *archakas* respondents to his petition and for the Court to have served a copy of the petition together with notice of the date fixed for the hearing of the petition on each of these 21 *archakas* or trustees.

As this was omitted to be done, I am constrained to set aside the order, as three of the trustees cannot be made to do certain acts which they themselves would be unable to do being only a small minority of the 21 trustees in the temple. The order, therefore, of the District Judge, dated the 5th of September 1922, in Original Petition No. 12 of 1922 is set aside and the case sent back to him for a fresh disposal according to law, after giving notice to all the necessary parties. The costs of this revision petition and of the application in the lower Court will be dealt with by the District Judge in passing final orders.

V. N. V. *Case remanded.*
N. H.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 447 OF 1923.
July 3, 1924.
Present:—Mr. Kinkhede, A. J. C.
RADHABAI AND ANOTHER—APPELLANTS
versus
BHIMRAO—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 16—Assignment of decree to two persons—Execution by one—Objection by other—Appeal, whether lies.

No appeal lies against an order allowing one of the two assignees of a decree to execute it to the exclusion of the other. [p. 735, col. 2.]

The word 'parties' as used in section 47 of the Civil Procedure Code contemplates that the parties are ranged on opposite sides and not as co-decree-holders on one side only. [p. 736, col. 1.]

Gyamonee v. *Radha Romon*, 5 C. 592; 2 Ind. Dec. (N. S.) 984, *Ratanlal* v. *Bai Gulab*, 23 B. 623; 1 Bom. L. R. 87; 12 Ind. Dec. (N. S.) 416, *Gooroo Doss Roy* v. *Ram Runginee Dossia*, 17 W. R. 136 and *Odhoya Pershad* v. *Mahadeo Dutt Bhandaree*, 17 W. R. 415, followed.

Lakshmi Ammah v. *Ponnassa Menon*, 17 M. 394; 6 Ind. Dec. (N. S.) 273, distinguished.

Appeal against the decision of the District Judge, Hoshangabed, in Civil Appeal No. 42 of 1923, dated the 14th July 1923.

Mr. *K. K. Gandhe*, for the Appellants.
Sir *B. K. Bose*, for the Respondent.

JUDGMENT.—One Rai Sahib Sunderlal had obtained a preliminary decree for foreclosure on the basis of a mortgage, on 5th January 1915. He assigned it for consideration to Donaji and his son Bhimrao, and one Gambhirrao, the share of Donaji and Bhimrao being 8 annas and that of Gambhirrao being 8 annas. The assignees got the decree made final in their favour on 14th April 1920. Thereafter Gambhirrao assigned his interest to Bhimrao by an assignment dated 23rd November 1920. On the strength of the assignment Bhimrao applied for execution of the decree in his own name as the sole decree-holder. Gambhirrao opposed the application on several grounds the merits of which I need not at present discuss. The First Court held Bhimrao to be solely entitled to execute the decree and ordered the name of Gambhirrao to be expunged from the decree. Against this order passed by the Subordinate Judge on 6th April 1923, an appeal was preferred to the Court of the District Judge. But the appeal was dismissed upon a preliminary objection being raised that it was not maintainable. The District Judge has also provisionally given his decision on the merits. Gambhirrao had, therefore, filed the present second appeal, but he having died during the pendency of the appeal his widows were brought on the record as his legal representatives.

A preliminary objection is taken by the respondent before me that even assuming that the order, dated 6th April 1923, is erroneous on the merits, it being an order between co-decree-holders, was not appealable under section 47 of the Civil Procedure Code, and that the decision by the District Judge to the effect that it was not appealable is correct, and cannot be questioned in second appeal,

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The question, which I have, therefore, to decide, is whether the District Judge's order, holding that no appeal lay against the order of the Subordinate Judge, is correct or not. The lower Appellate Court relied upon the ruling reported as *Gyamonee* v. *Radha Roman* (1), which fully supports the view taken by it.

On behalf of the appellants it is, however, contended on the strength of the ruling in *Lakshmi Ammah* v. *Ponnassa Menon* (2), that the appeal is maintainable, as such an order is one relating to the execution of the decree within the meaning of old section 244, Civil Procedure Code, which corresponds to section 47 of the new Civil Procedure Code.

On examining the case in *Lakshmi Ammah* v. *Ponnassa Menon* (2), I find that that case was distinguished from two other earlier cases, *Gooroo Doss Roy* v. *Ram Runginee Dossia* (3), and *Odhoya Pershad* v. *Mohadeo Dutt Bhandaree* (4), on the ground that the question, which arose in those two cases, was not one between the decree-holder on one side and the judgment-debtor on the other, but merely between two joint decree-holders. In *Lakshmi Ammah* v. *Ponnassa Menon* (2), the question had thus arisen between one of the decree-holders and the judgment-debtor and not between two joint decree-holders as in this case. That case is, therefore, no authority for holding that an appeal is maintainable against an order passed by an Executing Court as between two joint decree-holders.

The Bombay High Court in *Ratanlal* v. *Bai Gulab* (5) also held the same view. One Bai Gulab had entrusted certain jewellery of hers to one Utamram, who was trading in partnership with one Ratanlal. Utamram was charged by her with criminal breach of trust in respect of that jewellery and the Police seized the jewellery from the accused's partner Ratanlal and produced it before the Magistrate. The Magistrate discharged Utamram and passed an order directing the jewellery to be handed over to the complainant Bai Gulab. The High Court set aside the order and directed the restoration of the jewellery to Ratanlal from whom it was taken. Thereupon Bai Gulab filed suit and asked for an injunction restraining Utamram and Ratanlal from taking away the property from the Magistrate's Court. The Subordinate Judge decreed Bai Gulab's claim. The Nazir, who was, in the meantime, appointed as the Receiver of the property, handed it over to Bai Gulab in execution of the decree. The High Court reversed the decree and dismissed Bai Gulab's suit against defendants Utamram and Ratanlal. It was thus the decree of the High Court which was certainly a joint decree in favour of Utamram and Ratanlal, which Ratanlal alone applied to execute. The application was resisted by Utamram. So the question was between two joint decree-holders. The Subordinate Judge rejected the application holding that Ratanlal alone was not entitled to execute the decree of the High Court and referred them to a separate suit to determine their respective rights. Against this decision Ratanlal appealed to the High Court. The High Court held no appeal lay against an order under section 231 of the Code of the Civil Procedure, refusing to allow one of the several joint decree-holders to execute the decree.

Old section 231 of the Code of the Civil Procedure corresponds to O. XI, r. 15 of the new Civil Procedure Code.

The present case is a case of a transferee of an interest of one of two joint decree-holders seeking to execute the decree and as such it falls under O. XXI, r. 16, Civil Procedure Code. The Executing Court decided to allow one of the joint decree-holders to execute the decree on the ground that there is a valid assignment by Gambhirrao to Bhimrao. Assuming that the assignment is open to the objections levelled against it on Gambhirrao's behalf, the position would be that both Bhimrao and Gambhirrao would be entitled to execute the decree jointly, but that only one of them has been allowed to execute it ignoring the other; any decision one way or the other as

(1) 5 C. 592; 2 Ind. Dec. (N. S.) 984.
(2) 17 M. 394; 6 Ind. Dec. (N. S.) 373.
(3) 17 W. R. 136.
(4) 17 W. R. 415.
(5) 23 B. 623; 1 Bom. L. R. 87; 12 Ind. Dec. (N. S.) 416.

between Bhimrao and Gambhirrao as to Bhimrao's sole right to execute the decree would be a decision between two decree-holders. There is thus no difference in principle between the Bombay case and the present case. I, therefore, hold on the analogy of the Weekly Reporter cases and the Bombay case, that no appeal lay against the order of the Subordinate Judge under section 47, Civil Procedure Code. The word 'parties' as used in section 47 of the Civil Procedure Code contemplates that the parties are ranged on opposite sides and not as co-decree-holders on one side only. The District Judge was right in dismissing the appeal made to his Court as unmaintainable. In this view of the case I see no necessity to deal with the merits of the order dated 6th April 1923.

This appeal, therefore, fails and is dismissed with costs. Costs in the Courts below will be paid as already ordered.

G. R. D. *Appeal dismissed.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 341 OF 1921.

April 29, 1924.

Present :—Mr. Justice Mukerji and Mr. Justice Dalal.

MUHAMMAD ABDUL HASAN—PLAINTIFF—APPELLANT

versus

FIDA HUSAIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 49—Registration of mortgage-deed—Mortgagor's title, question of, whether relevant—Pleadings—Limitation, plea of.

The condition of the mortgagor's real title to the property does not affect the question of registration, where the parties *bona fide* intended to deal with the property. [p. 736, col. 2.]

Pahladi Lal v. *Musammat Laraiti*, 48 Ind. Cas. 200; 16 A. L. J. 871; 41 A. 22, *Harendra Lal Roy Chowdhury* v. *Haridasi Debi*, 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A. L. J. 774; 1 L. W. 1050; 41 I. A. 110 (P. C.), referred to.

A plea of limitation may be taken at any stage of the litigation. [*ibid.*]

First appeal from a decree of the Subordinate Judge, Budaun, dated the 28th of May 1921.

Mr. *Iqbal Ahmad*, for the Appellant.

Dr. *S. N. Sen* and Mr. *Ajodhia Nath*, for the Respondents.

JUDGMENT.—This was a suit for sale and on its dismissal the plaintiff has appealed. The mortgagee is the plaintiff Abdul Hasan. The defendants are one mortgagor the representatives-in-interest of two deceased mortgagors and two other defendants Nos. 10 and 11 who are subsequent mortgagees. One plea raised by the subsequent mortgagees was that the registration was a fraud on the registration law and, therefore, invalid. This plea was accepted by the learned Subordinate Judge who held the document to be invalid for want of registration. We do not agree with this finding of the lower Court. The property, a grove situated within the jurisdiction of the Sub-Registrar of Budaun, did exist, and mortgagor and mortgagee had reason to believe that it belonged to one of the mortgagors, Baqar Husain. There was no collusion between the mortgagor and the mortgagee and a fictitious property was not entered with a view to obtain registration in a registration office where it would not otherwise have been possible. In *Pahladi Lal* v. *Musammat Laraiti* (1) a Bench of this Court considered the Privy Council judgment reported as *Harendra Lal Roy Chowdhry* v. *Haridasi Debi* (2). As in that case, the facts here are that the parties intended to deal with the property, that is, the grove situated in Ujhani; so, the condition of the mortgagor's real title does not affect the question of registration.

The appeal, however, must fail on the point of limitation. This plea was not taken in the first Court but it is one which may be taken by the defendants at any stage of the litigation. The learned Counsel for the plaintiff-appellant submitted that we should not permit this plea to be taken in appeal. We, however, see no reason to disallow it. Obviously the legal advisers of the defendants made a mistake in not raising it in the first Court, and there is no bar to the defendants raising it

(1) 48 Ind. Cas. 200; 16 A. L. J. 871; 41 A. 22.

(2) 23 Ind. Cas. 637; 41 C. 972; 27 M. L. J. 80; (1914) M. W. N. 462; 16 M. L. T. 6; 18 C. W. N. 817; 19 C. L. J. 484; 16 Bom. L. R. 400; 12 A. L. J. 774; 1 L. W. 1050; 41 I. A. 110 (P. C.).

here. Of course, the question of costs will be considered when we come to deal with it.

The document was executed on 30th October 1905. The translation of the document given at page 42 is fairly correct. The relevant portion may be quoted :—

"We agree to pay the aforesaid amount in nine years, with interest at 12 annas per cent. per month. We shall pay the amount of interest annually. Should we fail to pay the interest annually, the unpaid amount of interest shall be added to the principal and the total shall carry interest at the aforesaid rate. This stipulation shall continue till the payment of the entire amount due under this bond. The mortgagee shall, in case of default, be competent to recover from us the amount due to him within the period stipulated."

It is admitted that interest was never paid, so the amount of the bond became recoverable on the 30th October 1906, and the last day of limitation was the 30th October 1918. The suit was instituted on 14th September 1920 and was, therefore, time-barred. It was argued by the appellant's learned Counsel that the "default" in the last sentence quoted above, meant not only default of payment of interest but also default of adding that interest as compound interst to the principal sum. As pointed out by one of us during arguments, this was not a matter within the control of the mortgagor. The interest, according to the stipulation, would be added automatically and run at the compound rate on non-payment. The default obviously meant the default of payment of interest and that default was made on 30th October 1906. The matter, in our opinion, is covered by the Full Bench ruling in *Shib Dayal* v. *Meharban* (3). The suit when instituted was, therefore, time-barred.

We dismiss the appeal, but having regard to the circumstances of the case, direct that parties shall bear their own costs here.

K. S. D. *Appeal dismissed.*

(3) 69 Ind. Cas. 981; 45 A. 27; 20 A. L. J. 819; (1923) A. I. R. (A.) 1.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 969 OF 1921.

April 24, 1924.

Present:—Mr. Justice Madhavan Nair.

P. RAMALINGAPPA AND OTHERS—DEFENDANTS—APPELLANTS

versus

ALLURU NARAYANAPPA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 63—Claim petition—Prayer to notify contents—Dismissal—Order against claimant.

An order upon a claim petition, which expresses no final judgment on the rights put forward, but simply directs the sale after notifying the claim is an order against the claimant for the purposes of O. XXI, r. 63 of the Civil Procedure Code. [p. 738, col. 2.]

Machi Raju Venkataratnam v. *Vadrevu Ranganayakamma*, 48 Ind. Cas. 270; 41 M. 985; 35 M. L. J. 335; 24 M. L. T. 197; (1918) M. W. N. 599; 8 L. W. 292 (F. B.), followed.

Lakshmi Ammal v. *Kadiresan Chettiar*, 63 Ind. Cas. 431; 41 M. L. J. 198; 14 L. W. 12; (1921) M. W. N. 495, *Parambil Saharabi* v. *Ali*, 72 Ind. Cas. 857; 44 M. L. J. 141; 17 L. W. 182; (1923) A. I. R. (M.) 295, *Ayya Pattar* v. *Attupurath Manakkal*, 52 Ind. Cas. 938; (1919) M. W. N. 805, distinguished.

Lakshumanan Chettiar v. *Parasivan Pillai*, 52 Ind. Cas. 720; 37 M. L. J. 159; (1919) M. W. N. 653, relied on.

Where an order on a claim petition adverse to the defendant is not set aside, he cannot take advantage of a suit filed by the plaintiff to re-agitate the question of his title. [p. 739, col. 1.]

Second appeal against the decree of the District Court, Anantapur, in Appeal Suit No. 40 of 1920 preferred against a decree of the Court of the District Munsif, Penukonda, in Original Suit No. 497 of 1918.

Messrs. *B. Sitaram Rao* and *K. Srinivasa Rao*, for the Appellants.

Mr. *B. Sammaya*, for the Respondents.

JUDGMENT.—Defendants Nos. 1 to 3 are the appellants. The facts of the case are clearly stated in paragraphs 6, 7 and 8 of the District Munsif's judgment. The suit properties belonged to Pullanna and, after his death, his three sons Pedda Chowdappa, Chinna Chowdappa and Ranganna became entitled to them. The plaintiffs may be described as the decree-holder-purchasers who purchased the properties in execution of a money-

decree in Original Suit No. 661 of 1899 obtained against Pullanna and his children. The decree was passed on the 27th of March 1900 and the sale was held on the 17th of January 1913. On two hypothecations executed by Ranganna and Pedda Chowdappa of their shares in the properties, suits, Original Suits Nos. 719 and 720 of 1911 were instituted by the mortgagees. Preliminary decrees for sale were passed on the 5th of September 1911 and final decrees in 1915. The decree-holder's representatives, the present defendants Nos. 1 to 3, applied for the sale of these properties. They were sold on the 26th of August 1915 and purchased by the first defendant. The plaintiffs in the present suit were not parties to the execution proceedings in the two suits. It may here be stated that under a sale-deed, Exhibit I, executed on the 1st of July 1911, the share of Chinna Chowdappa, the other brother, had also come into the possession of the family of defendants Nos. 1 to 3.

The question for consideration in this case is whether, on the facts stated above, the plaintiffs, or the appellants (defendants Nos. 1 to 3), are entitled to the possession of the shares of Pedda Chowdappa, Chinna Chowdappa and Ranganna in the plaint lands. The lower Courts held that the appellant's right to possession of these properties had become extinct in consequence of the adverse order that was passed by the Courts against them on their claim petition, Exhibit E. The facts relating to this claim petition are as follows:— In execution of the decree in Original Suit No. 661 of 1899 the sale, as already stated, was held on the 17th of January 1913 when the properties were purchased by the present plaintiffs. On the 16th of January 1913 the father of the first and second defendants and undivided brother of the third defendant preferred a claim to these attached properties under O. XXI, r. 58, Civil Procedure Code. Exhibit E is the copy of the claim petition. This claim petition covered the rights of all the three brothers. In that petition they stated their claim to these properties under the mortgage-decrees and the sale by Chinna Chowdappa and prayed that their claim may be allowed and said that "if it is found to be impossible to inquire into the claim now, the contents of the petition may be intimated to the intending bidders." On this petition the following order dated the 16th of January 1913 was passed: "The petition is presented too late. The claim will be notified. Petition dismissed." The auction sale was held on the 17th of January 1913.

The question for consideration is, what is the effect of this order passed on Exhibit E as regards the right of the appellants to these properties? Two arguments have been put forward by the learned Vakil for the appellants:— (1) that the order on the petition has been wrongly construed by the lower Court inasmuch as it really did not adjudicate anything about the claim of the appellants, still, as there was a preliminary decree in their favour passed on the 5th of September 1911 which became final in 1915, the Court sale is affected by the doctrine of *lis pendens* at least as regards the two shares of Pedda Chowdappa and Ranganna, the share of Chinna Chowdappa having been conveyed under Exhibit I. The answer to both these arguments, to my mind, depends upon the effect that is to be given to the order that was passed on the claim petition, Exhibit E. It has been held in *Machi Raju Venkataratnam* v. *Vadrevu Ranganaya Kamma* (1) that "an order upon a claim petition which expresses no final judgment on the right put forward but simply directs the sale after notifying the claim, is an order against the claimant and he is bound to institute a suit under Art. 11 of the Limitation Act" per Sheshagiri Aiyar, J., at p. 997.* The decision in *Ayya Pattar* v. *Attupurath Manakkal* (2), *Lakshmi Ammal* v. *Kadiresan Chettiar* (3) and *Parambil Saharabi*

(1) 48 Ind. Cas. 270; 41 M. 985; 35 M. L. J. 335; 24 M. L. T. 197; (1918) M. W. N. 599; 8 L. W. 292 (F. B.).

(2) 52 Ind. Cas. 938; (1919) M. W. N. 805.

(3) 63 Ind. Cas. 431; 41 M. L. J. 198; 14 L. W. 12; (1921) M. W. N. 495.

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v. *Ali* (4) do not really help the appellants. In *Ayya Pattar* v. *Attupurath Manakkal* (2) the claimants' prayer was that the objections might be recorded and the Court passed an order to that effect. This certainly cannot be considered to be an order negativing the rights of the claimants. In *Lakshmi Ammal* v. *Kadiresan Chettiar* (3) it was found that the claim could not be investigated by the Court because the District Munsif had no authority to dispose of it and it became unnecessary to investigate the claim when the sale was stopped. Therefore, it was held that the order did not negative the right set up by the claimants. In the order passed upon the claim petition in *Parambil Saharabi* v. *Ali* (4) also there was no adjudication against the claimants. In the present case it cannot be said that the order did not negative the rights of the claimants. The petition is expressly stated to be dismissed. Applying the decision in *Machi Raju Venkataratnam* v. *Vadrevu Ranganaya Kamma* (1), I am of opinion that the order passed on the claim petition in this case is an order negativing the rights of the claimants; [see also *Lakshman Chettiar* v. *Parasivan Pillai* (5)]. It is admitted that no suit had been laid as yet to set aside this order dated the 16th of January 1913. In this case the defendants had lost their rights long before the passing of the final decree on account of their failure to get the claim order set aside. That being so, it is not now open to the appellants to set up their claim to the properties. It was held in *Peda Yarkayya* v. *Kanumari Venkata Krishnaraju* (6) that an order on a claim petition adverse to the defendant not having been set aside, he could not take advantage of a suit filed by the plaintiff to re-agitate the question of his title, and that the fact that both the plaint and the written statement in the subsequent suit were within one year from the date of the order did not affect the question.

(4) 72 Ind. Cas. 857; 44 M. L. J. 141; 17 L. W. 182; (1923) A. I. R. (M.) 295.

(5) 52 Ind. Cas. 720; 37 M. L. J. 159; (1919) M. W. N. 653.

(6) 41 Ind. Cas. 684; 6 L. W. 281; 22 M. L. T. 232; (1917) M. W. N. 721.

Under these circumstances, I overrule the contentions raised by the appellant's learned Vakil and dismiss the second appeal with costs.

V. N. V.

N. H. *Appeal dismissed.*

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 132 OF 1923.

April 24, 1924.

Present:—Mr. Kincaid, J. C., and Mr. Aston, A. J. C.

NARUMAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JAGATMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, O. XLV, r. 13—Certificate for appeal to Privy Council, application for—Stay of execution—Inherent jurisdiction, exercise of.

The High Court has inherent power under section 151, Civil Procedure Code, in appropriate circumstances, to stay execution on receipt of an application for leave to appeal to the Privy Council, pending the passing of orders on the application. [p. 741, col. 2.]

Dame Janbai v. *Sale Mahomed Jafferbhoy*, 19 B. 10; 10 Ind. Dec. (N. S.) 7, relied on.

Bibi Sona v. *Mir Abdul Husein Khan*, 16 Ind. Cas. 845; 6 S. L. R. 86, doubted.

Nand Kishore Singh v. *Ram Golam Sahu*, 18 Ind. Cas. 207; 40 C. 955 at p. 961; 16 C. L. J. 508, followed.

Bibi Jarao Kumari v. *Gopi Chand Bothra*, 5 C. W. N. 562, referred to.

This inherent power should, however, be sparingly exercised in view of the provisions of O. XLV, r. 13 of the Civil Procedure Code and the onus is on the applicant to establish good grounds for staying execution. [*ibid.*]

Application by the appellants under O. XXXIX, r. 2, O. XLI, r. 6 and section 151, Civil Procedure Code, for stay of execution of a decree pending the grant of a certificate for leave to appeal to the Privy Council.

Mr. *Kimatrai Bhojraj*, for the Appellants.

Messrs. *Tolasing Khushalsing* and *Srikishendas H. Lulla*, for the Respondents.

NARUMAL v. JAGATMAL.

JUDGMENT.—This is an application under O. XXXIX, r. 2, O. XLI r. 6 and section 151.

The plaintiff obtained a decree against certain members of a Hindu family and wanted in execution to attach and sell property of the family in which the applicants who were other members of the family were interested.

Applicants thereupon filed a suit in Larkana praying for a declaration that their interest was not liable in execution.

The suit was dismissed. The applicants appealed and their appeal was also dismissed. As the matter involved more than Rs. 10,000, applicants have applied for leave to appeal to the Privy Council.

They desire execution to be stayed by injunction or otherwise.

It is contended by Mr. Tolasing and by Mr. Srikishendas Lulla who appear for the respondents, that this Court has no jurisdiction to grant an injunction or to stay execution. They urge that O. XXXIX, r. 2 applied to suits. As the applicants' appeal has been dismissed by the Appellate Court and there is now only a petition for leave to appeal, they contend there is no suit. Similarly they contend that O. XLI relates to appeals from original decrees and that O. XLI, r. 6 is otherwise inapplicable since it cannot be said that an appeal is pending before leave to appeal has been granted. Our attention has been drawn to O. XLV, r. 13 and the commentry of Mr. Mulla on the effect of the omission of the words "admitting the appeal" after the word "Court." It has, however, been held by an Appellate Bench of this Court that an application under O. XLV, r. 13, Civil Procedure Code, cannot be entertained by the Court before the grant of the requisite certificate see *Bibi Sona* v. *Mir Abdul Husein Khan* (1). In a case under section 608 of the Civil Procedure Code, 1882, the High Court of Bombay had held that the words "admitting the appeal" had no reference to the time when the Court had to give direction but were descriptive of the Court, and that they imposed no limitation as to time upon the exercise by the Court of its powers. It, therefore, held that where a petition for leave to appeal to the Privy Council from a decree of the High Court had been presented, the High Court might grant a stay of execution of the decree although the appeal had not yet been admitted, or a certificate granted: *Dame Janbai* v. *Sale Mahomed Jafferbhoy* (2). Pratt, J.C., however, in *Bibi Sona* v. *Mir Abdul Husein Khan* (1) while agreeing with the view that the words "admitting the appeal" were merely descriptive of the Court, said he preferred the construction of the Calcutta High Court in *Bibi Jarao Kumari* v. *Gopi Chand Bothra* (3). He appears, however, to have steered a middle course between the two rulings for in *Bibi Jarao Kumari* v. *Gopi Chand Bothra* (3) it was held that a Court has no power to stay execution, even when a certificate has been granted, and that it can only do so when the appeal has been admitted. Crouch, A. J. C., felt some difficulty in regarding a decree as "appealed from" within the meaning of O. XLV, r. 13 (2) (c) merely because a certificate for leave to appeal had been granted pointing out that in O. XLV, r. 7 after the grant of a certificate, the decree is still referred to as "complained of" not "appealed from". But in spite of this fact he felt confident that the Legislature intended to treat decrees as "appealed from" as soon as a cetificate had been granted. In my humble opinion the wording of O. XLV, r. 13 clearly shows that the Court has power to stay execution after grant of a certificate. Power has not been specifically conferred on the Court under O. XLV, r. 13 to stay execution prior to that stage; but since the words "appealed from" are not to be strictly construed any more than the words "admitting the appeal" in section 608 of the Civil Procedure Code, 1882, there appears to me considerable force in the view held by the Bombay High Court in *Dame Janbai* v. *Sale Mahomed Jafferbhoy* (2) that the Court has power to stay even before the grant of a certificate.

(1) 16 Ind. Cas. 845; 6 S. L. R. 86.

(2) 19 B. 10; 10 Ind. Dec. (N. S.) 7.

(3) 5 C. W. N. 562.

This point does not, however, appear to me of great importance for it seems to me clear that the High Court has inherent jurisdiction under section 151, Civil Procedure Code, to stay execution after receipt of a petition for leave to appeal. It was assumed by both parties in *Nand Kishore Singh* v. *Ram Golam Sahu* (4) that the Court has inherent power to stay execution of its decree when an appeal or an application for leave to appeal in the Privy Council is pending. Mookerjee, J., went further and held that even when leave to appeal had been refused, even when the parties were not before the Court, the High Court had inherent power to stay execution of its decree, where the judgment-debtor had applied to the High Court for special leave to appeal and before special leave to appeal had been granted.

Mookerjee, J., there regarded O. XLV, r. 5 (2), which expressly recognizes the principle that an Original Court has power for a time to stay execution of its decree in view of a possible appeal, as affording a useful guidance in the determination of the question how the inherent power of the Court should be exercised in a matter of this description, and he referred to *Brij Coomaree* v. *Ramrick Dass* (5) as conclusively showing that the Court has inherent power to stay proceedings pursuant to its own order in view of an intended appeal. He pointed out that if the contention of the decree-holders was to prevail the gravest injustice done to litigants. The views which he advocated did not entirely commend themselves to his colleague Holmwood, J., who considered that in the case before them the use of the inherent power would be an abuse of the powers of the Court, though he conceded that the Court has inherent powers to make such orders as may be necessary for the ends of justice. One of the difficulties felt by Holmwood, J., was that the parties were not before the Court, and another was that the matter had become *res judicata*. These difficulties do not apply to a case where a party has applied for leave to appeal under O. XLV, r. 2. On the contrary since O. XLV, r. 13, expressly empowers a Court to stay execution after the grant of certificate the ends of justice might often be defeated unless the Court has inherent powers to leave matters in *statu quo* until the Court passed orders under O. XLV, r. 13. It was conceded in the argument before us that considerable time must elapse between an application for leave to appeal to the Privy Council and the grant of a certificate. Apart from the laws delays and the congestion of Courts, paper-books have to be prepared and the matters are frequently traversed from one Bench to another. The use of the inherent power of the Court to stay execution may, therefore, be often necessary for the ends of justice. This would not be an evasion of O. XLV, r. 13. Even if that Order is strictly construed but would, in certain circumstances, be necessary in order to give effect to the provisions of that Order. For the protection granted under O. XLV, r. 13 would be meaningless if the decree-holder before the Court had time to stay execution under that Order, had full power to sell the property the subject-matter of the decree complained of, and the Court had no power to restrain him from so doing.

For the reasons above mentioned, I am of opinion whether *Bibi Sona* v. *Mir Abdul Husein Khan* (1) was rightly or wrongly decided, the Court has inherent power under section 151, Civil Procedure Code, in appropriate circumstances, to stay execution on receipt of an application for leave to appeal to the Privy Council pending the passing of orders on the application.

The wording of O. XLV, r. 13 appears to me, however, to indicate that the inherent powers of the Court to stay execution of its decree should be sparingly used. The onus is clearly laid on the applicant to establish good grounds for staying execution even when a certificate has been granted. The case of an applicant who has not yet obtained a certificate is on a lower footing and under ordinary circumstances an application to the Court to use its inherent

(4) 18 Ind. Cas. 207; 40 C. 955 at p. 961; 16 C. L. J. 508.
(5) 5 C. W. N. 781.

powers should be refused. In the present case both the Original Court and the Appellate Court decided against the applicant and it appears to me that he has failed to establish that it is necessary in order that the ends of justice should not be defeated, that the inherent powers of the Court should be exercised, I am of opinion, therefore, that this application must be rejected with costs.

N. H.

Application rejected.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL MISCELLANEOUS APPEAL No. 16 OF 1924.

July 28, 1924.

Present:—Mr. Wazir Hasan, J. C.

Lala BANARSI DAS—APPELLANT

versus

MESSRS. BALDEO DAS-BANARSI DAS AND ANOTHER—RESPONDENTS.

Provincial Insolvency Act (V of 1920), s. 6, cl. (g)—Notice to creditors suspending payment of debts—Act of insolvency.

A notice by a debtor to his creditors that he had suspended payment of debts is a sufficient act of insolvency so as to justify a petition under section 6 clause (*g*) of the Provincial Insolvency Act.

Appeal under section 75, Provincial Insolvency Act, V of 1920, against an order of the District Judge, Lucknow, dated the 8th December 1923.

Mr. *H. K. Dhaon*, for the Appellant.

Mr. *Bishambhar Nath Khanna*, for Respondent.

JUDGMENT.—This is an appeal under the provisions of the Provincial Insolvency Act. The creditors of one Udai Chand applied under sections 9 and 13, sub-section (2), of the Provincial Insolvency Act for an order of adjudication against Udai Chand. The appellant, another creditor, objected to such an order being made. The learned District Judge of Lucknow has rejected the application of the appellant and made the order of adjudication. In support of the appeal two points were urged:—(1) That the act of insolvency occurred more than three months before the presentation of the petition and consequently it was barred under section 9, sub-section (1), clause (*c*) of the Act, and (2) that the debt of the applicants is not a liquidated sum within the meaning of clause (*b*) of the same sub-section.

The first argument would be sound if the position were grounded merely on the fact that the debtor had absented himself from his dwelling house or the usual place of business, *vide* section 6, clause (*d*) (*ii*) of the Provincial Insolvency Act, but it is not so. The learned Judge has found and there is evidence in support of the finding that the act of insolvency consists of the fact of the debtor giving notice to his creditors that he had suspended payment of his debts. This will be a sufficient act of insolvency to justify a petition as given in clause (*g*) of section 6. It is admitted that this act occurred within three months before the presentation of the petition. The first argument, therefore, falls to the ground.

As regards the second argument the facts are as follows:—The debtor was given certain jewelleries by the applicants for being sold on condition, that he would be entitled to a certain commission on the sale proceeds. The debtor neither returned the jewelleries nor the price thereof. He has been convicted in a criminal prosecution. I have no doubt, in my mind that at the inception of the transaction between the creditor and debtor there was no liquidated sum payable by the debtor to the creditor. It was open to the debtor to return the jewellery, and the creditor could not refuse to take the delivery nor could insist on claiming merely the price of it. On the other hand, if the debtor did not deliver back the jewellery the creditor would be entitled to recover the price of it in damages. The measure of it will depend on many uncertain and fluctuating incidents. But whatever might have been the nature of the transaction at its beginning there is no doubt, in my mind, that long before the petition under consideration was presented the debtor had

acknowledged his liability for an ascertained sum as due to the creditors. This is amply proved by Exhibit 2. The second argument, therefore, also fails.

The appeal is dismissed with costs.

G. H. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 92 OF 1922.

March 7, 1924.

Present:—Mr. Justice Jackson.

VATAKKUMPAT VARIKKARA VATAKKA VEETTIL NARAYANAN NAIR—PETITIONER—APPELLANT

versus

VARIKKARA PATINHARE VEETTIL MUTHUVANYICHA VARIKKARA PARAMBIL VATAKKE MALIKAYIL PARKUM KUNHI RAMAN NAIR—RESPONDENT.

Limitation Act (IX of 1908), s. 20, Sch. I, Art. 182—Payment out of Court towards decree—Step-in-aid of execution—Payment not certified, effect of.

A payment out of Court towards a decree does not give a fresh start to limitation under Art. 182 (5) of Schedule I to the Limitation Act. It is not the payment but the application to certify it which constitutes a step-in-aid of execution.

Jotindra Kumar Dass v. *Gagan Chandra Pal*, 45 Ind. Cas. 903; 46 C. 22, not followed.

Where the decree-holder when applying for execution wishes to rely upon section 20 of the Limitation Act, the fact he has not certified the payment until making his application is by itself no obstacle.

Rajam Aiyar v. *Anantharatnam Aiyar*, 31 Ind. Cas. 318; 29 M. L. J. 669; 18 M. L. T. 475; (1916) 1 M. W. N. 127, relied on.

Appeal against the order of the Court of the Subordinate Judge, Tellicherry, dated the 12th January 1922, in A. S. No. 300 of 1921 (A. S. No. 237 of 1921 District Court) preferred against the order of the Court of the District Munsif, Talipramba, dated the 10th March 1921 in E. P. No. 55 of 1921, in O. S. No. 301 of 1915.

Mr. *O. T. Govinda Nambiar*, for the Appellant.

Mr. *A. Siva Rama Menon*, for the Respondent.

JUDGMENT.—This is an appeal against the order of the Subordinate Judge of Tellicherry in Appeal Suit No. 300 of 1921 in E. P. No. 55 of 1921.

The decree-holder relied on certain payments made within three years of the date of the prior application in order to save limitation. The lower Appellate Court has found that the payment is true and that finding is not traversed.

It also finds that the payment cannot save limitation and this is the point for determination.

The decree is dated 1915. There was an arrest in 1917. On or about 25th January 1918 Rs. 100 (Rupees one hundred only) was paid towards the decree debt, *i.e.*, on 10th *Makaram* 1893. On 17th January 1921 the decree-holder applied for execution in E. P. No. 55 of 1921 and the Munsif took this as a petition for certifying the payment of January 1918 and found that this payment saved limitation.

There are two ways in which a decree-holder may save limitation. He may prove a payment which satisfies the requirements of section 20 of the Indian Limitation Act or he may prove a step-in-aid of execution within three years of his application as laid down in Art. 182, clause (5). If the decree-holder when applying for execution wishes to rely upon section 20, the fact that he has not certified the payment, until making his application is no obstacle, *cf. Rajam Aiyar* v. *Anantharatnam Aiyar* (1). In the present case, there would be no objection to applying section 20 if its requirements were fulfilled, but as pointed out by the lower Appellate Court, they are not fulfilled and again this finding is not traversed. But the appellant relies upon Art. 182 and contends that the payment, certified in 1921, ranks as steps-in-aid on the date of payment, *i. e.* January 1918. In support of this contention he relies upon *Jotindra Kumar Das* v. *Gagan Chandra Pal* (2). The facts of that case are very similar to those of the present

(1) 31 Ind. Cas. 318; 29 M. L. J. 669; 18 M. L. T. 475; (1916) 1 M. W. N. 127.

(2) 45 Ind. Cas. 903; 46 C. 22.

that the entertainment of the suit is merely postponed until after the final publication of the Record of Rights.

Finally the learned Vakil argued that this case involved a matter which could not be measured in money by reason of the fact that the plaintiff was making a claim that the rent was liable to be enhanced. In a sense that liability for enhancement may not be capable of being measured by a particular sum of money, but it is to be noted that the suit does include a claim for enhancement and if the suit succeeds and the rent is enhanced it will follow that by reason of section 37 of the Bengal Tenancy Act another enhancement will not take place within a space of 15 years.

For these reasons I am of opinion that the subject-matter in dispute of the suit and of the appeal is not Rs. 10,000 in value and, therefore, the case does not comply with the requirement of section 110 of the Code of Civil Procedure. Consequently this application must be refused with costs 5 gold *mohurs*, but having regard to the grounds on which we have decided this application, we direct that each party do bear his own costs of the enquiry in the lower Court.

K. S. D. *Application refused.*

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 376 OF 1922.

May 8, 1924.

Present:—Mr. Justice Pearson and Mr. Justice Graham.

Srimati GIRIBALA DASSI DECREE-HOLDER—APPELLANT

versuos

BISWAMBHAR HALDAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XX, r. 7, O. XXI, r. 9—Certification of payment out of Court—Decree not drawn up, effect of.

Order XX, r. 7 of the Civil Procedure Code lays down that the decree shall bear the date, the day on which the judgment was pronounced. Therefore, the date of the decree may be held to be not the date on which the decree is reduced to writing and signed by the Court but the date on which the Court delivers its judgment and expresses what the decree is. [p. 747, col. 1.]

When a person has a judgment of the Court in his favour, it may be said that he then obtains his decree and that the decree when subsequently drawn up relates back to that time. [*ibid.*]

An application for certifying payment of a decree and satisfaction out of Court is maintainable even though the decree is not formally drawn up. [*ibid.*]

Appeal against an order of the Subordinate Judge, Fourth Court, 24-Perganas, dated the 12th of August 1922.

Babu *Sita Ram Banerjee*, for the Appellant.

Babu *Abinash Chandra Ghose*, for the Respondent.

JUDGMENT.—This is an appeal by the opposite party Giribala Dasi and arises out of an application made under O. XXI, r. 2 (2) of the Code of Civil Procedure for certifying payment of a decree and alleged satisfaction out of Court.

The learned Subordinate Judge found on the evidence that the alleged payment of Rs. 730 in satisfaction had been proved and directed satisfaction of the decree to be recorded accordingly. Against that order the present appeal has been filed, and the grounds on which it has been assailed are firstly, that the final decree not having been drawn up at the date when the application was made, the application was not maintainable, and secondly, that the Court below ought to have held on the evidence that the receipt (Exhibit I) was not a genuine document.

In connection with the first point it is necessary to refer to O. XXI, r. 2 (1) and (2) of the Civil Procedure Code, which read as follows:—"2 (1) Where any money payable under a decree of any kind is paid out of Court, or the decree is otherwise adjusted in whole or in part to the satisfaction of the decree-holder, the decree-holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly.

"(2) The judgment-debtor also may inform the Court of such payment or adjustment, and apply to the Court to issue a notice to the decree-holder to show cause, on a day to be fixed by the Court, why such payment or adjustment

should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly."

The application for certification of the payment in question was based upon these provisions and was made on the 6th January 1922. It appears however that though judgment in the suit in question had been delivered on the 28th June 1921, the final decree was not drawn up until the 5th February 1923, *i.e.*, subsequent to the date of the application. It has been argued, therefore, on behalf of the appellant that, as no decree was in existence at the date when the application was made, the application was not maintainable under O. XXI, r. 2. In support of this view reference has been made to the definition of "Decree" in section 2 of the Civil Procedure Code and in particular to the words "formal expression" occurring therein, the argument being that, unless and until the decree had been formally drawn up, it cannot be regarded as having come into existence. There is no doubt some force in this contention. On the other hand it is laid down in O. XX, r. 7, that "the decree shall bear date the day on which the judgment was pronounced", and the date of the decree may, therefore, be held to be not the date on which the decree is reduced to writing and signed by the Court, but the date on which the Court delivers its judgment and expresses what the decree is. In other words when a person has the judgment of the Court in his favour it may be said that he then obtains his decree, and that the decree, when subsequently drawn up, relates back to that time. Looked at from this point of view it follows that at the date when the application was made the decree was in existence, and, that being so, no question could arise as to application being maintainable. The point is not altogether free from difficulty, but we prefer on the whole not to place too narrow a construction upon the wording of the rule. We may also point out incidently that this contention upon which so much stress has been laid in this Court, was not raised at all in the Court below.

With regard to the second point urged on behalf of the appellant the learned Subordinate Judge has found as a fact without hesitation that the payment in question was made, and upon a consideration of the evidence, we are certainly not prepared to hold that that conclusion is wrong. On the contrary the evidence appears to leave no room for doubt regarding the genuineness of the receipt.

In the result, therefore, the appeal fails and is dismissed with costs. We assess the hearing fee at two gold *mohurs*.

N. H. *Appeal dismissd.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 21 OF 1923.

March 4, 1924.

Present:—Mr. Neave, J. C.

BASAWAN—PLAINTIFF—APPELLANT

versus

NATHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Usufructuary mortgagee—Delay in filing suit—Right to claim interest—Hindu Law—Compromise by Hindu widow—Reversioners, when bound—Transfer of Property (Act IV of 1882), ss. 52, 91—Mortgage of property of last male holder—Reversioner, whether interested—Right of reversioner to redeem—Purchase of property pendente lite—*Notice.*

A usufructuary mortgagee by making a delay of some years in bringing the suit for his mortgage money does not debar himself from claiming interest. [p. 749, col. 2; p. 750, col. 1.]

Bhawani Pershad Singh v. *Sahib Din Lal*, 9 O. C. 144, *Partab Bahadur Singh* v. *Gajadhar Bakhsh Singh*, 24 A. 521; 29 I. A. 148; 7 C. W. N. 97; 4 Bom. L. R. 845; 8 Sar. P. C. J. 310 (P. C.), *Khuda Bakhsh* v. *Alim-un-nissa*, 27 A. 313; 1 A. L. J. 715; A. W. N. (1904) 273, distinguished.

A compromise by a Hindu widow admitting the claim of a mortgagee from her husband for an amount far in excess of what is really due cannot be said to be for the benefit of the estate and does not bind the reversioners. [p. 750, col. 1.]

Ramsumaran Prasad v. *Shyam Kumari*, 69 Ind. Cas. 71; 49 I. A. 342; 31 M. L. T. 200; 3 P. L. T. 749; (1922) A. I. R. (P. C.) 356; 1 Pat. 741; 16 L.

W. 956; 21 A. L. J. 18; 9 O & A. L. R. (P. C.) 175; 27 C. W. N. 269; 37 C. L. J. 356; 44 M. L. J. 751; 25 Bom. L. R. 634 (P. C.), referred to.

A reversionary heir of the deceased husband of a Hindu widow has such an interest in the property within the meaning of section 91 of the Transfer of Property Act as would entitle him during the lifetime of the widow to redeem a mortgage made by the husband. [p. 750, cols. 1 & 2.]

Gumani Singh v. *Chakkar Singh*, 8 O. C. 349 and *Basant Singh* v. *Ram Lal Singh*, 51 Ind. Cas. 985; 6 O. L. J. 248; 1 U. P. L. R. (O.) 45, followed.

Ram Chander v. *Kalla*, 30 A. 497; A. W. N. (1908) 225; 5 A. L. J. 636, not followed.

A purchase made of property actually in litigation though for valuable consideration and without any express or implied notice, in point of fact affects the purchaser in the same manner as if he had such notice. [p. 750, col. 2.]

Basant Singh v. *Ram Lal Singh*, 51 Ind. Cas. 985; 6 O. L. J. 248; 1 U. P. L. R. (O.) 45, referred to.

Appeal against the decree of the Sub-Judge, Bara Banki, dated the 13th November 1922, reversing that of the Munsif, Fatehpur, dated the 8th April 1922.

Mr. *Bisheshar Nath*, for the Appellant.

Messrs. *M. H. Qidwai*, *Ali Zahir* and *E. R. Qidwai*, for the Respondents.

JUDGMENT.—Three appeals have been filed against an order of the Subordinate Judge of Bara Banki. They all arise out of the same transaction. The same facts are common to all and all will be disposed of in this order.

On the 17th August, 1904, one Mulhe executed a mortgage deed in favour of Raghunandan. The consideration was Rs. 400 and the mortgage was usufructuary with possession. It is not disputed that the mortgagee actually only obtained possession of half the property. Mulhe died in 1906 leaving a widow *Musammat* Birji.

On the 9th May, 1917, Raghunandan filed a suit for sale on foot of his mortgage claiming that Rs. 1,000 was due under it. The suit was brought against *Musammat* Birji who did not contest it or even file a written statement. On the 19th of June, 1917, a compromise was filed in which the widow admitted the whole amount of the claim to be due and a decree was passed for Rs. 1,000 with Rs. 120-12 on account of costs. Future interest was allowed as stipulated in the compromise at 12 per cent. per annum till realization.

On the 13th of September, 1920, Basawan, the appellant in two of these appeals, instituted a suit for possession of the property on the allegation that he was the next reversioner to the estate of the deceased Mulhe and that as such he was entitled to pay off the mortgage debt and save the property from being lost by sale. He also impugned the decree which had been obtained against the widow on the ground that it was collusive and fraudulent and intended to defeat his rights as reversioner. He was, therefore, not legally bound by it. The suit was brought against Raghunandan and *Musammat* Birji. During the pendency of the suit the property which had been brought to sale by Raghunandan in execution of his decree was sold on the 20th of May 1921 to Natha who was thereupon joined as a defendant.

Various defences were set up by the three defendants. The learned Munsif held that the plaintiff Basawan was the nearest reversioner. On the issue whether the decree had been obtainted by collusion he recorded no clear finding, but he decided that Raghunandan had been entitled only to Rs. 782 and not to Rs. 1,000 which had been admitted in the compromise. This amounts to a finding that the decree had in part been obtained by collusion. He granted a decree to the plaintiff for redemption on payment of Rs. 782.

Three appeals were filed against this decision by Basawan, Raghunandan and Natha in the Court of the Subordinate Judge who has held that the decree obtained by Raghunandan against the widow was not collusive and that it is legally binding on Basawan. The other findings of the Munsif were upheld; but in view of the finding that the plaintiff was bound by the decree he dismissed his suit altogether. He further decided that the auction purchaser was protected as he had bought the property in good faith and accordingly decreed the appeal of Natha but dismissed the other two appeals. As has already been mentioned three appeals have been filed from this order; two by Basawan (a)

against the order dismissing his appeal, and (b) against the order decreeing Natha's appeal; while the third is on behalf of Raghunandan. With regard to this last appeal it is contended on behalf of Basawan that it must be at once dismissed. As the suit against Raghunandan has been dismissed *in toto* Raghunandan has no cause of action left for an appeal. This contention appears to be sound.

On behalf of Basawan four pleas have been taken in arguing the appeal :—

(1) That the decree obtained by Raghunandan against *Musammad* Birji on the basis of a compromise was obtained by fraud and collusion.

(2) That in any case the decree is not legally binding on the reversioner because it was not fairly obtained after contest.

(3) That as the nearest reversioner to the estate of Mulhe, Basawan, is entitled to recover the property on payment of such an amount as is found to be due.

(4) That the auction-purchaser cannot set up any rights against Basawan because he was a purchaser *pendente lite* and in these circumstances no question of good or bad faith arises.

With regard to the first plea it is pointed out that the consideration for the mortgage was Rs. 400 only and the mortgage was usufructuary with possession. There is no condition in it for the payment of interest.

There are two clauses in the deed on which the Courts below seem to have founded their opinion that Raghunandan was entitled to interest. The first paragraph clearly deals only with the question of mutation. The mortgagor undertook to have the name of the mortgagee entered at his own expense. If he failed to do this the mortgagee could get it done and at the time of redemption recover the expenses from the mortgagor with interest at 12 per cent. per annum. The second clause is towards the end of the document and provides that if as the result of any litigation any portion or all of the property mortgaged should pass out of the possession of the mortgagee then the mortgagor would compensate him from other property moveable and immoveable. If he failed to do this the mortgagee would be entitled to file a suit and to recover the whole of the mortgage money with costs and damages by sale of the mortgaged property, making up the deficiency from any other property belonging to the mortgagor. This clause clearly authorised the mortgagee Raghunandan to bring such a suit as he did bring: but it is contended that he should have done so at once instead of waiting, as he did, for nearly 13 years. Reference is made to *Bhawani Pershad Singh* v. *Saheb Din Lal* (1) in which it was held that where a usufructuary mortgagee does not take possession of the mortgaged property and thereby loses the profits which he would otherwise have obtained he cannot subsequently claim interest in lieu of those profits.

In that case, however, there was no provision for the payment of interest in the event of the mortgagee failing to get possession. The learned Advocate for Basawan contends, however, that the delay in filing a suit was sufficient to debar the mortgagee from any right to interest. He acquiesced in his deprivation of possession for 13 years and it must be presumed from his conduct that he was content to accept half the property as sufficient security for his mortgage. A ruling of their Lordships of the Privy Council reported as *Partab Bahadur Singh* v. *Gajadhar Bakhsh Singh* (2) and another of the Allahabad High Court reported as *Khuda Bakhsh* v. *Alim-un-nissa* (3) in which that ruling was followed are referred to. Those, however, were both suits for redemption brought by mortgagors whereas in the present instance the suit was brought by the mortgagee in whose deed there was a distinct covenant authorising him to make the claim which he made. I do not consider that the mortgagee can be held to have acquiesced in the diminution of his

(1) 9 O. C. 144.
(2) 24 A. 521; 29 I. A. 148; 7 C. W. N. 97; 4 Bom. L. R. 845; 8 Sar. P. C. J. 310 (P. C.).
(3) 27 A. 313; 1 A. L. J. 715; (A. W. N. 1904) 273.

security merely because he delayed for some years in bringing his suit.

The learned Advocate for Basawan has indicated various details in the plaint and compromise and also in the decree which lead to the inference that there was collusion between Raghunandan and the widow; and though it is admitted that Raghunandan had been in possession of half the mortgaged property yet he claimed interest on the whole of the mortgage money from the date of execution of the deed till the date of the suit. A mere perusal of the plaint would have shown that this claim was an exaggerated one, yet in the compromise the full amount claimed was admitted to be due and future interest was also allowed at the abnormal rate of 12 per cent. per annum. Further though the suit was not contested yet costs were allowed on the contested scale.

It has recently been held by their Lordships of the Privy Council in *Ramsumaran Prasad* v. *Shyam Kumari* (4) that a compromise entered into by a Hindu widow *bonafide* for the benefit of the estate and not for her own personal advantage binds the reversioners as much as a decree against her obtained after litigation. But it cannot seriously be argued that such a compromise as the one which we are now considering was for the benefit of the estate, admitting, as it did, a claim for an amount far in excess of what was due and which could never have been supported had the case come to trial. Raghunandan undoubtedly had a good case on his mortgage but he would not have obtained a decree for so large a sum had the widow not colluded with him and refrained from contesting the suit.

The right of the appellant Basawan to institute this case had been questioned. The Allahabad High Court in *Ram Chander* v. *Kallu* (5) has held that the reversionary heirs of the deceased husband of a Hindu widow are not persons who within the meaning of section 91 of the Transfer of Property Act have such an interest in the mortgaged property as would entitle them during the lifetime of the widow to redeem a mortgage made by the husband. In this Court, however, the opposite view has been taken in *Gumani Singh* v. *Chakker Singh* (6). The soundness of the former decision has been doubted in *Basant Singh* v. *Ram Lal Singh* (7) but the question was not directly before the Bench on that occasion. I would, therefore, prefer to follow the previous Bench decision in *Gumani Singh* v. *Chakkar Singh* (6) and hold that Basawan could bring the present suit.

The auction purchaser Natha bought the property while this litigation was pending. The price which he paid for it indicates that he was aware of the risk attached to such a transaction and as the purchaser *pendenti lite* he cannot claim to have acted in good faith. A purchase made of property actually in litigation, though for valuable consideration and without any express or implied notice in point of fact, affects the purchaser in the same manner as if he had such notice: *Sohan Lal* v. *Jote Singh* (8). I consider that the view taken by the learned Munsif was the correct one and I accordingly allow the appeals of Basawan, set aside the order of the lower Appellate Court and restore the order and decree of the First Court. The appellant Basawan will have his costs in all Courts. The appeal of Raghunandan is dismissed with costs.

G. H. *Plaintiff's appeal allowed; Defendants' appeal dismissed.*

(4) 69 Ind. Cas. 71; 49 I. A. 342; 31 M. L. T. 200; 3 P. L. T. 749; (1922) A. I. R. (P. C.) 356; 1 Pat. 741; 16 L. W. 956; 21 A. L. J. 18; 9 O. & A. L. R. (P. C.) 175; 27 C. W. N. 269; 37 C. L. J 356; 44 M. L. J. 751; 25 Bom. L. R. 634 (P. C.).

(5) 30 A. 497; A. W. N. (1908) 225; 5. A. L. J. 636.

(6) 8 O. C. 349.

(7) 54 Ind. Cas. 985; 6 O. L. J. 248; 1 U. P. L. R. (O.) 45.

(8) 20 Ind. Cas. 458, 16 O. C. 148.

RAJAGOPALA PADAYACHI *v.* VARADARAJA PADAYACHI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 158 OF 1922.

July 28, 1924.

Present :—Mr. Justice Jackson.

RAJAGOPALA PADAYACHI—PLAINTIFF—APPELLANT

versus

VARADARAJA PADAYACHI—DEFENDANT No. 1—RESPONDENT.

Contract Act (IX of 1872), s. 74—Partition between family members—One member agreeing to take annuity instead of his share—Stipulation to resume share if annuity not paid—Penalty—Question of law—Second appeal.

If by an agreement of partition one of the several members of a family agrees to receive an annuity in lieu of his proper share, but reserves the right to resume his share on default of payment of annuity, the stipulation regarding resumption of share is not penal within the meaning of section 74 of the Contract Act and can be enforced. [p 751, col. 2.]

The question whether a stipulation is one by way of penalty is one of law and can be raised in second appeal. [*ibid.*]

If under a stipulation the contracting parties are merely remitted to their original position there can be no question of penalty, neither does the mere withdrawal of a privilege constitute a penalty. [p. 752, col 1.]

Pasupaleti Achayemma v. *Pabbamidi Papamma*, 2 Ind. Cas. 850, *Kulada Prasad Chowdhury* v. *Rama Nand Patnaik*, 61 Ind. Cas. 923; 48 C. 1036; 33 C. L. J. 414; 25 C. W. N. 776, *Davis* v. *Thomas*, (1831) 1 Rus. & M. 506; Tamlyn 416; 9 L. J. (o. s.) Ch. 232; 39 E. R. 195; 32 R. R. 257, relied on.

Second appeal against the decree of the Court of the Subordinate Judge, Cuddalore, in A. S. No. 79 of 1921 (A. S. No. 51 of 1921, District Court) preferred against a decree of the Court of the District Munsif, Mannargudi, in O. S. No. 249 of 1920.

Mr. *T. L. Venkatarama Iyer*, for the Appellant.

Mr. *C. Narasimhachariar*, for the Respondent.

JUDGMENT.—Appeal against the decree of the Subordinate Judge of Cuddalore in Appeal Suit No. 79 of 1921 (O. S. No. 249 of 1920, District Munsif's Court, Mannargudi.

The appellant was one of three brothers and at the time of partition it was agreed that instead of taking his share of the land, he should receive an annuity in moieties from his two brothers, and if either defaulted, he should resume that portion of his share which had gone to the defaulter. In schedule D of the partition deed, Exhibit C, the two halves which make up his share are shown as severally added to the shares of each of the other brothers. The respondent made default and appellant sued for arrears of annuity, and for the resumption of his half share from the defaulter. The Original Court decreed his suit, but the Subordinate Judge on appeal while decreeing the arrears, relieved respondent against the resumption of the half share holding that it was by way of penalty. Hence this appeal. It is contended on behalf of respondent that when once the lower Courts have found that a stipulation is by way of penalty, it is a decision on a question of fact which cannot be traversed on second appeal. The question is whether the stipulation can legally be said to be within the purview of section 74, Indian Contract Act, and the frequency with which this point has been raised on second appeal is in itself a guarantee that it is a question of law. However, it has always been conceded that there is no absolute rule of law which determines the matter, but each case has to be considered according to its particular circumstances. The exact wording and frame of Exhibit C are, therefore, important. The appellant refrained from taking his share of the land because as set forth in the document he was a bechelor. Besides the land, there were certain debts and outstandings which were divided between the two other brothers, and each agreed to give the appellant Rs. 100 who also got a *manai* and right of way. Then there is the arrangement mentioned above in regard to the annuity and resumption of schedule D lands in default of its payment. It was argued that because respondent and his brother got appellant's share of the land, they relieved appellant of the full burden of family debt, but I find no warrant for any such assumption in the document. Apparently it was reckoned that on a balance the debts and outstandings were worth Rs. 200 and that amount was paid in cash to the appellant. If his brothers lost by taking over these transactions

presumably there would have been no cash payment. I think it must be taken that the document does what it sets forth to do and makes a fair division between the three brothers. The lands are equally divided in schedules A, B, D and the D schedule share is equitably commuted to an annuity because so long as he got an annuity the appellant did not want the land. The question then for determination is whether the provision that appellant resumes his share of the land on default of payment is by way of penalty. In most cases in which this question arises there is a primary contract, and then a secondary contract by which the promisor binds himself to give something over and above his original liability to the promisee if he should commit laches in regard to the primary contract. Under section 74 a Court must consider what reasonable amount of damages on account of such laches is due to the promisee and find accordingly. See Wallis, C. J., in *Avathani Muthukrishnier* v. *Sankaralingam Pillai* (1). See also Sundara Ayyar, J. at page 265*. The Court will carry out the primary contract but not necessarily the subsidiary contract to come into operation if the primary contract is broken. In the present case what is the subsidiary contract? The appellant is not to receive anything extra by way of damages, and the respondent is not to be mulcted on account of his failure to pay the annuity. The arrangement as regards the annuity having broken down, the appellant is to resume his normal position as third member of the divided family enjoying a third share of the property. The contrary view can only be maintained on the assumption that the partition was unfair, and the arrangement that he was to be paid an annuity gave the appellant less than he would have got if he took the land; an assumption for which there is no warrant. If the contracting parties are merely remitted to their original position, there can be no question of penalty: *Cf. Pasupaleti Achayemma* v. *Pabhamidi Papamma* (2) and even assuming that appellant gave more than he need, when he entered into this arrangement, the mere withdrawal of a privilege is no penalty: *Cf. Davis* v. *Thomas* (3). This view has prevailed where a lower rate of interest was allowed as a matter of grace if payment was punctual. *Kulada Prasad Chowdhury* v. *Rama Nand Patnaik* (4).

In the case cited by the learned Subordinate Judge *Phayammalachi* v. *Sevu Rajali* (5), there was relief against forfeiture. I do not think that the present case can be described as forfeiture. A return to the *status quo* at the time when agreement was entered into does not vest the property in the respondent. So he cannot be said to forfeit what at that time was not his. Nor do I think anything is to be gained by way of analogy by describing respondent as a transferee of property with a contingent interest or as a tenant. What the Court has to enforce is an agreement of partition. The brother does not say "you shall hold my land at such and such a rent; but my share shall be satisfied in such and such a way." We should, as Napier, J., observes in *Krishna Shetti* v. *Gilbert Pinto* (6), be very careful in applying statutory provisions that are not in *pari materia*. I do not find the stipulation that appellant shall resume the land in schedule D on default of payment of his annuity to be penal, and, therefore, I restore the decree of the Original Court. This appeal is allowed with costs in this and the lower Appellate Court and as provided in the original decree.

V. N. V.

S. D. *Appeal allowed.*

(1) 18 Ind. Cas. 417; 36 M. 229 at p. 248; 13 M. L. T. 20; 24 M. L. J. 135.

(2) 2 Ind. Cas. 850.

(3) (1831) 1 Russel & M. 506; Tamlyn 416; 9 L. J. (o. s.) Ch. 232; 39 E. R. 195; 32 R. R. 257.

(4) 61 Ind. Cas. 923; 48 C. 1036; 33 C. L. J. 414; 25 C. W. N. 776.

(5) 12 Ind. Cas. 334; (1911) 2 M. W. N. 327; 10 M. L. T. 326.

(6) 50 Ind. Cas. 898; 42 M. 654 at p. 660; 36 M. L. J. 367; 9 L. W. 431.

*Page of 36 M.—[*Ed.*]

EMPEROR *v.* GHULAM HUSSAIN.

LAHORE HIGH COURT.

CRIMINAL APPEAL No. 1220 OF 1923.
February 26, 1924.

Present:—Sir Shadi Lal, KT., Chief Justice, and Mr. Justice LeRossignol.

EMPEROR—APPELLANT
versus
GHULAM HUSSAIN—ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 4, 190 —Report of Police Officer, meaning of—Allegation of non-cognizable case by Police Officer also Public Prosecutor whether "complaint"—Court, whether can take cognizance.

The words "report of a Police Officer" as used in the Criminal Procedure Code mean the report of a Police Officer in cases in which he is authorized to investigate by the Code.

Therefore a written allegation of a non-cognizable case made by a Police Officer who is also a Public Prosecutor with a view to the Court's taking action is not the report of a Police Officer but is a "complaint" as defined in section 4 of the Criminal Procedure Code and the Court is competent to take action thereon.

The Criminal Procedure Code does not prohibit a Police Officer from presenting a complaint to the Magistrate in a case non-cognizable by the Police.

Criminal appeal from an order of the Magistrate, First Class, with enhanced powers under section 30, Criminal Procedure Code, Simla, dated the 27th August 1923.

Lala *Jai Lal*, R. B., Government Advocate, for the Appellant.

Lala *Badri Das*, R. B., and Lala *Jagan Nath Bhandari*, for the Respondent.

JUDGMENT.—This is an appeal by the Crown against the acquittal of the respondent of an offence under section 509, Indian Penal Code. The Magistrate came to no finding on the merits but acquitted the respondent on the ground that the proceedings of the Court were void by reason of the absence of a proper complaint.

The machinery of the Court was set in motion on what purported to be a complaint signed by the Court Inspector as *ex-officio* Public Prosecutor. The facts are that the circumstances of the case were stated by a Miss Cooper and the Chief Officer of Telegraphs to the Additional District Magistrate who directed the Court below to try the case.

Now, section 190 of the Code is, and is intented to be, very wide. It empowers a Magistrate to take cognizance of an offence in almost every conceivable set of circumstances. He may take cognizance

(1) Upon receipt of a complaint;

(2) Upon a Police report;

(3) Upon information received from any person other than a Police Officer, or upon his own knowledge or suspicion.

It was clearly the intention of the Legislature that the machinery of the Courts should be set in motion without any difficulty and the only restriction appears to be that the Magistrate should not act upon information received from a Police Officer unless that Police Officer is empowered by the Code to submit a report of the facts, but it does not prohibit a Police Officer from presenting a complaint to the Magistrate even in a case non-cognizable by the Police. Section 4 of the Code defines "complaint" as being any allegation made orally or in writing to a Magistrate with a view to his taking action but does not include the report of a Police Officer. Now, "the report of a Police Officer" has a peculiar meaning throughout the Code. It means the report of a Police Officer in cases which he is authorized to investigate by the Code. If a statement of facts made to a Magistrate is not a Police Officer's report and for the respondent it is admitted that the document in this case is not a Police report, then there seems to be no ground for holding it to be other than a complaint. It is an allegation in writing not the report of a Police Officer addressed to a Magistrate with a view to his taking action. The signatory of the document is, it is true, an Officer of the Police but he is also a Public Prosecutor. The report of a Police Officer is excluded from the definition of 'complaint' and this is probably due to the fact that certain offences can be prosecuted only on receipt of a complaint by a Magistrate.

In the case before us there was before the Court a written allegation made with a view to the Court's taking action and that document was signed by an Officer of the Police who was also a Public Prosecutor. As the facts recited established only a non-cognizable case no Police report could have been made in

connection with those facts. In our opinion there was a complaint before the Magistrate and he should have decided the case on the merits.

We accept the appeal, set aside the order of acquittal and direct the Magistrate to proceed with the case on the merits.

K. S. D. *Appeal accepted.*

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION
No. 38 OF 1924.
April 29, 1924.
Present:—Mr. Kincaid, J. C., and
Mr. Kennedy, A. J. C.
NURAN—APPLICANT
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 439, cls. (1), (5)—Appeal competent—Revision — High Court, whether can interfere on its own motion.

When an appeal lies against any criminal proceedings but no appeal is brought, no proceedings by way of revision can be entertained at the instance of the party who could have appealed, having regard to section 439 (5) of the Criminal Procedure Code; and if proceedings by way of revision are instituted by such a party, the High Court cannot interfere even on its own motion under clause (1) of that section.

Jumo v. *Crown*, 28 Ind. Cas. 108; 8 S. L. R. 229; 16 Cr. L. J. 252, followed but doubted.

Application to revise an order of First Class Sub-Divisional Magistrate, Tando Mahomed Khan, dated the 12th November 1923.

Mr. *Motiram L. Lalvani*, for the Applicant.

Mr. *T. G. Elphinston*, Public Prosecutor for Sind, for the Crown.

JUDGMENT.—The facts of this case are shortly as follows:—The Sub-Divisional Magistrate, it would seem, called upon a certain Nuran to give security for good behaviour under section 118 of the Criminal Procedure Code. Nuran appealed to the District Magistrate who confirmed the lower Court's order. Nuran then produced sureties before the Sub-Divisional Magistrate of Tando and the learned Magistrate rejected them for reasons which I shall refer to later. Nuran did not lodge any appeal against the Sub-Divisional Magistrate's order as he might have done to the Sessions Judge. He has, however, come in revision to this Court. We are of opinion, that the reasons given by the learned Sub-Divisional Magistrate for rejecting the sureties are not proper ones. It would almost be impossible for any one to put forward a surety which would pass successfully his scrutiny. If the witnesses know the sureties then according to the learned Sub-Divisional Magistrate they are his friends and they are joined together by the common bond of offering protection to *Badmashes*. If, on the other hand, the witnesses say that they do not know Nuran, they are rejected as being unworthy of belief. No less than six witnesses came forward in this case amongst whom one was a retired *Mukhtiarkar*. We think that on his evidence and on that of the other witnesses called to prove the value of the sureties, the learned Sub-Divisional Magistrate should not have rejected them. The difficulty, however, which stands in our way is the section 439, sub-cluase (5) of the Criminal Procedure Code. It lays down that where an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. Now here an appeal lay and it was not brought. It would seem, therefore, under section 439, sub-clause (5) that we are precluded from helping the applicant. Section 439, clause (1) has been brought to our notice. Under that section the High Court in the case of any proceedings the record of which has been called for by itself or which has been reported for order or which otherwise comes to its notice the High Court may in its discretion exercise any of the powers conferred on the Court of Appeal. The question arises whether, precluded as we are by section 439, sub-clause (5) we yet have a discretion vested in us by section 439, sub-clause (1). If this were a *res integra* I should incline to the opinion that the High Court under section 439, sub-clause (1) should on its

own motion interfere wherein injustice appears to have been done even in spite of the bar in its way from sub-clause (5). But the matter is not a *res integra*. A decision on this point was pronounced *Per Curiam* in the case of *Jumo* v. *Emperor* (1). The learned Judges observed: "No doubt this Court can interfere on its own motion in cases where a person affected is debarred from moving it under section 439, sub-clause (5) but in this case the Court has not acted of its own motion in calling for the proceedings under section 435 but at the instance of the applicant and it would be a pure quibble to say that in spite of the provisions of section 439, sub-clause (5) of the Code, the Court could do what applicant wants of its own motion. This would be a mere evasion of the Statute which the Court cannot permit".

It may at some future date be desirable for a Full Bench of this Court to consider whether the learned Judges in the case of *Jumo* v. *Crown* (1) did not go rather beyond the necessity of the case before them in making these observations and whether the Court has not full liberty to act under section 439, sub-clause (1) in spite of sub-clause (5). But until the Full Bench does consider the reasoning in *Jumo* v. *Crown* (1) and set it aside we are bound by that ruling. There is thus no other course open to us but to dismiss this application for revision. At the same time, we would express the hope that the learned Sub-Divisional Magistrate will consider our remarks and deal with any further application for sureties which may be presented before him agreeably to what we have said.

P. B. A. & N. H. *Application dismissed.*

(1) 28 Ind. Cas. 108; 8 S. L. R. 229; 16 Cr. L. J. 252

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 98-B OF 1924.
July 31, 1924.
Present:—Mr. Kinkhede, A. J. C.
LOCAL GOVERNMENT—APPLICANT
versus
GULAM JILANI—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 435, 439, 497, 498, 561-A—Case pending before Sub-Divisional Magistrate — Order of bail by Sessions Judge—High Court, whether can interfere —"Any proceedings" in s. 439, scope of—Passage prejudicial to fair trial of case—Power of High Court to expunge.

A High Court has no jurisdiction to entertain an application under section 497 (5) or section 498 of the Criminal Procedure Code against an order granting bail, passed by a Sessions Judge in a case pending before a Subordinate Magistrate. The powers of the High Court under section 497 (5) of the Code are restricted to the cases of persons released by the Trial Magistrate; and those under section 498 enable the High Court to release an accused on bail but not to order the arrest and commission to custody of persons already released on bail by the Sessions Judge. [p. 757, cols. 1 & 2.]

But proceedings in which it is or has been determined whether bail from the accused person should be taken or not fall within the definition of "any proceedings" under section 439 of the Criminal Procedure Code and the High Court has powers under that section to interfere and thus to control the propriety as well as the regularity of orders in such proceedings. [p. 758, col. 1.]

Manikam Mudali v. *Queen*, 6 M. 63; 6 Ind. Jur. 573; 2 Weir 409; 2 Ind. Dec. (N. S.) 322, *King-Emperor* v. *Badri Prasad*, 5 A. L. J. 419; A. W. N. (1908) 195; 8 Cr. L. J. 49, *Queen* v. *Thimma Reddi*, 10 M. L. J. 411 and *Faiz Muhammad* v. *Emperor*, 20 Ind. Cas. 209; 9 N. L. R. 81; 14 Cr. L. J. 385, referred to.

At any rate, the High Court can interfere with an order granting bail passed by a Sessions Judge under its inherent powers under section 561-A, Criminal Procedure Code. [p. 758, col. 2.]

The High Court has powers under section 561-A of the Criminal Procedure Code to order the expunging of passages in the order of a Sessions Judge granting bail if such passages are likely to prejudice the Magistrate in the impartial trial of the case. [p. 759, col. 2.]

Revision against an order of the Additional Sessions Judge, Akola, dated the 9th July 1924.

Mr. *P. Lobo*, for the Applicant.
Dr. *H. S. Gour*, for the Opposite Party.

LOCAL GOVERNMENT *v.* GULAM JILANI.

ORDER.—One Ramkuwar, a young woman of 20, and her husband, Gopala, are alleged by the prosecution to have been wrongfully confined by one Gulam Jilani with the help of his confederates, with a view to effect recovery of a debt said to be due to him from Gopala, by compelling Gopala to bring in his wife with him, in order that they both should transfer to him certain fields in the name of the wife, in satisfaction of the said debt by executing a deed in his favour. After bringing the husband and the wife under their clutches by keeping them confined, the accused are said to have taken them from place to place and kept them in secret wrongful confinement with a view to attain the object of extorting a document from them. It is also the case of the prosecution that while they were in such secret confinement they were made to execute a certain document and after that was done, the accused managed to finally separate the wife from the husband thus compelling the former to remain behind in the wrongful custody of Gulam Jilani and his associates until she was traced at a house in Pipalgaon Raja. During her stay with Gulam Jilani and others Ramkuwar is said to have been raped.

A prosecution was accordingly started in the Court of Mr. K. R. Joshi, Sub-Divisional Magistrate, Khamgaon, against Gulam Jilani and six others, two out of whom are absconding, under sections 365, 366, 376, 386, 346, 347 and 109 of the Indian Penal Code. While Gulam Jilani and his four other associates were being thus tried together before the Sub-Divisional Magistrate in Criminal Case No. 13 of 1924 an application under section 497 of the Criminal Procedure Code was made to the Magistrate on behalf of the accused for their release on bail. The Trying Magistrate refused to grant bail for reasons stated in his order dated 25th March 1924.

An independent application was made to the Sessions Judge, Akola, (Mr. K. B. Misra), on behalf of all the five accused on 3rd May 1924 under section 498 of the Criminal Procedure Code. The Sessions Judge after considering the evidence which had till then gone on the record, passed the order dated 9th May 1924 granting the bail with heavy sureties. He expressed his views on the evidence rather strongly and observed: "The facts disclosed . . . (1) an offence under section 347, Indian Penal Code, which being bailable there should be no objection to the grant of bail" It is against this order dated 9th April 1924 passed by the Sessions Judge that Criminal Revision No. 99-B of 1924 is filed on behalf of the Local Government purporting to be one under section 497, sub-section (5) of the Criminal Procedure Code.

While passing the aforesaid order dated 9th May 1924 the Sessions Judge noticed an irregularity in the trial of the Criminal Case No. 13 of 1924 which consisted in trying the offence under section 376, Indian Penal Code, of which Gulam Jilani was accused, in the same case, and pointed out the advisability of trying it separately "if the prosecution or the Magistrate so wish". Accordingly the trial was split up and a separate case started under sections 376 coupled with some other sections against Gulam Jilani alone on 17th May 1924 (Criminal Case No. 67 of 1924). While Gulam Jilani was thus on his separate trial for the offence under section 376 an application was made on his behalf for being released on bail under section 497, sub-section (1), Criminal Procedure Code, as this was not covered by the order passed on 9th May 1924. This application was rejected by the Sub-Divisional Magistrate for reasons stated in the order dated 21st May 1924. Consequently on 4th June 1924, an application under section 498 of the Criminal Procedure Code was made to the Court of the Additional Sessions Judge, Akola. The Additional Sessions Judge (Mr. Deshpande) by his order dated 9th June 1924 ordered bail to be taken from Gulam Jilani. It is against this order that Criminal Revision No. 98-B of 1924 has been similarly filed on behalf of the Local Government.

A Rule *Nisi* was issued in each of the aforesaid cases to the opposite party to show cause why the bail bonds should not be cancelled and also for personal appearance before this Court. The non-

applicants accordingly appeared and showed cause why the Rule should not be made absolute and this order will govern the decision of both the cases.

On behalf of the accused a preliminary objection is taken to the jurisdiction of this Court to entertain a revision against the order granting bail passed by a Sessions Judge under section 498 of the Criminal Procedure Code, and it is further urged that section 497, sub-section (5) under which the applications for revision are professedly made, has no application and does not confer jurisdiction on this Court as that section applies to the case of a *person released* by the Trial Magistrate under that section. In this case the Trial Magistrate had refused to grant bail as his orders dated 25th April 1924 and 21st May 1924 show. Consequently section 497, sub-section (5) has no application to the present case. As regards the power of this Court under section 498 it is argued that that section in terms enables the High Court just as it does the Court of Session to direct that "*in any case*" any person may be admitted to bail, whether there be an appeal on conviction or not, but that it does not confer on the High Court a similar jurisdiction as the one conferred by section 497 sub-section (5) to cause any person who has been released under section 498, by the Sessions Judge to be arrested and commit him to custody. The Counsel for the accused further submits that the jurisdiction of the High Court and the Sessions Judge is concurrent in the matter of admitting accused persons to bail, and that as ample discretion is given to the one as to the other, and that this Court cannot, therefore, substitute its own discretion for that of the Sessions Judge.

There is much force in this argument addressed in support of the preliminary objection, and I am inclined to the view that the applications for revision as laid under section 497, sub-section (5) are not maintainable. I am further of opinion that they are not maintainable under section 498 as it stands: but at the same time I am of opinion that this does not and cannot mean that the High Court has no power to interfere with orders made in proceedings for bail when such proceedings are proved to be illegal. The proceedings in which it is or has to be determined whether bail from the accused person should be taken or not fall within the definition of judicial proceedings and the High Court has power to interfere with the order made in such proceedings: *Manikam Mudali* v. *Queen* (1). Even though the High Court's power of interference is thus limited, the Allahabad High Court in a case of *King-Emperor* v. *Badri Prasad* (2) pointed out that where a Sessions Judge after considering the evidene thinks that there are no reasonable grounds for believing the accused to be guilty of the offence of which he is accused, and release him on bail, the High Court will not go behind this finding and cancel the order of the Judge releasing the accused on bail. Of course this case was committed to the Sessions and the order was passed by the Sessions Judge in the course of the Sessions trial. But this does not make any difference in principle. A similar view was also taken in *Queen* v. *Thimma Reddi* (3). The admission of an accused to bail is a matter within the discretion of the Judge before whom it comes. The discretion of the Trying Magistrate if exercised in favour of releasing the accused on bail is expressly made, under section 497 (5), Criminal Procedure Code, subject to revision by the High Court. While the discretion of the Sessions Judge has not been similary made subject to such revisional jurisdiction by the High Court by any express provision to that effect in that or other sections in the Chapter on Bails. But this does not mean that the Sessions Judge is at liberty to exercise the discretion vested in him under law, arbitrarily and not in conformity with sound judicial principles.

(1) 6 M. 63; 6 Ind. Jur. 573; 2 Weir 409; 2 Ind. Dec. (N. S.) 322.
(2) 5 A. L. J. 419; A. W. N. (1908) 195; 8 Cr. L. J. 49.
(3) 10 M L. J. 411.

LOCAL GOVERNMENT *v.* GULAM JILANI.

The Court of every Sessions Judge in Central Provinces and Berar is subject to the general revisional as also appellate jurisdiction of this High Court which is the highest Court of Appeal or Revision for the Provinces, and it is not, therefore, correct to say that, even if it appears in any particular case the record of which has been called for by it under section 439 read with section 435, Criminal Procedure Code, or it comes to the notice of the High Court, that the Sessions Judge has not exercised his discretion with proper care, the High Court should be powerless in the matter of interference. The words "any proceeding" in section 439, Criminal Procedure Code appear to me to be sufficiently general to give to the High Court ample power to control the propriety as well as the regularity of a finding, sentence or order of any inferior Criminal Court, should it appear to it fit to do so. No hard and fast limitations can, therefore, be placed on the powers of superintendence and correction which the High Court can exercise over the proceedings of the Courts subordinate to it. In my opinion the words 'any proceeding' would apply even to the proceedings for bail taken before a Sessions Judge under section 498, Criminal Procedure Code. In the case of *Faiz Muhammad* v. *Emperor* (4) this Court laid down that under section 439 read with section 435 of the Code of Criminal Procedure, 1898, the High Court has power to revise an order of proceeding which though legal, is, in its opinion, sufficiently improper to justify its interference. I have, therefore, no doubt that the powers of this Court are sufficiently wide.

It is, however argued that the essence of the Code of Criminal Procedure is to be exhaustive, and where no express power to interfere with an order of a Court of Session granting bail under section 498, Criminal Procedure Code, is conferred on the High Court by any of the other sections, such power ought not to be exercised, because by such interference the liberty of the accused who are let off on bail is likely to be jeopardised. On the other hand it is urged on behalf of the Crown that to deny such authority to the High Court might in some cases result in great injustice to the prosecution. I think that if any authority be lacking under any of the other sections of the Code, section 561 A added by the new Amendment Act XVIII of 1923 supplies it. That section gives statutory recognition to the inherent powers of the High Court—a principle which is already well-recognized. For all these reasons I hold that the preliminary objection fails and that I can in the exercise of my general revisional jurisdicton entertain the petitions for revision though not under the particular section under which they are laid.

I now proceed to discuss the merits of the orders dated 9th May 1924 and 9th June 1924, passed by the Sessions and the Additional Sessions Judge on the bail applications respectively made to them. The Sessions Judge while dealing with the evidence before him in connection with a side issue of granting or refusing bail has to a certain extent not been very careful or guarded in the use of certain expressions. Exception is, therefore, taken on behalf of the Crown to certain passages in the order where he has even gone to the length of holding that "the facts disclosed to his mind an offence under section 347, Indian Penal Code" which was bailable offence, and another when he expressed his opinion in the following terms "Looking to the stories as told by Gopala and his wife in their plain narative void of all exaggerations there was no intent at secret confinement with any object, but it was after all a case of wrongful confinement in an aggravated form for the purpose of extorting from the person confined, any property or valuable security, falling under section 347, Indian Penal Code, which is a bailable offence". The underlined words are likely to be misconstrued by each party. The prosecution says the story appeared to the Sessions Judge to be a plain narrative which was devoid of all exaggerations, while it is capable of bearing the interpretation that what was

(4) 20 Ind. Cas. 209; 9 N. L. R. 81; 14 Cr. L. J. 385.

meant by the Sessions Judge was that if the stories are stripped of all the exaggeration they would show that. In a still another passage in his order he observes: "The Magistrate has rightly characterised the story of the woman to be a thrilling story, but it is at the same time a story which bears close and careful scrutiny. I have no desire to prejudice the mind of the Magistrate. In granting bail or otherwise, I have to consider what offence, bailable or non-bailable, appears to have committed and also to the method adopted in the trial calculated to prejudice the accused or otherwise." In this passage the expressions "bears close and careful scrutiny" are relied on, on behalf of the Crown, as indicating that the evidnce is strong enough to *stand* scrutiny and still the bail is allowed. What the Sessions Judge meant was "requires close and careful scrutiny." No doubt the Sessions Judge has qualified his opinion by saying "he has no desire to prejudice the mind of the Magistrate", still I cannot help remarking that the Sessions Judge could well have refrained from expressing such pronounced views on the evidence. His attempt at refuting some of the arguments used by the Magistrate in refusing the bail, leads me to think that he was approaching the question as if he was sitting in judgment over the order of the Magistrate by way of appeal or revision. This was not, however, really the case. The application to his Court was an independent application and it had to be and could have been disposed of on its own merits and without reference to the grounds stated by the Trying Magistrate. What is needed in such cases is a broad and not nice and critical examination of the evidence. Ordinarily, evidence for the prosecution ought to be taken at the face value unless it is obviously incredible.

The Counsel for the Crown justly remarks and in fact he had made it a ground for special grievance against the order under consideration that observations such as these in an order for bail are likely to influence the further trial of the case and also the mind of the Trying Magistrate. There is room for thinking that such remarks or observations coming from the Sessions Judge are likely to be misconstrued by Subordinate Courts and might in some instances even shape the ultimate decision by such Magistrate. Really speaking section 498, Criminal Procedure Code, makes no distinction between bailable and non-bailable offences in connection with the discretion which the Sessions Judge may have an occassion to exercise in any particular case. In this particular case the Sessions Judge may well have refrained from expressing his views whether the facts disclosed a bailable or a non-bailable offence. I, therefore, think that those remarks some of which are equivocal or ambiguous and, therefore, likely to be misconstrued were not quite necessary in the particular circumstances of this case. Acting under the power recognized by section 561-A, Criminal Procedure Code, I, therefore, direct that the objectionable matter which is likely to be misunderstood as meaning that the Sessions Judge has prejudged the case, be treated as expunged from his order dated 9th May 1924.

In the order of the Additional Sessions Judge dated 9th June 1924 there are more or less similar observations which I need not reproduce here at length which are also objectionable and are likely to be similarly misconstrued by the Trying Magistrate, while appreciating or weighing the evidence and the probabilities of the case. These observations are to be mostly found in paragraph 3 of his order. Acting under section 561-A, Criminal Procedure Code, I direct that the order dated 9th June 1924 should be read as if all such objectionable matter which is likely to create an expression in the mind of the Trying Magistrate that the Additional Sessions Judge has prejudged the case, is expunged thereform.

Looking to the nature of the offences which the accused are alleged to have committed, and taking into consideration the advisability of giving to the prosecution a fair opportunity of adducing evidence of a really incriminating nature, untrammelled by the dread which the accused, if let off on bail, might inspire on the minds of the prosecution wit-

nesses, the Trying Magistrate in his discretion thought fit to refuse the bail. On the other hand the Sessions Judge and the Additional Sessions Judge have after taking into consideration those circumstances, and the possible inconvenience which may be caused to the accused by their detention while under trial, in their discretion though fit to hold that the balance of justice was more on the side of the accused than of the Crown and allowed the bails. The question which I have thus to consider is whether this discretion has been improperly exercised by the Sessions Judge, or the Additional Sessions Judge, or, in the words of Stanyon, A. J. C., in *Faiz Muhammad* v. *Emperor* (4) whether the order or proceeding for granting bail "*though legal is sufficiently improper to justifiy 'my' interference.*"

Taking all the circumstances into consideration and particularly the right of an accused to demand that the charges against him should be tried without any unreasonable delay, I think that the discretion cannot in the circumstances of the cases before me, be said to have been improperly or arbitrarily exercised so as to call for my interference. In these cases very large number of witnesses 33 in one and 17 in another are proposed to be examined by the prosecution. This must necessarily entail enormous delay in the trial and disposal of the cases, and it may not, therefore, be proper to detain the accused in custody indefinitely by cancelling the bail-bonds already taken from them. In the case of *Narendra Lal Khan* v. *Emperor* (5) the High Court of Calcutta granted bail on the ground of unreasonable delay. Adopting the principle of that case I think I am justified in refusing to cancel the bail-bonds in the cases before me.

The applications are, therefore, rejected and the Rule *Nisi* issued in each case is hereby discharged.

G. R. D. *Applications rejected.*
& *Rule discharged.*
N. H.

(5) 1 Ind. Cas. 738; 36 C. 166; 13 C. W. N. 43; 9 Cr. L. J. 375.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 11 OF 1924.
March 24, 1924.

Present :—Mr. Kincaid, J. C., and Mr. Aston, A. J. C.

KHANU AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 209, 437, 439—Magistrate refusing to charge accused with offence triable by Court of Session—Discharge or acquittal—District Magistrate's order of committal to Sessions, legality of—Revisional powers, exercise of.

Certain persons were charged before a Magistrate of the First Class under sections 424 and 506, Part II, of the Penal Code and acquitted. Subsequently the complainant made several applications to him to frame a charge against the accused under section 395, Penal Code, and commit the accused to the Court of Session. The Magistrate put the applications on record but declined to entertain them. The complainant, thereupon, moved the District Magistrate who acting under section 437 of the Criminal Procedure Code, framed a charge against the accused and committed them to take their trial before the Court of Session. On its being contended, on revision, that the order of the District Magistrate was illegal on the ground that the accused had been acquitted and not discharged:

Held, that the order of the Magistrate was in substance an order discharging the accused in respect of an alleged offence under section 395, Penal Code, and that the District Magistrate had jurisdiction to make the order sought to be revised. [p. 761, col. 2.]

Krishna Reddi v. *Subbamma*, 24 M. 136; 2 Weir 544, followed.

King-Emperor v. *Ayyan*, 24 M. 675; 2 Weir 699, *Abdul Hakim* v. *Bazruk Ali*, 41 Ind. Cas. 658; 22 C. W. N. 117; 26 C. L. J. 210; 18 Cr. L. J. 834, *In re Sessions Judge of Coimbatore*, 47 Ind. Cas. 669; 41 M. 982; (1918) M. W. N. 486; 24 M. L. T. 82; 35 M. L. J. 667; 19 Cr. L. J. 945 and *Gulli Bhagat* v. *Narain Singh*, 77 Ind. Cas. 734; 2 Pat. 708, distinguished.

Where a discretion has been exercised by a Court of competent jurisdiction which is not on the face of it arbitrary, the practice of the High Court is that as a revisional Court, it will neither enquire into the reasons nor interfere with the exercise of the discretion. [p. 763, col. 1.]

Gulli Bhagat v. *Narain Singh*, 77 Ind. Cas. 734; 2 Pat. 708, followed.

Application to revise an order of the District Magistrate, dated the 24th November 1923.

Mr. *Dharmdas Mulchand*, for the Applicants.

KHANU *v.* EMPEROR.

Mr. *T. G. Elphinston*, Public Prosecutor for Sind, for the Crown.

JUDGMENT.—The facts of this case are shortly as follows:—

There was a dispute between one Bhurasing, a *zemindar* of Matli, regarding the ownership of the produce of Survey No. 15, Deh Bhambhai, *Taluka* Matli and certain Khanu. Both parties claimed to be owners of this Survey Number. As the result of this dispute Melhusing the brother of Bhurasing, the *zemindar*, filed a complaint under section 145 of the Criminal Procedure Code in the Court of the *mukhtiarkar* and First Class Magistrate of Guni against Khanu and others. In those proceedings the Magistrate attached the produce of this Survey Number through the *mukhtiarkar* of Matli and ordered that a watchman should be appointed to look after the produce. Agreeably to those directions the *mukhtiarkar* of Matli ordered Bahadurkhan Tapedar to comply with them and the Tapedar put a seal on the produce and appointed a watchman by the name of Khamiso to look after it.

On the night of the 31st of December 1922, so it has been alleged by the prosecution, Khanu, Khamiso, Imambux, Daryakhan and a certain Mahomed Khan, who has since absconded, came on the scene with hatchets and removed the produce from the possession of the watchman Khamiso. He remonstrated with them, but they overawed him by threatening to kill him with hatchets which they carried. Khamiso the watchman afterwards made a report of what had happened to the Tapedar and the Police challaned Khanu, Khamiso, Imambux and Daryakhan under section 424 and section 506 Part II of the Indian Penal Code before the First Class Magistrate of Tando Mahomed Khan (Mr. Hassanali). That gentleman enquired into the case and on the 18th of September 1923 acquitted all the accused of the offences with which they had been charged. An application was subsequently made by the Tapedar Bahadurkhan to the learned District Magistrate, urging that the accused Khanu and the three accused persons Khamiso, Imambux and Daryakhan should have been committed to the Court of Session on a charge framed under section 395 of the Indian Penal Code. The learned District Magistrate, Mr. Taunton, on the 24th of November 1923 came to the conclusion that there was a *prima facie* case of an offence under section 395 of the Indian Penal Code and committed them to take their trial before the Court of Session Against the learned District Magistrate's order of committal Khanu and the three other persons committed have made an application in revision to this Court. The application was admitted only for the examination of the legal question whether the learned District Magistrate in view of the acquittal order of the First Class Magistrate was empowered by law to commit the accused to take their trial before the Sessions Court of an offence committed under section 395 of the Indian Penal Code.

We have had the benefit of an able legal argument by the learned Pleader on behalf of the accused. Nevertheless, we are of the opinion that the order of the learned District Magistrate was within his competence to pass. We do not wish to examine it on the merits, as the application was not admitted on the merits. We shall only examine the law point involved.

The question for our decision is simply this, whether the District Magistrate had under section 437 of the Criminal Procedure Code power to commit the accused before the Court of Session.

In this connection it must be borne in mind that no less than three applications, all of which the learned Magistrate has put on record, were made to the Magistrate to commit the case to the Court of Session. He declined to do so and in declining to do so he really discharged the accused, although he passed no formal written order to that effect. This case, as it seems to us, is on all fours with the Full Bench case of *Krishna Reddi* v. *Subbamma* (1).

The following passage from the judg-

(1) 24 M. 136; 2 Weir 544.

ment of the Full Bench is highly pertinent:—

"If section 209 of the Criminal Procedure Code is to be construed as meaning that there can be no 'discharge' under that section in respect of an offence exclusively triable by a Court of Session in cases where it appears to the Magistrate that the accused should be tried before himself or some other Magistrate in respect of offences not so exclusively triable, there would be a deadlock, since there is no provision in the Code, other than that contained in section 209, for dealing with a case where the Magistrate is of opinion that there is no evidence of an alleged offence which is triable exclusively by a Court of Session but considers that the accused should be tried before himself, or some other Magistrate, in respect of alleged offences which are not so exclusively triable. From the terms of the Magistrate's order it is clear that he adjudicated upon the question whether there was any evidence against the accused in respect of the major offence. The Magistrate came to the conclusion that there was not, and he declined to charge him with the major offence. It seems to us that this is a 'discharge' within the meaning of section 209. . . . . We think that the Sessions Judge had jurisdiction to make the order under section 436."

The case of *Emperor* v. *Ayyan* (2) was brought to our notice. But that case must be widely distinguished. There the learned Magistrate tried a person for giving false evidence in a judicial proceeding. The Sessions Judge subsequently held that as this false statement had been made in connection with a charge of murder the accused could only have been tried by the Court of Session. He held that the trial and conviction by the First Class Magistrate were void and set aside the convictions. Their Lordships very properly held that even though the facts disclosed a graver offence, yet the Magistrate was perfectly competent to try and convict the prisoner for a lesser offence which the facts disclosed. The proceedings, therefore, were not void.

That question does not arise here. The question before us is not whether the acquittal of the accused was void but whether the Magistrate did or did not discharge the accused of an offence under section 395.

The learned Pleader for the applicants next relied upon the case of *Abdul Hakim* v. *Bazruk Ali* (3). That decision, too, can be distinguished from the present one. There the Magistrate never considered whether the accused had or had not committed a graver offence. As the learned Judge, Richardson, J., observed, the Magistrate's mind was never directed to that issue and it was not enquired into. Here three applications were made to the learned Magistrate of the First Class to commit the accused to take their trial in the Court of Session. As the learned District Magistrate has observed, it is thus clear that this issue was present to the First Class Magistrate's mind, when he was disposing of the case.

A somewhat similar case is reported as *In re, Sessions Judge Coimbatore* (4). But there the graver offence was not mentioned in the Police charge sheet and the graver offence was not pressed by the prosecution. Nor was the Magistrate asked to frame a charge against the accused in respect of it. Their Lordships, therefore, held that the case was not covered by *Krishna Reddi* v. *Subbamma* (1). The last case brought to our notice is that of *Gulli Bhagat* v. *Narain Singh* (5). That case so far as we can understand it, has no bearing on the present question. All that the Judges laid down there was that the High Court would not interfere in revision at the instance of a private party with an order of acquittal passed

(2) 24 M. 675; 2 Weir 699.

(3) 41 Ind. Cas. 658; 22 C. W. N. 117; 26 C. L. J. 210; 18 Cr. L. J. 834.

(4) 47 Ind. Cas. 669; 41 M. 982; (1918) M. W. N. 486; 24 M. L. T. 82; 35 M. L. J. 667; 19 Cr. L. J. 945.

(5) 77 Ind. Cas. 734; 2 Pat. 708.

under section 494. It contains, however, a passage which we might well quote in our present judgment: "Where a discretion has been exercised by a Court of competent jurisdiction which is not on the face of it arbitrary, the practice of the High Court is that as a revisional Court it will neither enquire into the reasons nor interfere."

In the present case before us a competent District Magistrate has, after recording grounds which show that he had carefully studied the case, passed an order directing committal of the applicants to take their trial before the Sessions Court of an offence said to have been committed by them under section 395. We as a reversional Court do not propose either further to enquire into the reasons or to interfere with the judgment.

The application is dismissed.

P. B. A. & N. H. *Application dismissed.*

CALCUTTA HIGH COURT.

APPLICATION FOR LEAVE TO APPEAL TO PRIVY COUNCIL No. 102 OF 1923.

October 5, 1923.

Present:—Justice Sir Asutosh Mookerjee, KT., and Justice Sir N. R. Chatterjea, KT.

PHILLIP E. BILLINGHURST—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Letters Patent, (Cal.) 1865, cl. 41—Leave to appeal to His Majesty in Council—Judgment, order or sentence passed by High Court in criminal appeal—Limitation Act (IX of 1908), Sch. I, Art. 181.

The High Court has no power to grant leave to appeal to His Majesty in Council from its judgment, order or sentence pronounced in a Criminal appeal; nor is a person aggrieved by such judgment, order or sentence entitled to invite the High Court to give him leave to appeal to His Majesty in Council, either under clause 41 of the Letters Patent or under any other provision of the law. [p. 765, col. 2.]

Quære.—Whether the period applicable to an application for leave to appeal to His Majesty in Council from the judgment, order or sentence passed by the High Court in a criminal appeal is not three years under Art. 181, Sch. I, Limitation Act. [p. 766, col. 1.]

Application from the decision of Sanderson, C. J., and Richardson, J., dated the 31st May 1923, published as 82 Ind. Cas. 545.

JUDGMENT.

Mookerjee, J.—This is an application for leave to appeal to His Majesty in Council from the sentence passed by this Court in a criminal appeal.

The petitioner Billinghurst was tried by the Chief Presidency Magistrate, Calcutta, for offences punishable under section 120-B read with section 420, Indian Penal Code, and under section 420, Indian Penal Code. The accused was arrested on the 1st September 1919; the trial began on the 7th June 1921; the hearing was finished on the 22nd August 1922; and the judgment was delivered on the 28th November 1922. The petitioner was found guilty on each of the two charges and was sentenced to rigorous imprisonment for one year. The petitioner thereupon preferred an appeal to this Court. The appeal was heard by Sanderson, C. J., and Richardson J; their judgment was pronounced on the 31st May 1923. The decision of the Magistrate as to the first charge was upheld, while the conviction under the second charge was set aside; and the sentence was reduced from one year to nine calendar months: *Billinghurst* v. *Emperor* (1). The prisioner has now applied to this Court for leave to appeal to His Majesty in Council from the judgment and sentence pronounced by this Court in the appeal on the 31st May 1923. The petition, which has been forwarded by the Superintendent of the Alipore Central Jail with a convering letter dated the 29th September 1923, does not specify under what provision of the law this Court is invited to grant leave to appeal to His Majesty in Council.

Clauses 39-42 of the Letters Patent deal with appeals to the Privy Council. Clauses 39 and 40 deal with matters other than those of criminal jurisdiction. Clause 41 deals with appeals from

(1) 82 Ind. Cas. 445; 27 C. W. N. 821; (1924) A. I. R. (C.) 18.

criminal cases and is in the following terms:

"41. And We do further ordain that, from any judgment, order, or sentence of the said High Court of Judicature at Fort William in Bengal, made in the exercise of original criminal jurisdiction, or in any criminal case, where any point or points of law have been reserved for the opinion of the said High Court in manner hereinbefore provided, by any Court which has exercised original jurisdiction, it shall be lawful for the person aggrieved by such judgment, order, or sentence to appeal to Us, Our heirs or successors, in Council, provided the said High Court shall declare that the case is a fit one for such appeal, and under such conditions as the said High Court may establish or require, subject always to such rules and orders as We may, with the advice of our Privy Council, hereafter make in that behalf."

This clause is of no assistance to the petitioner. The judgment and sentence assailed by him were not made in the exercise of original criminal jurisdiction. Nor can it be maintained that the judgment and sentence were made in a criminal case where any point of law had been reserved for the opinion of the High Court, in manner provided in the Letters Patent, by any Court which had exercised original jurisdiction. The substance of the matter is that the judgment and sentence were pronounced in exercise of the power conferred by clause 27 of the Letters Patent, which is in the following terms:

"27. And We do further ordain, that the said High Court of Judicature at Fort William in Bengal shall be a Court of Appeal from the Criminal Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any law now in force."

This clause has to be read with section 411 of the Criminal Procedure Code which provides that "any person convicted on a trial held by a Presidency Magistrate may appeal to the High Court if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees." Section 430 then provides that judgments and orders passed by an Appellate Court upon appeal shall be final, except in the cases provided for in section 417 (Appeal on behalf of Government from an original or appellate order of acquittal) and Chapter XXXII (which includes section 432-442 and treats of reference and revision). There is, consequently, no escape from the position that the petitioner is not entitled to invite this Court to grant him leave to appeal to His Majesty in Council from the appellate judgment of this Court, either under clause 41 of the Letters Patent or under any other provision of the law. The view we take is supported by four decisions of this Court.

In *Chintamon Singh* v. *Emperor* (2) an application for leave to His Majesty in Council was made in respect of an order of this Court which confirmed an order of the Court below under section 118 of the Criminal Procedure Code. In the matter of *Chintamon Singh* v. *Emperor* (3), leave was refused, and Rampini, C.J., observed that the case did not fall within the scope of clause 41 of the Letters Patent. A similar view was adopted in the case of *Ataur Singh* v. *Emperor* (4). In a reference under section 374 of the Criminal Procedure Code, and a connected appeal, Stephen, J., held that the sentence of death passed upon the appellants should be confirmed. D. Chatterjee, J., on the other hand, held that the appellants should be acquitted. The case was then referred under section 429 to Carnduff, J., who agreed with Stephen, J., that the guilt of the appellants had been established but held that the sentence should be one of transportation of life. The prisoners thereupon applied for leave to appeal to His Majesty in Council. The application

(2) 21 Ind. Cas. 470; 18 C. L. J. 119; 14 Cr. L. J. 598.
(3) 35 C. 243; 12 C. W. N. 299; 7 C. L. J. 177; 7 Cr. L. J 146.
(4) 21 Ind. Cas. 912; 18 C. L. J. 121; 14 Cr. L. J. 672.

was refused. Jenkins, C. J., observed: "We reject the application, not because we express any opinion on the merits, but because our only power to grant leave is under clause 41 of the Letters Patent, and the present case does not come within that clause." A similar course was adopted in *Thakur Madho Singh* v. *Emperor* (Unreported) where an application for leave to appeal to His Majesty in Council was presented against an order made in a Criminal Reference. Greaves and Walmsley, JJ., observed: "We must reject the application as it does not come within clause 41 of the Letters Patent which is the only clause which gives the Court power to entertain appeals in criminal matters" (Privy Council No. 3 of 1916 in Criminal Reference No. 24 of 1915, unreported, decided on 19th January 1916). To the same effect is the decision in *Joges Chandra Sarkar* v. *Legal Remembrancer af Bengal* (Unreported) where an application for leave to appeal to His Majesty in Council was made on behalf of the accused who had been acquitted by the Sessions Judge of Tipperah on appeal from a conviction by the Deputy Magistrate of Chandpur but were on the 5th September 1919 convicted and sentenced to imprisonment by this Court as the result of an appeal preferred by the Government. The application was refused by Shamsul Huda and Rankin, JJ. (Privy Council No. 41 of 1919 in Government Criminal Application No. 1 of 1919, unreported, decided on 30th September 1919).

Reference may in this connection be made to the decision of the Bombay High Court in *Reg.* v. *Reay* (5). Lt. Reay, a European born British subject, was convicted by a Magistrate at Ahmedabed under section 31 of the Bombay District Police Act, of driving in that city at night without sufficient lights and was fined one rupee. The District Magistrate of Ahmedabad entertained doubts as to the legality of the conviction and referred the case for the orders of the High Court. Gibbs and Sargent, JJ., prononnced elaborate judgments and held that the Bombay District Police Act was *ultra vires* in so far as it conferred criminal jurisdiction upon Magistrates, beyond the limits of the Presidency Town, over, British-born subjects. The consequence was that the conviction was annulled and the fine levied was restored to the accused: *Reg.* v. *Reay* (6). The Government Prosecutor thereupon applied for leave to appeal to Her Majesty in Council from the order of acquittal, and the question of the power of the High Court to grant leave was fully argued by the Advocate-General (Scoble) before Westropp, C. J., Gibbs and Melvill, JJ. The Full Bench rejected the petition. Sir Michael Westropp, C. J., observed that the decision which was impeached had not been made in the exercise of original criminal jurisdiction nor in a criminal case where a point of law had been reserved within the meaning of clause 41 which seemed to refer to clauses 25 and 26. The Chief Justice conceded that the question as to the scope of the powers of the Bombay Legislature, involved in the case, was of considerable importance, and one which it was desirable should be brought before the Tribunal of final resort. But he added that in a case so circumstanced as the one then before the Court, the Court, however willing, had no power to grant leave under clause 41 the Letters Patent.

We are of opinion that the application now before us has been misconceived, that this Court has no power to grant leave to appeal to His Majesty in Council from the judgment and sentence pronounced in the appeal preferred by the petitioner. In saying this, we must not be understood as in any wise throwing doubt upon that judgment; in fact we have not formed any opinion upon the merits of the case and we say nothing as to the probable result, if an application should be made directly to His Majesty in Council for leave to appeal.

We may add finally that we are not unmindful that the application has been presented to this Court after the lapse of more than ninety days from the date

(5) 7 B. H. C. R. 77 C. C.

(6) 7 B. H. C. R. 6 C. C.

of the judgment and sentence. The period of ninety days prescribed by Art. 179 of the Schedule to the Indian Limitation Act is restricted by its terms to an application for leave to appeal, made by a person desiring to appeal to His Majesty in Council under the Code of Civil Procedure. We need not express a final opinion upon the question, whether, in such circumstances, the period applicable to the present application may not be that prescribed by Art. 181, which ordains that all applications for which no period of limitation is provided elsewhere in the Schedule, may be made within three years from the date when the right to apply accrues. In any event, for reasons, already stated, the application must be refused and it is ordered accordingly.

S. D. *Application rejected.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL MISCELLANEOUS APPLICATION No. 194 OF 1924.

May 14, 1924.

Present:—Mr. Kendall, A. J. C.

RUP NARAIN BAKKAL—COMPLAINANT—APPLICANT

versus

ABDUL HAMID KHAN AND OTHERS—ACCUSED—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Expression of opinion by District Magistrate in favour of accused—Transfer of case.

A complaint was lodged against *A* and certain other persons on a charge of murder in the Court of the Sub-Divisional Officer of a District. Within a few days of the alleged occurrence, the District Magistrate in a public speech addressed to the Sub-Divisional Officer and other officials referred to the high services of *A* and the baselessness of the charges made against him:

Held, that the speech amounted to a decided opinion about the charges in question and was likely to create a reasonable apprehension in the mind of the complainant that he will not have a fair and impartial trial and that it was expedient for the ends of justice that the case be transferred to another district. [p. 767, col. 1.]

Application under section 526, Criminal Procedure Code, for transfer of a case instituted on a charge of murder under section 302, Indian Penal Code.

Mr. *Moti Lal*, for the Applicant.

ORDER.—This is an application under section 526 of the Criminal Procedure Code made by one Rup Narain Bakkal for the transfer of the hearing of a complaint, which he had made in the Court of the Sub-Divisional Officer of Tarabganj, Gonda District. The grounds for the application are as follows:—

The brother of the applicant was found dead in his bed in the verandah of his house with a bullet wound in his head in the early morning of October 21st, 1923. A report was made at the Thana the same morning, and the Police made an enquiry and had several statements recorded under section 164 of the Criminal Procedure Code, but did not prosecute any one, and dropped the case. Subsequently on the 8th March 1924, the present applicant filed a complaint in the Court of the Sub-Divisional Officer against Abdul Hamid Khan, and two others.

On the 1st November 1923, the Deputy Commissioner of Gonda in the course of a speech addressed to this Sub-Divisional Officer and various other officials and non-officials, including one of the persons named in the applicants' complaint, said as follows:—"*Main ek arse se Khan Saheb Subedar Abdul Hamid se khub waqif hun unki jangi khidmat ka bhi mujhko aitraf hai aur jo be bunyad ilzamat Khan Saheb par lagae ja rahen hain main unka hargiz bawar nahin kar sakta. Wakla ka pesha hai ki wuh logon ko larakar apna pet palen.*"

It is represented, that this is an expression of opinion which is likely to influence the mind of the Sub-Divisional Officer, to the prejudice of the applicant, and, in favour of one of the persons against whom he has made his complaint.

The words do not give any expression of opinion in regard to the subject-matter of this complaint, but it must be admitted that they do express a

decided opinion not only in regard to the character of the individual concerned—which might be done without prejudice—but also in regard to charges made against him, and to the baselessness of these charges. As these words were spoken within a few days of the incident which gave rise to the complaint, and as they were addressed, among others, to the Sub-Divisional Officer in whose Court the complaint was filed, these words are, in my opinion, calculated to create in the mind of the applicant a reasonable apprehension that he may not have a fair and impartial hearing. I would not go so far as to say that clause (*a*) of sub-section (1) of section 526, Criminal Procedure Code will apply to the case, but a wide discretion is given to the Court under clause (*e*) of that sub-section, and in the circumstances of this case, in which it appears that the applicant's brother has been murdered, it is, in my opinion, expedient for the ends of justice that he should be satisfied and that his complaint should be heard before a Tribunal which he can have no grounds for regarding as baissed.

I, therefore, direct that the complaint referred to be transferred for enquiry from the Court in which it has been filed to that of the Deputy Commissioner of Lucknow, who may direct the enquiry to be conducted by any competent Magistrate subordinate to him.

G. H. *Complaint transferred.*

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 337 OF 1924.

July 3, 1924.

Present :—Mr. Justice Newbould and Mr Justice Mukherjee.

HRIDAY GOVINDA SUR *alias* HRIDGOVINDA SUR—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act XVIII of 1923),

s. 539B—Inspection note, record of—Provision whether mandatory.

It is obligatory on a Magistrate under the second clause of section 539B of the Criminal Procedure Code to make his inspection a part of the record.

This provision is mandatory and the failure to comply with this express direction of law is an illegality and not an irregularity which can be cured.

Mr. *Gregory* (Counsel), (with him Babu *Suresh Chandra Talukdar*), for the Petitioner.

Babu *Ramani Mohan Chatterjee*, for the Complainant.

Mr. *Remfry* (Counsel), for the Crown.

JUDGMENT.—This Rule must be made absolute on the second of the two grounds, on which it was granted, namely, that the Trial Magistrate did not comply with the provisions of section 539B. It appears that the Trying Magistrate inspected the place under the provisions of that section and also that he drew up a diagram and made an inspection note thereon. But he omitted to comply with the provisions of the second clause of this section and the note did not form part of the record of the case. This provision in the section is, in our opinion, mandatory and the failure to comply with this express direction of law was an illegality and not an irregularity which could be cured if we hold that there was no prejudice to the accused.

We accordingly set aside the conviction and sentence passed on the petitioner and direct that the accused be re-tried according to law. The fine, if paid, will be refunded.

K. S. D. *Conviction set aside; Re-trial ordered.*

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 106 OF 1924.

August 19, 1924.

Present:—Mr. Dalal, J. C.

RAM SAMUJH LAL AND ANOTHER—ACCUSED—APPLICANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 423

RAM SAMUJH LAL *v.* EMPEROR.

(1) (b) *and* (c), 439—*Order of commitment, whether can be quashed in revision.*

Under section 439 of the Code of Criminal Procedure, a Court has jurisdiction to exercise the powers of an Appellate Court conferred by section 423 (1) (c) and *a fortiori* to reverse or alter an order of commitment passed by a Sessions Judge under section 423 (1) (*b*), Criminal Procedure Code.

Application for revision under sections 435 and 439, Criminal Procedure Code, from an order of the Sessions Judge, Fyzabad, dated the 23rd April 1924.

Mr. *Niamatullah*, for the Applicants.

The Government Pleader, for the Crown.

JUDGMENT.—The applicants Ram Samujh and Badri have applied in revision from an order passed by the learned Sessions Judge of Fyzabad for their commitment to the Court of Session for trial under section 395, Indian Penal Code. This order was passed by the learned Judge under section 423 (*b*) where the Sessions Court has power in appeal from conviction to reverse the finding and sentence and order the commitment of the accused persons for trial. I take the present application to be one in which this Court can exercise powers under section 439 of the Code of Criminal Procedure. These powers consist of the powers conferred on a Court of Appeal by section 423 among others. Under section 423 (1) (*c*) on an appeal from any order the Appellate Court can alter or reverse the order. I, therefore, take it that this Court has jurisdiction in revision to reverse or alter an order of commitment passed by a Sessions Judge under section 423 (1) (*b*) of the Code of Criminal Procedure.

The complaint was one of dacoity but the Magistrate who tried the case did not think that a charge of dacoity was made out. He has, therefore, jurisdiction to discharge the accused persons of the offence of dacoity. He has not specifically said so in his judgment but that is what he intended to do. His action, therefore, cannot be considered to be illegal. I have gone through the record and see no hope of proof that more than four persons joind in commiting the offence alleged by the complainant woman. Even the learned Judge of the lower Court when giving the gist of the offence writes the following words in the judgment: "If there was any house trespass committed by the applicants that night it was not done on the sly, but the story of the prosecution is that the doors of Dargahi's house were forced open and four men rushed into the house without any attempt at concealment and used violence to *Musammat* Raghuraji and others in order to compel them to deliver up the property." Practically the offence whatever it was is alleged against four persons and a vague statement is made that several others stood outside. The judgment of the Magistrate is not happily worded but it is apparent that he did not believe, and in my opinion rightly, that more than four persons took part in committing the offence. As pointed out by the Deputy Magistrate in another connection, if there had been 10 or 12 men taking part in committing the offence the result of the violence would have been far more serious than slight injury being done to one of the prosecution witnesses. No Court is likely to believe that more than four persons took part in the offence. The applicants were, therefore, rightly discharged of an offence of dacoity.

I quash the order of commitment passed by the learned Sessions Judge and remit the record to him for trial of the appeal filed in his Court according to law.

S. D. *Order quashed.*

CALCUTTA HIGH COURT.

ORIGINAL CIVIL SUIT No. 331 OF 1922.
February 8, 1924.
Present:—Mr. Justice Buckland.
SUNDERMULL PORESHRAM—PLAINTIFFS
versus
TRIBHUBAN HIRACHAND & Co.—DEFENDANTS.

Arbitration Act (IX of 1899), s. 9 (b)—Arbitration agreement—Alternative methods of arbitration—Choice given to one party—Failure to follow chosen method—Other party, whether can fall on alternative method—Procedure.

Parties to a suit had entered into a contract whereby the plaintiffs had sold and defendants had bought a quantity of sugar. The contract contained, among others, an arbitration clause in the following words:—"Any disputes to be settled by arbitrations under the rules of the Bengal Chamber of Commerce, or, at the option of the sellers by the arbitration of two European sugar importers of Calcutta, one to be appointed by the sellers and one by the buyers." Disputes arose and the plaintiffs elected to have the arbitration of two European importers and declined to go to the Bengal Chamber of Commerce. They did not however nominate an arbitrator whereupon the matter having been referred to the arbitration of the Chamber by the defendants, an *ex parte* award was made. The plaintiffs appealed:

Held, that the plaintiffs sellers having elected to go to the arbitration of two European importers it was not open to the defendants buyers to have the dispute arbitrated upon by the Tribunal in question, and in the case of failure of the plaintiffs to appoint an Arbitrator within the time fixed, in the absence of a different intention expressed in the submission, the procedure laid down in section 9, sub-section (*b*) of the Arbitration Act should have been followed. [p. 771, col. 1.]

Mr. *S. N. Banerjee* (with him Mr. *S. C. Bose*), for the Plaintiffs.

Mr. *L. P. E. Pugh* (with him Mr. *S. Ghose*), for the Defendants.

JUDGMENT.—This is a suit to set aside an award of the Bengal Chamber of Commerce made on the 19th January 1922.

The parties on the 14th April 1920, entered into a contract whereby the plaintiffs sold and the defendants bought white Java sugar.

The contract contains, among others, an arbitration clause in the following terms:—

"Any disputes to be settled by arbitration under tne rules of the Bengal Chamber of Commerce, or, at the option of the sellers by the arbitration of two European sugar importers of Calcutta, one to be appointed by the sellers and one by the buyers, with powers to appoint a European merchant as Umpire. The decision of the Chamber, Arbitrators or Umpire shall be final and binding on both parties either of whom may make the same a rule or order of Court. If the buyers shall fail to join in such arbitrations or to appoint an Arbitrator within three days after being required to do so, the arbitration may, at the option of sellers, proceed *ex parte* and the award thereon shall be binding on the buyers, and the sellers may make the same a rule or order of Court."

Disputes arose and form the subject of correspondence but no letter is relevant earlier than that of the 6th September 1921, from the Registar of the Tribunal of Arbitration of the Bengal Chamber of Commerce to the plaintiffs and the Solicitors for the defendants. That letter stated that the defendants had applied for arbitration and requested the parties to send their statements of the case to the Registar. The plaintiffs' Solicitors on the 29th September, wrote to the Registrar, saying:—

"Our clients as sellers, have, under the above contract, option of claiming arbitration either of the Bengal Chamber of Commerce or of two European sugar importers of Calcutta. They elect to have the arbitration of two European sugar importers and they decline to go to the aribitration of the Bengal Chamber of Commerce."

On the 4th October 1921, Messrs. Khaitan & Co., Soilcitors for the defendants, wrote two letters, one to the Registrar, which it is not necessary to read, as it merely informs the Registrar of the contents of the other, and another to the plaintiffs. That letter, after making allegations which may or may not be justified, concludes:—

"You should, therefore, nominate an Arbitrator without any further delay. We are, therefore, instructed to call upon you which we hereby do to nominate an Arbitrator within seven days from receipt hereof failing which please note our clients will have the matter decided by

the Bengal Chamber of Commerce as provided for in clause 18 of the contract."

The plaintiffs did not nominate an arbitrator and took no further steps in that behalf. The Tribunal of Arbitration of the Bengal Chamber of Commerce entered upon the reference and in due course made its award, which was against the plaintiffs.

The short point which has been argued is whether or not under clause 18 of the contract, after the plaintiffs had elected to go to the arbitration of two European sugar importers, it was open to the defendants to have the dispute arbitrated upon by the Tribunal in question.

The plaintiffs contend that, having exercised their election, the Tribunal of the Chamber of Commerce had no authority to arbitrate. On the other hand, it has been argued on behalf of the defendant that the election was not properly exercised or that having been exercised but not pursued, the defendants were entitled to have recourse to arbitration by the Tribunal of the Chamber of Commerce.

First, it is to be observed the right of election is given to the sellers. It is submitted that merely writing and saying that they elect to have arbitration by two European sugar importers is not sufficient and that to make a proper election they should have appointed an aribtrator. The latter part of the clause is relied upon for this purpose; it says:—

"If the buyers shall fail to join in such arbitration or to appoint an Arbitrator within three days after being required to do so, the arbitration may, at the option of sellers, proceed *ex parte*."

Now, there is nothing in this part of the clause about the sellers appointing an Arbitrator. The sellers have the election, but how they shall make the election is not provided for by this clause. I do not consider that for the purpose of such election the sellers have to appoint their Arbitrator, and in my judgment a statement such as they made, following the words of the clause, that they did so elect is sufficient.

That being so, what then is the position when the election has been made and what follows?

Section 9 of the Arbitration Act says what shall be done where a submission provides that the reference shall be to two Arbitrators, and sub-section (*b*) provides for a case of this kind. It says:—

"If, on such a reference, one party fails to appoint an Arbitrator, ... for seven clear days after the other party, having appointed his Arbitrator, has served the party making default with a written notice to make the appointment, the party who has appointed an Arbitrator may appoint that Arbitrator to act as sole Arbitrator . . ."

Excluding the latter part of clause 18 of the contract the effect of which I shall consider immediately the position is very clear. When it came to the knowledge of the buyers that the arbitration was to be in the manner stated, the sellers not having already appointed their Arbitrator, what the buyers should have done was to have appointed their Arbitrator and, as they did, given the sellers seven days' notice to appoint their Arbitrator, in default of which the buyers might have proceeded in accordance with the section. If the sellers had not then duly appointed an Arbitrator, the buyers might have appointed their Arbitrator to act as sole Arbitrator.

Default on the part of the sellers in appointing an Arbitrator did not entitle the buyers to revert to arbitration by the Chamber of Commerce as they purported to do by the letter of the 4th of October. That was not in accordance with the Act nor is it contemplated by the latter part of clause 18 of the contract.

The latter part of this clause deals with conditions which do not arise in this case, *viz.*, where the seller has appointed his Arbitrator, but the buyer has not. In these circumstances it follows the Act but with this difference, that the notice is reduced from seven days to three.

This part of the clause appears to me, if I may say so, to be somewhat indifferently worded, because it does not make provision for default on the part of the seller in making an appointment and it only deals with the case of failure on the part of the buyers to appoint their arbitrator. But if the Act is followed, no difficulty need arise in practice.

In the circumstances of this particular case however the latter part of clause 18 has no application, and its object is limited to the purpose which I have indicated.

The election having been made and there being a procedure laid down by the Arbitration Act, which could and should have been followed in the absence of a different intention expressed in the submission, that is, clause 18 of the contract, it was not open to the defendants to revert to arbitration by the Tribunal of Arbitration of the Bengal Chamber of Commerce.

In my judgment, the Bengal Chamber of Commerce had no authority to arbitrate and the award must be set aside, with costs of the suit on scale No. 2.

N. H. *Award set aside.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 182 OF 1918.
March 26, 1920.
Present :—Mr. Kotval, A. J. C.
GOVIND—DEFENDANT—APPELLANT
versus
DHEKLU—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 58, 62—Objection by mortgagee to attached property—Order in objector's favour—Subsequent proceedings by mortgagee objector—Decree-holder auction-purchaser, whether can circumvent order.

A decree-holder cannot circumvent the order in an objection case under O. XXI, r. 58, Civil Procedure Code, by himself becoming an auction-purchaser. [p. 772, col. 1.]

When, therefore, an objection under O. XXI, r. 58, Civil Procedure Code, is allowed and the attached property is sold subject to the objector's mortgage, the decree-holder by becoming an auction-purchaser cannot challenge the mortgage in a subsequent suit by the mortgagee for foreclosure of the mortgage and is bound by the order made in the objection case.

Second appeal against a decree of the District Judge, Nagpur, dated the 4th January 1918.

Messrs. *M. B. Kinkhede* and *M. D. Khandekar*, for the Appellant.

Messrs. *M. V. Joshi* and *V. D. Kale*, for the Respondent.

JUDGMENT.—Dheklu filed the present suit for foreclosure on a mortgage-bond dated the 8th June 1912, Exhibit P-1, executed by Ghudan, the father of defendants Nos. 1 to 4. The mortgaged property consisted of absolute occupancy, occupancy and ordinary fields. Defendant No. 5 had obtained a money-decree on the 23rd November 1911 against Ghudan in Suit No. 309 of 1911, and had got the absolute occupancy fields attached in execution. Dheklu filed an objection to the attachment on the 23rd December 1912 on the basis of his mortgage-deed. Defendant No. 5 replied that he knew nothing about the objecter's mortgage, that the judgment-debtor was the objector's cousin and that it was doubtful whether the mortgage was genuine. He added that the property might be sold subject to the mortgage, if proved.

On the 7th February 1913 the objection was allowed in the following terms :—

"The objection is partly allowed. Property will be sold subject to the objector's mortgage. The objecter to bear his costs."

Form C was then sent to the Collector on the 26th April 1913. The fields were sold, defendant No. 5 himself becoming the purchaser.

In this suit defendant No. 5, who was the only contesting party, denied execution and attestation of the mortgage-deed and pleaded that it was a nominal transaction effected to defeat or delay him. Other pleas were raised which it is not necessary to refer to for the purposes of this appeal.

The First Court found that the mortgage-deed was duly attested and was executed for consideration and not with the object of defeating or delaying defendant No. 5. It also held that in view of the order in the objection case it was not open to defendant No. 5 to dispute the genuineness of the mortgage.

The lower Appellate Court held that the order allowing the mortgagee's claim in the objection case was conclusive and debarred defendant No. 5 from pleading that the mortgage was without consideration or was not properly attested. A new plea taken in that Court that the mortgage was void for want of the written permission of the Collector was also held to be

barred by the order in the objection case.

In this Court it is urged that in spite of the order in the objection case it was open to defendant No. 5 to urge the pleas which the lower Appellate Court held that he was debarred from raising.

As regards the plea that the mortgage is void for want of the written permission of the Collector I hold that it cannot be allowed as it was not raised in the First Court and as there is nothing on the record to show that written permission was not given. It appears from the plaint that the mortgage was taken during the pendency of proceedings before the Collector in Suit No. 434 of 1908 ; but I am unable to find anything in it from which it may be inferred that the mortgage was without the written permission of the Collector and void. The plaint states that a part of the mortgage-debt was borrowed to pay the decretal amount into the Court and it may be that it was paid under r. 89, O. XXI, First Schedule, Civil Procedure Code or that the Collector had sanctioned the transfer.

The next point urged is that the order in the objection case does not preclude defendant No 5 from raising the other pleas referred to above. Defendant No. 5 had in that case challenged the genuineness of the mortgage and called for its proof. It seems to me that the objection would not have been allowed if the Court had not been satisfied that the mortgage-deed was executed and duly attested and was for consideration. The decision on these points constituted the order in the objection case and it is now conclusive as between the parties to it. It is, however, urged that defendant No. 5 was a party to the objection case in his position of a decree-holder and as in the present suit he is joined as an auction-purchaser in possession he is not bound as auction-purchaser, by the order in the objection case. In other words it is argued that a decree-holder can circumvent the order in an objection case by himself becoming the auction-purchaser. No authority is cited in support of this proposition. On the contrary *Ramu Aiyar* v. *Palaniappa Chetty* (1), is directly against this contention. See also *Narayan Sadoba* v. *Umbar Adam* (2). The case of *Lalchand Hiralal Marwari* v. *Hasto Bai*(3) cited by the appellant, appears to be one where there was no objection.

The appeal fails and is dismissed with costs.

N. H. *Appeal dismissed.*

(1) 8 Ind. Cas. 117; 35 M. 35; 8 M. L. T. 381; 21 M. L. J. 756; (1910) M. W. N. 589.

(2) 10 Ind. Cas. 913; 35 B. 275; 13 Bom. L. R. 307.

(3) 7 C. P. L. R. 73.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 748 OF 1921.

July 12, 1922.

Present :—Mr. Justice Stuart and Mr. Justice Sulaiman.

MUNNA LAL—PLAINTIEF—APPELLANT

versus

THE EAST INDIAN RAILWAY COMPANY—DEFENDANTS—RESPONDENTS.

Railways Act (IX of 1890), s. 72—Contract Act (IX of 1872), s. 151—Bailment of goods—Station Master retaining goods—Liability of Railway—Bailee, duty of.

Where goods are delivered to a Station Master to be booked, but he being unable to book on account of stoppage of booking, keeps the goods on the Railway premises, under cover of a roofed platform, till the booking re-opens, never definitely directing the plaintiff to remove the goods, or telling him in unmistakable terms that the goods are kept at his own risk, nor at the same time definitely accepting the goods at Railway risk, and the goods are damaged in the retention, he by his conduct in keeping the goods in the Railway shed satisfactorily proves that he accepted the bailment of the goods on behalf of the Railway Company and under section 72 of the Railways Act makes the Railway Company responsible for the loss. [p. 775, col. 2.]

A bailee is bound to take care of the goods as he would have taken of his own goods of a similar nature and is bound in damages for loss resulting from his negligence. [p. 776, col. 1.]

Second appeal from the decision of the District Judge, Agra, dated the 3rd February 1921.

Dr. *K. N. Katju*, for the Appellant.

Mr. *L. P. Zutshi*, for the Respondents.

JUDGMENT.

Stuart, J.—The suit out of which this appeal arises was brought in 1918

in the Court of the Subordinate Judge of Agra by the proprietor of a firm carrying on business at Agra against the East Indian Railway Company on the following allegations :--

(1) that the plaintiff had had consigned to him 101 bales of strawboard from Howrah to Agra City in two waggons, one containing 53 bales weighing 362 maunds 1 seer, and the other containing 48 bales weighing 315 maunds 30 seers by the defendant Company's line.

(2) That the consignment arrived on 28th May 1918 and 1st June 1918.

(3) That the 48 bales were delivered in good condition but that the consignment of 53 bales was carelessly unloaded with the result that damage was done to a certain number of bales.

(4) That the plaintiff having sold 50 bales to a firm in Delhi to booked to Delhi the 53 bales which had been carelessly unloaded on a forwarding note which was accepted by the Station Master at Agra.

(5) That at first there was a refusal to forward but that on the 19th July 1918, 42 bales weighing 80 maunds 11 seers were actually booked to Delhi.

(6) That when these 42 bales were booked the plaintiff discovered that 11 bales which had been concealed by the remainder of the consignment had become spoilt.

On these allegations the plaintiff claimed damages against the Railway Company. The Railway Company in their written statement suggested that the damage if any had been done before the goods reached Agra. They denied ever having accepted liability in respect of any portion of the consignment after it had reached Agra. Their case was that the plaintiff had taken away 48 bales on their arrival in Agra (there the plaintiff agreed) and that the remaining 53 bales had been offered to them to book to Delhi, but that they had refused to accept the offer inasmuch as at that time booking to Delhi was suspended owing to the exigencies of Military Service. The defence continued that the plaintiff in spite of their reply had refused to remove the 53 bales, and had left them on the Railway premises at his own risk, that subsequently 42 bales had been booked by them to Delhi but that no responsibility had been incurred in respect of the 11 bales. The Company claimed wharfage against the plaintiff in respect of the time that the bales had remained on their premises.

The learned Subordinate Judge dismissed the suit. His decree was affirmed by the learned District Judge. The present appeal is filed here.

I find that the Courts below do not appear to have appreciated the exact nature of the dispute, or to have considered, as they should have considered, the evidence before them. The learned Subordinate Judge appeared to consider that when the consignment arrived in Delhi the goods had undergone no damage, and he took the view that it followed that from the date the plaintiff took delivery the goods must have remained on the Railway premises at the owner's risk. He practically decided the case on assumptions without going in any way into the question as to whether the Railway Company had accepted the custody of the goods after delivery in Agra. The learned District Judge took much the same view.

This in my opinion was a mistaken view It is true that the plaint might have been better worded, but it is perfectly clear that the points for determination were brought out by the evidence on the record. The first point to be noted is this. The East Indian Railway Company, were the carriers from Howrah to Agra. The plaintiff took some sort of objection originally in respect to an alleged damage done to the goods when they arrived at Agra. He instituted a suit in the Small Cause Court in respect of that damage, but he subsequently withdrew it. The withdrawal in no way affects the real point now in dispute. That suit was certainly ill-advised, and he made a mistake in re-iterating his complaint in respect of damage at the time of delivery at Agra in his plaint in the present suit. It is sufficient to say that on the facts, the goods were apparently delivered in Agra in good

condition. The plaintiff's real grievance was this. He wished to consign 53 bales after their arrival in Agra to Delhi. The Company was unable to accede to his wishes for some time, as booking had been stopped between Agra and Delhi for goods in bulk, owing to the exigencies of Military requirements. These 53 bales were undoubtedly left at Agra on the Railway premises. The plaintiff's real case was that they were left in the custody of the Company and that when booking was re-opened owing to the negligence of the Company during the period in which the goods had remained on the Railway premises, considerable damage had been done to the consignment, and it is in respect of this damage that the appeal is pressed. It is somewhat surprising that although there is on the record a mass of proved correspondence between the parties, a perusal of which sheds considerable light upon the dispute, neither the Trial Court nor the lower Appellate Court has referred to any portion of this correspondence. It will be necessary for me to refer to this correspondence in some detail.

[Here, after referring to the correspondence, His Lordship proceeded :—]

Before I arrive at a finding as to what actually happened—a finding which it is open to this Court to arrive at under section 103 of the Code of Civil Procedure as the evidence disclosed by these documents has not been in any way considered by the lower Appellate Court, I think it advisable to state my view of the principles which should be applied to this case. In respect of the consignment from Howrah to Agra no difficulty arises. Under the conditions governing that consignment it was for the plaintiff to remove the goods from the Railway premises without unnecessary delay, and if he did not remove those goods from the Railway premises the Railway Company was in no way responsible for their safe custody. This is clear. But this circumstance does not really affect the point in dispute. The plaintiff's case is that a fresh contract arose after delivery was taken by him at Agra whereby the Station Master undertook to retain the 53 bales in Railway custody until booking of goods in bulk to Delhi was re-opened. The case of the Railway Company is that the Station Master accepted no responsibility in the matter, and that the plaintiff in spite of the protests of the Station Master left the goods on the Railway premises. It is further argued that even if the Station Master accepted responsibility, the Railway Company is not bound by his action. My first decision will have to be a decision of fact. Did the Station Master accept responsibility for the custody of the 53 bales after they were delivered in Agra ? If he did not accept responsibility there is an end of the matter and this appeal must fail. If he did accept responsibility a further question will arise, as to whether the Railway Company is bound by his action. The learned Counsel for the respondent Company has suggested that there is a rule under which no Railway Company is responsible for the safe custody of goods delivered to them whatever acceptance there may have been by their agent until a Railway receipt has actually been given. He has not produced this rule. But even if such a rule existed it would not have force in any circumstances under the decision of a Full Bench of this Court in *Sohanlal Munnalal* v. *East Indian Railway*. (1) In the particular circumastances of this case such a rule could have no application apart from that authority. Ordinarily there would not have been the slightest difficulty in re-booking the goods to Delhi. The plaintiff would have indicated his requirements on a forwarding note, the Railway would have at once accepted the consignment and the Railway's responsibility would have been clear. But a peculiar situation has arisen owing to the fact that booking had been stopped to meet the special circumstances of the Military situation. The Station Master was clearly the agent of the Company. It was open to him to say to the plaintiff either that he would not permit the goods to remain upon the Railway premises, or that he would permit the goods to remain upon the Railway premises at the plaintiff's

(1) 65 Ind. Cas. 109; (1922) A. I. R. (A.) 9; 44 A. 218; 20 A. L. J. 91 (F. B.).

risk, or that he would accept bailment of the goods. There was nothing to restrict his authority whichever of the three courses he chose to adopt. This is a case where the Station Master was acting both in the course of his employment and within the scope of his authority, and there can be no question as to the law upon the subject. That law is very clearly laid down in section 226 of the Indian Contract Act and it is unnecessary to discuss whether the principles of *Dyer* v. *Munday* (2) and *Bayley* v. *The Manchester, Sheffield and Linconshire Railway Co.* (3) to which reference has been made in *Fazl Ilahi* v. *East Indian Railway Co.* (4) are modified by the provisions of sections 227 and 237 of the Indian Contract Act. Here the Station Master clearly had authority to bind the Company by his action. The responsibility of the Railway Company is thus that of a bailee under sections 151, 152 and 161 of the Indian Contract Act. This is clear from the provisions of section 72 of the Indian Railways Act (IX of 1890).

It now has to be considered what actually happened. It is clear that the 53 bales when taken out of the waggon were placed under cover of the roofed platform and sheeted. This will be seen from Mr. Sandwell's letter of the 18th June 1918. The Trial Court found that the plaintiff did not execute a forwarding note. The lower Appellate Court was apparently under the impression that he did execute a forwarding note. Whether he did or did not do so appears to me unimportant. He probably did. But his letter of the 24th May, 1918, would have the effect of a forwarding note. It contains a clear request to book the goods. The Station Master certainly did not book the goods but he kept them in his custody. On the 27th May 1918 the plaintiff stated that the goods were at Railway risk. The Station Master did not reply that the goods were not at Railway risk in his answer to that letter. He merely requested the plaintff to await the Traffic Manager's reply. It is true that on the 1st of June 1918, the Station Master suggested that the goods were at plaintiff's risk but the plaintiff denied that suggestion on the 2nd June 1918, and on the 13th June, 1918, the Station Master in his letter to the District Traffic Manager did not suggest that the goods were at plainliff's risk and left it an open question whether wharfage should be charged. When the Traffic Manager directed the plaintiff to remove the goods the Station Master on the 19th June 1918, forwarded the order to the plaintiff, but on the 21st June 1918, he made the suggestion that he would book the goods in small consignments of 6 maunds each. From the 27th June 1918 the Station Master again referred to the goods as being at the plaintiff's risk but on the 19th July 1918, the Station Master wrote to the plaintiff that re-booking had been opened, offering to book the goods to Delhi at once. It is clear to me on this evidence—and I would arrive at a finding of fact accordingly—that the Station Master never definitely directed the plaintiff to remove the goods, that he never definitely told the plaintiff in unmistakable terms that the goods were being kept on the Railway premises at his own risk, and that he never definitely accepted the goods at Railway risk. But his conduct in retaining the goods in the Railway shed sheeted affords to my mind satisfactory evidence that he accepted the bailment of the goods on behalf of the Railway Company and in the circumstances section 72 of the Railways Act comes into operation and the Railway Company is responsible for their safe custody. There are no qualifying circumstances. I attach no importance to the Railway Company claiming for wharfage as showing an admission on their part that they were responsible for the goods for they appear to have claimed wharfage not on goods for despatch waiting to be consigned, but on an insupportable plea that the goods were available for delivery as soon as they arrived in Agra and were afterwards kept on the Railway premises at the plaintiff's risk. It is

(2) (1895) 1 Q. B. 742; 64 L. J. Q. B. 448; 14 R. 306; 72 L. T. 448; 43 W. R. 440; 59 J. P. 276.

(3) (1872) 7 C. P. 415; 4 L. J. C. P. 278.

(4) 64 Ind. Cas. 868; 43 A. 823; 19 A. L. J. 654; 1922) A. I. R. (A.) 324.

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however sufficient for the purpose to find, as I do, that the Railway Company were bailees. As bailees they were bound to take such care of the goods as they would have taken of their own goods of a similar nature, and are bound in damages for loss resulting from their negligence.

The question now arises whether there was any damage and whether that damage originated owing to the defendant Company's negligence. There can be no doubt as to the fact of damage and this point can be decided at once as a question of fact under the provisions of section 103 of the Code of Civil Procedure. The evidence is ample for the decision of this point. It would be most inadvisable, in my opinion, to drag out this protracted trial by sending the matter back for a finding of fact by the Court below. The Commissioner's report which was made in conjunction with members of the Railway staff has never been challenged; so both the questions of damage and the amount of damage can be determined on that report.

Further a finding under section 103 can be arrived at, as to the cause of damage. The materials here again are ample. There is nothing to show that the goods were damaged when they arrived at Agra or that they were damaged while being unloaded. It is clear on facts that the damage took place while the goods were stored under cover of the roofed platform, and it was due entirely to careless stacking. The goods had clearly been packed in such a manner that if a very heavy weight was superimposed upon them, they were bound to be damaged, and they were apparently so stacked that a heavy weight was superimposed on many with the result that the cases broke and the contents were in some instances irretrievably ruined. I have no hesitation in finding that this damage was caused by careless stacking by the Railway Company and that it was caused after the arrival of the goods in Agra and before the Commissioner made his inspection. Taking this view I would decree the appeal for Rs. 828-8-6 with proportionate costs and future interest at 6 per cant. from the date of institution to the date of realisation. The respondent Company will pay their own costs throughout, the proportionate costs of the plaintiff in the Trial Court and his full costs in the First Appellate Court and in this Court his full costs including fees on the higher scale.

Sulaiman, J.—I agree with the conclusion arrived at by my learned brother.

N. H. *Appeal allowed.*

CALCUTTA HIGH COURT.

CIVIL REVISION No. 843 OF 1921.

June 12, 1922.

Present:—Mr. Justice Suhrawardy and Mr. Justice Panton.

RAJ CHANDRA DAS—PETITIONER

versus

KALI KANTA DAS AND OTHERS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), ss. 89, 92—Sale, setting aside of—Auction-purchaser, if necessary party—Mention of auction-purchaser's name in petition, if sufficient—Notice on parties.

There is no provision in the law that the auction-purchaser must be made a party in an application to set aside the sale. It is enough for the purposes of an application under O. XXI, r. 89, Civil Procedure Code, that the auction-purchaser should be mentioned by name.

Obiter:- It is desirable that in an application for setting aside a sale, the Court, without reference to the parties mentioned in the petition, should direct the issue of notice of the application upon the decree-holder, the auction-purchaser and any other party who may appear to have been affected by the sale. [p. 778, col. 2.]

Civil revision against an order of the Court of the District Judge, Rangpur.

Mr. *Atul Chandra Gupta*, for the Petitioner.

Messrs. *Jatindra Nath Sanyal* and *Dinesh Chandra Roy*, for the Opposite Party.

JUDGMENT.

Suhrawardy, J.—The facts of the case out of which this appeal has arisen are as follows:—The petitioner held a

mortgage-decree against one Kali Kanta Das. In execution of a rent decree against Kali Kanta the mortgaged property was sold and purchased by the opposite party Kasiruddin Sarkar. On 1st March 1921, within 30 days from the sale, the petitioner made the necessary deposit and filed an application under O. XXI, r. 89, Civil Procedure Code. The Munsif passed the following order. "One Raj Chandra Das applies for setting aside the sale on deposit of the decretal amount with compensation. He is to prove the mortgage. Fix 9th March 1921 for hearing. The decree-holder also to bring evidence if he likes." On the 9th March following the order passed was: "The applicant does not appear to prove his case and hence the application under O. XXI, r. 89, Civil Procedure Code is rejected." The petitioner appealed to the District Judge against the order of the Munsif rejecting his application under O. XXI, r. 89, and the learned District Judge in a considered judgment expressed the opinion that, if on account of a certain bar in law the petitioner's application was not infructuous, he would have remanded the case to the First Court. He observes in one part of his judgment: "I consider, therefore, that the case has been disposed of on a preliminary ground, and that should it otherwise appear desirable to do so, it would be open to me to make the order of remand asked for." He, however, dismissed the petitioner's appeal on the ground that the auction-purchaser was not made a party to the application made under O. XXI, r. 89, and hence that application was incompetent, inasmuch as the auction-purchaser could not be made a party at that stage as more than 30 days had elapsed since the sale. He was pressed by a decision of this Court in *Ajiuddin Ahmad* v *Khudabux Khondkar* (1), decided on the 27th January 1919 by Fletcher and Walmsley, JJ., and held that the auction-purchaser was a necessary party in an application like the present one, and as he was not made a party to this application within time, it would serve no useful purpose to remand the case to the Munsif.

The petitioner contends before us first that there is no provision in law enjoining that an auction-purchaser must be made a party. What the law insists upon is that before an order is passed setting aside a sale the auction-purchaser must have notice of the application under O. XXI, r. 92, clause (2). His second ground is that as a matter of fact he did mention the name of the auction-purchaser and it was for the Court to give him proper notice of the application.

With reference to the first point the Civil Procedure Code of 1882 did not expressly declare that the auction-purchaser must have notice of the application to set aside the sale either under section 310-A or section 311 of that Code or that no order setting aside the sale should be made in his absence. The point, however, came for consideration in several cases under the old Code before this Court and the majority of them held that on general principles an adverse order should not be passed against a party affecting his vested right without notice to him and behind his back, *Kripali Singh* v. *Pairoo Rout* (2). In order to give effect to this view of the law a proviso has been added to O. XXI, r. 92, of the present Code to the effect: "provided that no order shall be made unless notice of the application has been given to all persons affected thereby." All that the Statute now demands is that no order should be passed setting aside a sale without giving notice to the parties affected by it. The Statute or the case law does not go beyond the rule, namely, that no order should be passed without such notice. There is no provision in the law, nor have we been referred to any case where it has been authoritatively laid down that the auction-purchaser must be made a party in an application to set aside the sale. It is not clear what is meant by the expression "made a party." It seems to have been loose-

(1) 50 Ind. Cas. 5.

(2) 5 Ind Cas. 305; 11 C. L. J. 86.

ly used in some of the reported cases, but all these cases were decided to substantiate the rule that the auction-purchaser should be afforded an opportunity of being heard before an order was passed setting aside the sale. If by the expression it is understood that the parties to the application should be arrayed in the corresponding categories of plaintiffs and defendants, there is no provision to that effect within the four corners of the Code of Civil Procedure. To hold otherwise would necessitate reading into the proviso to O. XXI, r. 92 a mandatory provision which could have, had the Legislature so intended, been expressly mentioned. Reference may usefully be made to the Forms prescribed in the First Schedule, Appendix E to the Code of Civil Procedure. Form 6 which is the form of application for execution of decree has a column in which names of the parties, namely, the plaintiff and the defendant are to be mentioned. All the other forms relating to execution have the word "title" on top of them. By "title" the names of the parties given in the application for execution are clearly indicated as all these applications and notices relate to the execution case. Form No. 36 which is the form of an application under rule 90 (and is applicable to an application under rule 89) has the same superscription. If any other "title" including the name of the auction-purchaser was intended, the heading of the form would have been otherwise.

Coming to the facts of the present case it appears that the petition which the petitioner filed on the 1st March praying for permission to deposit the decretal amount and to have the sale set aside does not contain the name of any party to it save the names of the parties to the execution case. It is headed *Naresh Chandra Lahiri*, decree-holder v. *Kali Kanta Das*, judgment-debtor: and mentions the number of the execution case in which the property was sold. The name of the petitioner even does not appear at the top of it. In the body of the petition the applicant mentions the name of the auction purchaser, the present contesting opposite party as the person who had purchased this property at the auction-sale. In my judgment this is sufficient compliance with the requirements of the law. No doubt the Court was incompetent to pass any order without notice to the auction-purchaser, but notice which the law thus enjoins upon all parties affected by the sale may be issued at the instance of the petitioner or even at the instance of the Court. It is apparent from the order passed by the Court on this petition directing the decree-holder to bring his evidence if he liked that the learned Munsif at that stage thought that the only party affected by the sale was the decree-holder. If it were subsequently discovered that the auction-purchaser had not got notice of the application, it was open to the Court to direct service of notice upon him before passing any order on the application. It appears desirable that in an application for the setting aside of a sale the Court, without reference to the parties mentioned in the petition, should direct issue of notice of the application upon the decree-holder the auction-purchaser and any other party who may appear to have been affected by the sale.

The case on which the learned Judge relies does not lay down the exact proposition that the auction-purchaser must be made a party in the sense in which that expression is used in connection with suits. There the learned Judges were considering the question whether the auction-purchaser was a necessary party to the application. It may be that in that case the auction-purchaser was not even mentioned in the petition. The judgment in the case does not show the real facts and so I am unable to hold that it in any way lays down a view contrary to that which I have expressed above. I have sent for and examined the record of this Court in that case and find that it was an application under O. XXI, r. 90 and that the sale in that case took place on May 5, 1916 and the application to set it aside was made on October 4, 1917. An application was made by the judgment debtor on November 8, 1918, to make one of the auction-purchasers party to the case. These were the peculiar features of that case on which the judgment of this Court is justifiable.

The second point raised by the learned Vakil for the petitioner had been virtually answered by my observations with regard to the first point. I am of opinion that it is enough for the purposes of an application under O. XXI, r. 89 that the auction-purchaser is mentioned by name. The present application was filed in time and was in order.

As I have observed the learned Judge was willing to send the case back for hearing on the merits, had he taken the view of the law we have now adopted. It, therefore, remains for us to pass the order which the learned Judge should have made in this case. The order of the Munsif, dated the 9th March 1921, will, therefore, be set aside and the case sent back to him for hearing on the merits. We allow no costs.

Panton, J.—I agree.

N. H. *Order set aside.*

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

June 26, 1924.

Present :—Lord Dunedin, Lord Carson and Mr. Ameer Ali.

NAYAK VAJESINGJI JORAVARSINGJI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

*Act of State—Acquisition of territory—Municipal Courts—Rights of subjects—Pleadings—Burden of proof—General statements—*Potta *holder, whether lease-holder—Panch Mahals—Naiks, status of.*

When a territory is acquired by a Sovereign State for the first time that is an Act of State. It matters not how the acquisition has been brought about. [p. 780, col. 2.]

Secretary of State for India in Council v. *Bai Rajbai*, 30 Ind Cas. 303; 42 I. A. 229; 19 C. W. N. 1087; 13 A. L. J. 953; (1915) M. W. N. 563; 29 M. L. J. 242; 18 M. L. T. 179; 2 L. W. 731; 17 Bom. L. R. 730; 39 B. 625; 23 C. L. J. 1 (P. C.), *Secretary of State for India* v. *Kamachee Boye Sahaba*, 7 M. I. A. 476; 13 Moo. P. C. 22; 7 W. R. (Eng.) 722; 4 W. R. P. C. 42; 1 Suth. P. C. J. 373; 1 Sar P. C. J. 684; 19 E. R. 388 and *Cook* v. *Sprigg*, (1899) A. C. 572; 68 L. J. P. C. 144; 81 L. T. 281 15 T. L. R. 515, referred to.

Any inhabitant of the territory can only make good in the Municipal Courts, established by the new Sovereign, such rights, as that Sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to these inhabitants to enforce these stipulations in the Municipal Courts. The right to enforce remains only with the High Contracting Parties. [p 780, col. 2.]

If there existed a right, either admitted or that could be established by decree of Court, and that right it was alleged was taken by an "Act of State", it would be necessary for the soveriegn so specifically to plead the "Act of State", but if cession is admitted the onus is cast on the person admitting cession to show the acts acknowledging his rights after cession and a plea specifically using the words "Act of State" is not required. [p. 781, col. 1.]

In a treaty of cession a mere general statement that existing rights will be upheld cannot prevail against exact determinations made by Government Officers. [p. 781, col. 1.]

Any statement in general terms that rights will be respected must necessarily mean as these rights are on investigation determined by the Government Officials. To suppose that by such general statements in a proclamation the Government renounced their right to acknowledge what they thought right and conferred on a Municipal Court the right to adjudicate as upon rights which existed before cession, is a misapprehension of law. [*ibid.*]

The mere fact that a document of title held by certain persons is called a *potta*, and that they executed a *kabuliyat* in similar terms is not conclusive of the question of whether they were mere lease-holders, *i.e.*, farmers of revenue, or were true proprietors paying a *jamabundi* to the overlord. The term "*potta*" might quite appropriately be used for the instrument fixing such *jamabundi*. [p. 781, col. 2.]

The Naiks in Panch Mahals do not possess rights of hereditary proprietorship. [p. 783, col. 1.]

Appeals against the judgments and decrees of the Bombay High Court (Sir Basil Scott, C. J., and Beaman, J.), dated the 17th January 1917, affirming those of the District Judge, Ahamedabad, dated the 24th February 1913.

Messrs. *Dunne, K. C.*, and *Parikh*, for the Appellants.

Sir *G. Lowndes, K. C.*, and Mr. *Kenworthy Brown*, for the Respondents.

JUDGMENT.

Lord Dunedin.—In these consolidated appeals the three Naiks of Tanda, Chandwana and Katwada respectively, sue the Indian Government for a declaration that they are proprietors of the whole lands in the *talukas* belonging to them and that they are not bound to accept a lease of the same in

the terms offered to them by the Government in 1907. They admit that they are bound to pay a *jamabandi* or revenue contribution but contend that there the right of the Government of India ends. Their demand was refused by the District Judge and his judgment was confirmed on appeal by the High Court.

The lands in question are situated in the Panch Mahals and previously to 1860, were in the domain of Scindia of Gwalior. On December 12th of that year Scindia ceded this territory to the British Government by a treaty of which Art. 3 is as follows:—

"The Maharaja transfers to the British Government in full Sovereignty the whole of His Higness' possession in the Panch Mahals and to the south of the river Narbada also Paragna Kumghar on the Betwa river on the following conditions:—

"1st. That for the lands transferred by His Highness, the British Government shall give in exchange lands of equal value calculated on both sides on the present gross revenue.

"3rd. That each Government shall respect the conditions of existing leases until their expiry, and that in order that this may be made clear to all concerned, each Government shall give to its new subjcets leases for the same term of years and on the same conditions as those which they at present enjoy.

"4th. That each Government shall give to its new subjects '*sanads*' in perpetuity for the rent-free lands—the *jageers* the perquisites and the hereditary claims (*i. e.*, '*huks* and *watans*') which they enjoy at present under the other Government."

Their Lordships will have occasion presently to enquire into the circumstances of an earlier date, but, for the moment, they pause at this date because what happened in 1860 determines the law of the case. This law was most clearly laid down in the judgment of the Board delivered by Lord Atkinson in the case of *Secretary of State for India in Council* v. *Bai Rajbai* (1). Their Lordships do not propose to repeat what was there said. It was no new law that Lord Atkinson laid down. The same had been held in the case of *Secretary of State for India* v. *Kamachee Boye Sahaba* (2) and *Cook* v. *Sprigg* (3). But a summary of the matter is this. When a territory is acquired by a Sovereign State for the first time that is an Act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can only make good in the Municipal Courts, established by the new Sovereign, such rights, as that Sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to these inhabitants to enforce these stipulations in the Municipal Courts. The right to enforce remains only with the High Contracting Parties. This is made quite clear by Lord Atkinson at page 238,* when, citing the Pongoland case of *Cook* v. *Sprigg* (3) he says: "It was held that the annexation of territory made an Act of State and that any obligation assured under the treaty with the ceding State either to the sovereign or the individuals is not one which Municipal Courts are authorised to enforce." Their Lordships have thought it necessary so far to repeat what has been said before because the appellants' Counsel sought to make two points. He said that Act of State had not been pleaded before the Judge of first instance and ought not to be given effect to now.

(1) 30 Ind. Cas. 303; 42 I. A. 229; 19 C. W. N. 1087; 13 A. L. J. 953; (1915) M. W. N. 563; 29 M. M. L. J. 242; 18 M. L. T. 179; 2 L. W. 731; 17 Bom. L. R. 730; 39 B. 625; 23 C. L. J. 1 (P. C.).

(2) 7 M. I. A. 476; 13 Moo. P. C. 22; 7 W. R (Eng.) 722; 4 W. R. P. C. 42; 1 Suth. P C. J. 373; 1 Sar. P. C. J. 684; 19 E. R. 388.

(3) (1899) A. C. 572; 68 L. J. P. C. 144; 81 L T. 281; 15 T. L. R. 515.

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Their Lordships think that at least the appellants themselves recognised the true situation when, in paragraph 6 of the plaint, they say: "after the advent of the British rule the ancestors of the plaintiffs used to be treated as proprietors of the estates in the same way as the other *talukdars* in the Panch Mahals." But in truth no plea specifically using the words "Act of State" is required. If there existed a right, either admitted or that could be established by decree of Court, and that right it was alleged was taken by an Act of State, it would be necessary so specifically to plead, but that is not the situation. The moment that cession is admitted the appellants necessarily become petitioners and have the onus cast on them of showing the acts of acknowledgment, which give them the right they wish to be declared. The other point was that, in virtue of certain general declarations, the appellants became entitled to enforce the treaty. The general declarations will be subsequently examined. If they give a right of themselves well and good, but they can never have the effect of altering the law as above stated; that is to say, of making the appellants, so to speak, a party to the treaty with a right to enforce the conditions of the same in a Municipal Court.

The whole object accordingly of enquiry is to see whether, after cession, the British Government has conferred or acknowledged as existing the proprietary right which the appellants claim. The appellants first sought to prove that under Scindia they were proprietors. The defender retorted that they were merely farmers of revenue. Certain documents were produced out of the Gwalior repositories and controversy was raised as to whether they were genuine or had been tampered with. Their Lordships, for the reasons of law above stated, think it quite unnecessary to consider this question because their view of what was the tenure under Scindia has no bearing on the question. The view of the officials of the Government as to that would influence them to make up their minds as to what title should be given or recognised, but even then, as far as their Lordships are concerned, it is what they did after investigation, not what they thought at investigation, that is matter of moment.

The first touch between the Government of India and these people did indeed precede the cession. In 1850—51, owing to frontier troubles, it was thought expedient that a lease of all this territory should be granted to the Company, who thereupon managed the territory, respecting the rights of the inhabitants as they found them. As a matter of fact the ancestors of the appellants at that time were the holders of *pottas* for an unexpired term, these *pottas* having been granted by Scindia and payments were under them made payable to the Company. Their Lordships will at once, in order to show that they have not been swayed by any contrary contention, make the concession that the mere fact that the document of title held by the appellants is called a *potta*, and that they executed a *kabuliyat* in similar terms is not conclusive of the question of whether they were mere lease holders, *i. e.*, farmers of revenue, or were true proprietors paying a *jamabundi* to the overlord. The term *potta* might quite appropriately be used for the instrument fixing such *jamabundi*. The terms of the existing *pottas* expired in 1859, and in February 1860 Captain Buckle, who was in charge for the Government (who had by this time succeeded the Company), granted, on the part of the Government of Scindia, three *pottas* to the appellants for a period of three years from 1860 to 1863. One of these *pottas* may be taken as a sample. The *jamabundi* for each year is fixed at Rs. 5,617-5-3. This was made up of Rs. 5,000 for the "*jamabundi* revenue," Rs. 217-2-5 for a balance and Rs. 600 a debt due to *jamadar* Satarkhan. This last was an old debt due by the Naik which the Government was making him pay. Clause 2 provides for the Naik finding security from a banker, a proceeding unnecessary if the land could have been attached, but quite necessary if the lessee was

not proprietor but merely a farmer of revenue. Then there is a clause binding the Naik at the termination of the *potta* to "hand over" the villages to the Government.

In 1860, in December, as already stated, came the cession. Immediately after the cession the Government set itself to enquire what were the estates transferred and what were the tenures of their new subjects. This was necessary, first of all, because as land of equal value elsewhere was to be ceded to Scindia, it was necessary to note the exact value of what had been taken over, and also because undoubtedly the Government wished to give effect to the terms of the treaty above quoted and in particular to the fourth head of the 3rd clause. Accordingly Captain Buckle, who was in charge, was told to make enquiries and furnish exact lists, giving particulars of extent leases, also the names of all *jagirdars* and their tenures and all charitable and rent-free holdings. Buckle made a report and in this report he enters the appellants as mere lease-holders and not as *jagirdars* holding proprietary interests. No doubt this was, so to speak, behind the backs of the appellants but it is significant as being the foundation of the action which followed. The *pottas* which had been granted expired in 1863, consequenlty they had to be renewed. The Government officers proposed some increase of rent. In the meantime some outsiders made offers to take leases of the three *talukas* for a rent preposterously higher than anything hitherto received. The Naiks had got wind of this and made representation to the Government in August, 1863. Their prayer is worded "As Government had been taking care of us they will be graciously pleased to grant us a *potta* to do which they are quite competent."

The Government came to the conclusion that they would not accept the outsiders' offer in view of the long time that the Naiks had had possession and renewed on the same terms. In 1868 the question came up again. There was a long enquiry by the Government as to the precise position of the Naiks. As an interim arrangement a lease was granted on the old terms to endure till the Survey. This lease also provided for handing back the villages at the expiry of the period. The enquiry dragged on for some years, but in 1876 the Government came to a decision that the Naiks were not entitled to hereditary rights, but might be continued as leaseholders so long as they behaved themselves. This determination was conveyed to the Naiks by letter of 12th June, 1876, which contains the following passage:—

"It appears that under the old rule the *pottas* (leases) of these villages were also given several times to other people besides these Naiks, and from this it appears that their status may not be of hereditary *talukdars*; but for about the last fifty years the *vahivat* (management) has been smoothly carried on by the houses (families) of the three Naiks under their respective *pottas* and Meherban Propert Saheb and Major Voice Saheb have expressed their opinions that the management under the *potta* may continue with the Naiks so long as they properly take care of the villages. Hence this question is decided accordingly. The *pottas* of the three *talukas* are to be continued till the survey takes place. The Survey Department has taken the trigonometrical Survey of the three *talukas* and it may be suitable to fix the amounts of the *pottas*, keeping in view the trigonometrical measurement at the time of the Survey. No hereditary right of the Naiks is admitted in the preparation of the *pottas*."

In 1881, the Survey having been introduced, the Government came to a resolution as to what leases should be granted. They were to be on a sliding scale calculated on the Survey assessment and allowing the Naiks a 10 per cent. margin. This proposal must have been communicated to the Naiks, though there is no direct evidence to that effect, for in 1883 there is a petition from the Naiks complaining of the proposal as calculated to impoverish them; complaining of the taking away of the forest land, and offering as evidence of right a document

granted in Scindia's time. This petition was refused in 1883 and the refusal communicated to the Naiks. In 1887 the question of the forest land arose in an acute form. The Naiks petitioned against the taking of the forest land by the Government. In the petition they really sought to re-open the whole question. Thus, in Article 7 of the petition of 31st October, 1887, they say as follows:—

"7. If our right is considered by the Government as specially that of *ijaradar* mentioned above, it is a great mistake; we have the right of ownership over our village, which is handed down from generations; we had been recovering and we have been recovering the *jamabandi* tax, *vaje* (payment in kind), etc., from our villages in any manner we like. Also we gave (land) to others free from any tax; we had been and have been giving as a loyal subject to the late and present Government a certain amount as *chauth* in lieu of remaining under their protection."

This petition was considered, was not sanctioned, and a reply sent in the negative on 26th April, 1888. Under the Forestry Acts the Naiks could have appealed against this order, but did not do so.

In 1902 the Naiks again sought to raise the whole question by sending a memorial to the Government, in which they went over the whole ground again and claimed to have proprietary rights. This was sent to headquarters, when a report from the Under-Secretary, *inter alia*, said as follows:—

"4. The question as to the proprietary rights of these Naiks in their villages was fully inquired into and decided in the year 1880, and we are of opinion that no valid reason has now been shown for re-opening it after so long an interval of time. We are also of opinion that as the status of the memorialists is that of mere lease-holders, holding their leases at the pleasure of Government, their claims to the sole proprietary title in the forests within the limits of their villages cannot be admitted."

And the final determination of the Government was conveyed in a resolution of 13th December, 1902:—

"The evidence collected by Mr. Beyts clearly showed that these Naiks never acquired the position of *talukdars*, but that they were merely lease-holders, and in paragraph 1 of Government Resolution No. 2,783, dated 31st May, 1880 (copy appended), the following orders were passed by this Government."

In 1904 there was a final report from the Government Officials as to the leases, which, as already noticed, had not actually been granted. By this time there had been complaints of what the Naiks had been doing, and some of the officials were anxious that no new leases should be granted to the Naiks, but that the whole villages should be made *kasla*. The Government, however, determined that the Naiks should have another chance, and the leases were offered, upon which they took the present proceedings.

It is abundantly clear from what has been above set forth that, although the Government Officials took great pains to determine what was the position of the Naiks, they came to the conclusion that their rights were not those of hereditary proprietors. To say that, is, in view of the law as laid down above, to say enough, but their Lordships will notice what has been urged on the other side. It is pointed out that the Naiks have been in the saddle for a long time. This is true, and it is to this fact that they held their position as lease-holders at all. But for long possession the villages would have been made *kasla* as others had been.

Then it is said that, by the terms of certain proclamations, the Government acknowledged the right. The proclamations in 1852, when there was merely a transference for administration purposes, are neither here nor there. When we come to the cession the proclamation referred to is in these terms:—

"I wish to let you know in time that the laws of the British Empire will be in force from the 1st of May next in the Panch Mahals.

"2. It has hitherto been the practice to reserve civil suits against the lands or houses for arbitration.

"3. That can no longer be the case; a suit once filed cannot be withdrawn unless by the consent of the complainant and the law will be enforced.

"4. As a friend of all your ancient houses I wish to warn you before-hand against debt. If you wish to preserve your present position, you should avoid it as the most unfortunate thing which can happen to you."

Then follows a list of names, among which are persons who have had acknowledged to them a real proprietary right, and in this list occurs the names of Katwada, Chandwana and Tanda. There is also, specially in the Naiks' petition, reference made to proclamations made at the time of the Durbar. There are two answers to be made to an argument founded on such documents. The first is that a mere general statement that existing rights would be upheld could never prevail against exact determinations such as have been above set forth. The second is that any statement in general terms that rights will be respected must necessarily mean as these rights are on investigation determined by the Government Officials. To suppose that by such general statements in a proclamation the Government renounced their right to acknowledge what they thought right and conferred on a Municipal Court the right to adjudicate as upon rights which existed before cession, is, in their Lordships' opinion, to misapprehend the law as above set forth. It was also urged that the Government had recognised certain free grants which had been made in the past by the Naiks. This is true. But the Government had directed a special head of inquiry to be made as to free grants. The wish not to disturb persons whose tenure had been, *de facto*, free was a generous policy. But to infer from this generosity that the Government was admitting that the grants had originally been properly made and that from that admission flowed the further admission that the Naiks were true proprietors is to make a mere inference override a direct statement. One other matter may be noticed. The Naiks' susceptibilities seem to have been aroused by the term "*ijaradars*" being used as to them, and requested that the term "*talukdars*" should be used. The Government reply is as follows:—

"In reply to his petition, dated 26th September, 1898, to the address of Government, Naik Ratansing Pratapsing of Tanda in the Dohad Taluka of the Panch Mahals District, is informed that Government have no objection to his being addressed as '*talukdar*' instead of a '*patadar*' in official communications, but it should be distinctly understood that this concession will not in any way affect the orders passed by Government in May, 1880, regarding the tenure of the petitioner's holding."

Now, the resolution of 1880 referred to was the foundation of the proposals as to the 10 per cent. margin, which, denying the proprietary rights of the Naiks, was objected to by the petition which was refused in 1883.

For these reasons their Lordships are satisfied that this appeal must be dismissed with costs, and they will humbly advise His Majesty accordingly.

Their Lordships feel bound to call attention to the state of the record. In the teeth of directions issued from the office no trouble whatsoever had been taken with the arrangement of the record, and it came before their Lordships in quite a disgraceful state of confusion. Had the appellants been successful their Lordships would not have hesitated to disallow *in toto* the Solicitors' fee for perusing the record.

S. D. *Appeal dismissed.*

Solicitors for the Appellants.—Messrs. *T. L. Wilson & Co.*

Solicitor for the Respondent.—*Solicitor to the India Office.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 222 OF 1921.
March 26, 1924.
Present:—Sir Victor Murray Coutts-Trotter, Chief Justice, and Mr. Justice Ramesam.

AL. VR. CT. LAKSHMANAN CHETTY AND OTHERS—PETITIONERS—APPELLANTS
versus
V. R. RM. VL. SUBBIAH CHETTY AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), s. 7—Civil Procedure Code (Act V of 1908), O. XXXII, r. 6—Decree obtained by Hindu father and minor sons—Discharge by father—Execution application—Limitation.

Where a Hindu father and his minor sons (suing through their father as their next friend and guardian) obtain a decree, section 7 of the Limitation Act applies to an application for execution of the decree, inasumch as, the father cannot give a discharge without the leave of the Court under O. XXXII, r. 6 of the Civil Procedure Code. [p. 786, col. 2.]

Appeal against the order, dated the 24th January 1921 of the Court of the Additional Subordinate Judge, Ramnad at Madura, in Execution Application No. 48 of 1920, in Original Suit No. 224 of 1911.

Messers. *K. V. Krishnaswami Iyer* and *V. Rajagopala Iyer*, for the Appellants.

Mr. *A. Swaminatha Iyer*, for the Respondents.

JUDGMENT.

Coutts-Trotter, C. J.—This case furnishes a signal instance of the mischievous tendency of the Courts in this country to evade, or endeavour to evade, plain statutory mandates, and in no sphere of the law, so far as I have observed, has that tendency been more freely exercised than in that branch of the law we are concerned with in the present case, namely, the Law of Limitation. The way in which this matter stands is as follows:—In October 1913, a decree was obtained in a suit in which the plaintiffs were a father and his three sons, and the three sons were described on the face of the proceedings as suing through their next friend and guardian the first plaintiff (that is, the father). Two months after that decree the father died and it was not until December of the following year 1914 that the eldest of the three sons attained his majority. On the 3rd December 1917, well within three years of the attainment of majority, an execution application was taken out. It is said that that application was barred because time must be taken to have run not from the attainment of majority of the eldest son but from the date of the decree itself, *i. e.*, October 1913. The reason for it is said to be this and it depends upon the construction of two sections of two Statutes, one the learned Judges has referred to, and the other he has not. Before I approach the consideration of the case-law I will look at the sections of the Statutes themselves. The relevant sections of the Limitation Act is section 7. It says this:—"Where one of several persons jointly entitled to institute a suit or make an application for the execution of a decree is under any such disability (that means for our present purpose the minority) and a discharge can be given without the concurrence of such person, time will run against them all; but, where no such discharge can be given, time will not run as against any of them until one of them becomes capable of giving such discharge without the concurrence of the others or until the disability has ceased".

Therefore a good discharge, which could be given without the concurrence of the others, is necessary before, limitation can be invoked. Now, it is said that the father in this case became entitled to give a good discharge as soon as the decree was passed, and to give a good discharge not only on behalf of himself but on behalf of his minor sons. This Court held in a number of cases culminating in the case of *Ganesha Row* v. *Tuljaram Row* (1) that a Hindu father could, as managing member of a family, give a good discharge of a decree-debt notwithstanding the fact that he might appear in the suit in the capacity of guardian *ad litem* or next friend. They based that decision upon the express provisions of Hindu Law and they said that his position as a father was independant of his position as guardian *ad litem* or next friend and that no disability which could attach to him can

(1) 3 Ind. Cas. 928; 21 M. L. J. 1093; 6 M. L. T. 325.

be supposed to attach to him by reasons to which I am coming presently and could in any way affect his position under the general Hindu Law as father. That is the decision of this Court in several cases culminating in *Ganesha Row* v. *Tuljaram Row* (1). What their Lordships were dealing there with was an argument based upon a section of the Civil Procedure Code. That section is the present r. 6, in O. XXXII, and it reads as follows:—"A next friend or guardian for the suit shall not without the leave of the Court receive any money or other moveable property on behalf of a minor either—(*a*) by way of compromise before the decree or order, or (*b*) under a decree or order in favour of the minor". As I said, the basis of the decision in *Ganesha Row* v. *Tulja Ram Row* (2) was that the father occupied two entirely separate positions that he was clothed with a double personality, and that inhibition of his action in a certain manner in one of those capacities was no inhibition of his doing it under the other, the general powers of a Hindu father. Thereupon *Ganesha Row* v. *Tulja Ram Row* (2) went to the Privy Council with this pronouncement of the Madras High Court to deal with and to say whether it was right or whether it was erroneous, and the words of the Privy Council are absolutely explicit in their application of the principle laid down by the Madras High Court and which, so far as I can see, is the necessary substratium of the whole of the argument that has been addressed to us. What their Lordships say is this. "They (their Lordships of the Privy Council) consider it to be clear that when he (that is the father) himself is the next friend or guardian of the minor his powers are controlled by the provisions of the law and he cannot do any act in his capacity of father or managing member which he is debarred from doing as a next friend or guardian without leave of the Court. To hold otherwise would be to defeat the object of the enactment." In other words, their Lordships say in the plainest language, the inhibition imposed upon him in one character must be extended to the other suggested character or else the Act becomes a waste paper. It is said that there are decisions of this Court subsequent to that pronouncement of the Judicial Committee which nevertheless go on saying that a father can give a good discharge without the consent of the Court where the decree has been obtained. I am not at all sure that those cases—most of them are very inadequately reported—do purport to go counter to the principle laid down in *Ganesha Row* v. *Tulja Ram Row* (2), because it is not quite plain, so far as I can see, that, in these cases, the father was the guardian *ad litem* of the minors. All I can say is that, if he was the guardian, the Privy Council decision compels me to say that those cases were wrongly decided; if he was not, they merely say that, where the father is not the guardian *ad litem* he can take the money and give a good discharge, and though I do not disagree with that, I would like to re consider that position hereafter. I am not saying that if this was what those cases had decided, those cases are incorrect; but I am quite clear about this; that, if in those cases, the father was the guardian *ad litem*, they are clearly wrongly decided, and decided in the teeth of the express mandate of the Privy Council case. No one, I think, could plausibly contend that a man in such a double position could give a good discharge. He can only give a discharge after obtaining the permission of the Court. It, therefore, follows that at the time when the father died, he had never been in a position to give a good and legal discharge for this debt and that, therefore, the time must be calculated as beginning to run from the date when the respective disabilities cease. Seeing that one of the decree-holders is still a minor there is really no question of limitation arising in the case. The case will go back for further proceedings in execution.

The appellants will have their costs throughout.

Ramesam, J.—I agree. Several decisions of this Court have been referred

(2) 19 Ind. Cas. 515; 36 M. 295; 17 C. W. N. 765; 13 A. L. J. 589; 18 C. L. J. 1; 15 Bom. L. R. 626; 14 M. L. T. 1; (1913) M. W. N. 575; 25 M. L. J. 150; 40 I. A. 132 (P. C.).

by the learned Vakil for the respondents. The first of these is the decision in *Duraisawmi Sastrial* v. *Venkatarama Iyer* (3). It expressly purports to be based on the decision in *Ganesha Row* v. *Tuljaram Row* (1) which was a decision of this Court, on O. XXXII, r. 7. It was reversed afterwards by the Privy Council in *Gensha Row* v. *Tulja Ram Row* (2). This was followed by a Single Judge in *Ramanadhan Sivayya* v. *Udatha Atchayya* (4). The next case is *Palaniandi Pillai* v. *Papathi Ammal* (5). It is true that this was after the decision of the Privy Cauncil but no reference was made in the argument to O. XXXII, r. 6 or to the fact that the decision in *Ganesha Row* v. *Tuljaram Row* (1), on which the decision in *Duraisawmi Sastrial* v. *Venkatarama Iyer* (3), was based, had been reversed by the Privy Council. This was again followed in *Chivikula Venkatasubbiah* v. *Gollapudi Venkateswarulu* (6) and the same remarks apply to this case also. In *Rati Ram* v. *Nadar* (7) the decree was obtained by a single decree-holder. There was no minor among the original plaintiffs. The original decree-holder died leaving two sons, one a major and the other a minor. The major son on behalf of himself and acting as the next friend for his yonger brother applied that they should be made legal representatives in the place of their deceased father. Before the order was made on the application, the applicant died, and on the day the application came on for hearing nobody appeared and the petition was dismissed. The result was they were not made parties, so that it is not a case where we have two decree-holders one of whom is major and the other a minor represented by the major as next friend. Order XXXII, r. 6 cannot apply to the facts of that case. That case is, therefore, correctly decided and cannot, therefore, help us in this case.

Case reversed and remanded.

S. D.

(3) 12 Ind. Cas. 503; 21 M. L. J. 1038; 10 M. L. T. 370; (1911) 2 M. W. N. 420.
(4) 18 Ind. Cas. 723; (1913) M. W. N. 238; 13 M. L. T. 304.
(5) 22 Ind Cas. 76; (1914) M. W. N. 159; 15 M. L. T. 100.
(6) 44 Ind. Cas. 563; (1917) M. W. N. 816.
(7) 49 Ind. Cas. 990; 41 A. 435; 17 A. L. J. 649.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 84 OF 1922.
November 20, 1922.
Present:—Mr. Justice Pratt.
MAUNG SHWE ON—PLAINTIFF—APPELLANT
versus
PONNIAH MUDALIAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 63—Mortgaged land—Government waste adjoining—Mortgagee, cultivation by—Land capable of separate enjoyment and use—Waste, whether accretion—Mortgagor, whether can sue for redemption.

Government waste land adjacent to a mortgaged holding which is brought under cultivation by the mortgagee and is capable of separate enjoyment and use, is not an accretion to the mortgage land under section 63 of the Transfer of Property Act and, therefore, the mortgagor cannot sue for its redemption.

Appeal against the decree of the Divisional Court, Myaungmya, in Civil Appeal No. 76 of 1920.

Mr. *Ba Thein*, for the Appellant.

JUDGMENT.—Plaintiff sued for redemption of a piece of paddy land measuring 20·61 acres. The Sub-Divisional Court gave a decree for redemption of the 9·03 acres originally mortgaged but refused a decree for the remainder, which was adjacent land brought under cultivation by the mortgagees.

On appeal the Divisional Court gave a decree for the balance as an accession coming under the terms of section 63 of the Transfer of Property Act. My own opinion is that section 63 did not contemplate Government waste land adjoining a mortgage holding as coming within the category of accession.

It is admitted that the so-called accession can be enjoyed and utilised separately. In *Tha Dun* v. *The Zan* (1), Twomey, J., held that an extension into waste adjoining land was not an accession.

(1) 11 Ind. Cas. 808; 4 Bur. L. T. 167.

ADDAKARLU LATCHAMMA v. SEETHALA SUBHARAGUDHU.

This is in accordance with my own view. The appeal will be allowed with costs.

N. H. *Appeal allowed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 471 OF 1922.

August 1, 1924.

Present :—Mr. Justice Jackson.

ADDAKARLU LATCHAMMA—PLAINTIFF—APPELLANT

versus

SEETHALA SUBHARAGUDHU—DEFENDANT—RESPONDENT.

Hindu Law — Inheritance — Division between daughters with full rights — Right of survivorship, whether destroyed.

Where on the death of a Hindu, his daughters effect a division of his properties arranging that each daughter will enjoy her respective share "with full right *i.e.*, with right of alienation by sale etc.," the right of survivorship is destroyed and on the death of any one of them, her share will go to her own heirs and not to her surviving sisters.

Gomathi Ammal v. *Kupputhayi Ammal*, 14 M. L. J. 175, distinguished.

Alamelu Ammal v. *Balu Ammal*, 26 Ind. Cas. 455; 28 M. L. J. 685; 16 M. L. T. 592; (1915) M. W. N. 26, relied on.

Second appeal against the decree of the Court of the Subordinate Judge, Kistna at Ellore, in A. S. No. 210 of 1921, preferred against the decree of the Court of the Additional District Munsif, Tanuku, in O. S. No. 179 of 1919 (O. S. No. 107 of 1919, District Munsif's Court, Tanuku).

Mr. *T. Suryanarayana*, for the Appellant.

Mr. *T. Ramadoss*, for the Respondent.

JUDGMENT.—This appeal is from the decree of the Court of the Subordinate Judge of Kistna at Ellore in Appeal Suit No. 210 of 1921 preferred against the decree of the Court of the Additional District Munsif of Tanuku, in Original Suit No. 79 of 1919.

One Venkanna died leaving three daughters. They came to an oral agreement by which Latchamma and Atchamma each took three acres of his property and Chellamma 5 acres and odd. Chellamma has died and her share is in the possession of her step-son, first defendant. Latchamma, claiming a right as survivor of Chellamma sues for Chellamma's share (she has sold 1·80 acres which are subject of a connected suit Original Suit No. 78 of 1919). The Subordinate Judge had dismissed the suit and Latchamma appeals.

The question for determination is whether when the three sisters made their agreement they cut off the right of survivorship among themselves. The only evidence of the agreement is the statement of Latchamma as plaintiff's first witness: "We effected a division arranging that this property should be enjoyed according to the desire of each. Since then each of us was enjoying our respective shares of property with full right, that is to say, with the right of alienation by sale, etc". The Munsif who recorded this statement did not address his mind to its significance. He confines himself to the question whether before this agreement Chellamma was bequeathed absolute rights by her father Venkanna.

Contrariwise the learned Subordinate Judge does not decide the question of the Will, but confines himself to the agreement. He finds that the sisters intended to destroy their rights of survivorship, and having regard to the language used by Latchamma, I am not prepared to hold that he is wrong. "Full right with the right of alienation by sale, etc"., must, I think, mean that the right of survivorship was destroyed; and Latchamma when she conveyed her share to first defendant's father, seems to have held the same view. The defendant put the point quite clearly in his defence statement, paragraph 5; "it was arranged that each party should enjoy without any right of survivorship". Each case must be interpreted according to the language employed whether written or oral; and not much is to be gained by examining analogous rulings. It is laid down in *Gomathi Ammal* v. *Kupputhayi Ammal* (1), that there must be apt language. In that case as the sisters

(1) 14 M. L. J. 175.

imagined that they had all along an absolute estate it was held that they could not have intended to destroy the right of survivorship. In this case (assuming that Chellamma had no absolute right under Venkanna's Will) the sisters did not imagine that they were dividing an absolute estate. In *Alamelu Ammal* v. *Balu Ammal* (2) the sisters made an oral partition purporting to take their respective shares absolutely and it was held that they had relinquished their right of survivorship.

In *Rukmani Ammal* v. *Narasimha Chariar* (3) the phrase is "the only relationship between us is one of friendship not of property". Such a phrase was not used in the present case but it is not an essential formula. I find that the right to survivorship was destroyed by the agreement. No other point was raised on appeal or appears to be valid. The second appeal is dismissed with costs.

S. D. *Appeal dismissed.*

(2) 26 Ind. Cas. 455; 28 M. L. J. 685; 16 M. L. T. 592; (1915) M. W. N. 26.

(3) 78 Ind. Cas. 173; 46 M. L. J. 285; 19 L. W. 465.

LOWER BURMA CHIEF COURT.

CIVIL REVISION NO. 120 OF 1922.

December 11, 1922.

Present:—Mr. Justice Pratt.

MC AYOOB AND ANOTHER—DEFENDANTS—APPLICANTS

versus

SOWDAGER—PLAINTIFF—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), s. 43—Pro-note—Consideration, failure of—Fraud, effect of.

Where a seller has no title to property sold a pro-note executed in part payment of the price creates no obligation, notwithstanding that the seller is able to give possession to the purchaser.

Fraud vitiates all agreements and this principle extends to pro-notes which are given on the faith of fraudulent misrepresentation.

Civil revision against the decree of the Small Cause Court, Rangoon, in Civil Regular No. 3844 of 1922.

Mr. *Munshi*, for the Applicants.

Mr. *N. N. Sen*, for the Respondent.

JUDGMENT.—Defendant pleaded failure of consideration and misrepresentation.

The allegation was that the pro-note in suit was in part payment of price of room sold and that it transpired that plaintiff had no title and had misled the vendor. The Trial Court hold that there was no defence because plaintiff had been able to give defendant possession and they were not entitled to resist payment until plaintiff gave them a conveyance. Section 43 of the Negotiable Instruments Act provides that a negotiable instrument made for a consideration, which fails, creates no obligation between the parties to the transaction. Fraud vitiates all agreements and there is no reason why this principle should not be extended to pro-notes, which have been given on the faith of fraudulent misrepresentation. The case of *Baboo Lal* v. *Joy Lall* (1) is an authority, if any authority is required for a proposition which seems self evident. I set asid the decree of the lower Court and remand the case for trial on its merits; costs to follow final disposal.

N. H. *Case remanded.*

(1) 24 C. 533; 12 Ind. Dec. (N. S.) 1023.

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

June 26, 1924.

Present:—Lord Dunedin, Lord Shaw, Lord Carson, Lord Blanesburgh and Sir John Edge.

LACHMI NARAYAN AGARWALA AND OTHERS—APPELLANTS

versus

RAMESHWAR PRASAD SINGH AND OTHERS—RESPONDENTS.

Stamp Act (II of 1899), s. 35, pro. (a), scope of—Non-payment of stamp duty, effect of—Penalty.

The proviso (a) of section 35 of the Stamp Act is of equal ambit with the body of the section, and just as an instrument cannot be acted upon, that is to say, nothing can be recovered under it unless it has a proper stamp, so the proviso provides that if there is not a proper stamp it may be put on afterwards on payment of a penalty and the instrument then becomes effective.

RAM DIN v. HAR DAYAL.

Appeal from the judgment and decree of the Patna High Court (Dawson Miller, Kt., C. J., and Mullick, J.), dated the 9th August 1920, printed as 58 Ind. Cas. 99, affirming that of the Subordinate Judge, Purulia, dated 27th September 1917.

Sir *G. Lowndes, K. C.*, and Mr. *Raikes*, for the Appellant.

JUDGMENT.

Lord Dunedin.—In this case, which has been heard *ex parte*, Sir George Lowndes has said everything that could be said on behalf of the appellants, but he has not created any doubt in their Lordships' minds that the judgment of the High Court at Patna was right. It is clear to their Lordships that the proviso (*a*) of section 35 of the Indian Stamp Act, 1899 is of equal ambit with the body of the section, and that just as an instrument cannot be acted upon, that is to say, nothing can be recovered under it unless it has a proper stamp, so the proviso provides that if there is not a proper stamp it may be put on afterwards on payment of a penalty and the instrument then becomes effective.

Their Lordships will humbly advise His Majesty that the appeal be dismissed.

S. D. *Appeal dismissed.*

Solicitors for the Appellant:—Messrs. *W. W. Box & Co.*

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 536 OF 1921.

November 21, 1922.

Present :—Mr. Justice Stuart.

RAM DIN—PLAINTIFF—APPELLANT

versus

HAR DAYAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 177—Ejectment of tenant, suit for—Decision of Assistant Collector First Class—Appeal, where lies—Civil Procedure Code (Act V of 1908), s. 11—Decision of Court not competent to try subsequent suit, whether res judicata.

In a suit for the ejectment of a tenant, an appeal from the decision of an Assistant Collector First Class lies to the District Judge [p. 791, col. 1.]

The decision in a rent suit decided by an Assistant Collector Second Class is not *res judicata* in the Court of an Assistant Collector First Class in a suit for ejectment which the Assistant Collector Second Class is not competent to try. [*ibid.*]

Appeal against the decree of the District Judge of Budaun, dated the 21st December, 1920.

Messrs. *S. A. Haider* and *Harnandan Prasad*, for the Appellant.

Messrs. *S. P. Sinah* and *S. B. Johri*, for the Respondents.

JUDGMENT.—The facts of the suit out of which this appeal arises are these.—Har Dayal cultivates one *bigha* of land on a Rs. 10 rent in Allapur village in Budaun District. In 1920 Ram Din, *zemindar* of the village, sued Har Dayal for two years' rent and interest in the Court of an Assistant Collector of the Second Class. Ram Din asserted that he was the *zamindar* of the plot and that the plot was his *sir* and that Har Dayal was his sub-tenant. Har Dayal denied this. The Assistant Collector, Second Class, found that the land in question was the *sir* of Ram Din which Har Dayal cultivated as his sub-tenent on a rent of Rs. 10 a year, and decreed the suit accordingly. That decision became final.

The suit out of which this present appeal arises had apparently been filed before the suit for arrears of rent. It was filed on the 29th September 1919. In this, Ram Din and two women called Reoti and Chameli sued Har Dayal in the Court of an Assistant Collector, First Class, for the ejectment of Har Dayal from the same plot in respect of which the suit was brought for arrears of rent. Har Dayal set up a plea that he was the *zemindar* of the plot and that the plot was his *khudkasht*. It is not true that he was the *zemindar*. His family had been *zemindars* in the village but had lost their proprietary rights long before 1919. On the 30th June 1920 the Assistant Collector, First Class, decided, some two months after the arrears of rent suit had been decided, that the plaintiffs were *zemindars*, that the land in question was their *sir* and that Har Dayal was a sub-tenant. Har Dayal again asserting that the land was his *khudkasht* appealed to the District Judge

who allowed his appeal. The District Judge found on the facts that the land in question was not the plaintiffs' '*sir*', that Har Dayal and his predecessors cultivated the land in question for more than 50 consecutive years and that Har Dayal had ex-proprietary rights therein. He, therefore, dismissed the suit.

The present appeal is preferred upon the following grounds:—That no appeal lay to the District Judge; that it was concluded by *res judicata*; that the land in question was the *sir* of the appellants, and that Har Dayal was sub-tenant that the Judge had made out a new case for Har Dayal which he did not set up for himself; and that the Judge could not legally decide the nature of Har Dayal's holding.

In regard to the first point it appears to me that on the authority of the Full Bench decision in *Bindeshwari* v. *Gokul* (1), an appeal lay to the District Judge.

In regard to the second point, in the first place, Ram Din alone was plaintiff in the arrears of rent suit, Reoti and Chameli were not parties to that suit. But apart from that point, can it be held that a decision of the Court of an Assistant Collector, Second Class, can operate as *res judicata* in the Court of an Assistant Collector, First Class, when the Court of the Assistant Collector, Second Class, is not competent to try the subsequent suit in which the plea of *res judicata* is raised? It appears to me that on the plain wording of section 11 that question must be answered in the negative. An Assistant Collector, Second Class, is not competent to hear suits for ejectment.

It has been pressed on me by the learned Counsel for the appellant that the decision in *Shahzade Singh* v. *Muhammad Mehdi Ali Khan* (2) lays down a different view. If it laid down a different view I should of course follow the view laid down, as that decision is the decision of a Bench. But I do not understand that decision to touch the point. What it laid down is this:—That in a Civil Court a question of title decided by a Rent Court would be binding as between the same parties on the principle of *res judicata* as the decision on the question of title would be considered as the decision of a Civil Court whatever be the jurisdiction of the Rent Court. That is a different proposition. There is nothing in that decision to justify a departure from the actual law that a previous decision only binds in a subsequent suit when the Court which passed the decision was competent to try the subsequent suit. I, therefore, decide that the learned District Judge was not bound, on the principle of *res judicata*, to hold that the land in question was the *sir* of the plaintiffs and that the defendants was their sub-tenant. I do not consider that the learned District Judge made out a new case for the defendant. It was his duty to see whether the plaintiffs had made out a case to eject the defendant. He found on facts that they had not made out such a case.

In regard to the last point, it was unnecessary for the learned District Judge to decide for the purposes of the decision of the suit, that the defendant had ex-proprietary rights and it was not open to the learned District Judge to lay down what rights he did possess as the determination of the class of tenancy is a matter reserved for the Revenue Courts alone.

But in so far as his decision is that the suit for ejectment should be dismissed, it must stand. I, therefore, dismiss the appeal with costs.

H. B. *Appeal dismissed.*

(1) 22 Ind. Cas. 964; 36 A. 183; 12 A. L. J. 251 (F. B.).
(2) 3 Ind. Cas. 954; 32 A. 8; 6 A. L. J. 917.

BOMBAY HIGH COURT.

CIVIL SUIT No. 1501 OF 1923.
July 18, 1923.
Present:—Mr. Justice Pratt.
WILLIAM JACKS & Co.—PLAINTIFFS
versus
JOOSAB MAHOMED—DEFENDANT.

Evidence Act (I of 1872), s. 115—Estoppel—

WILLIAM JACKS & CO. v. JOOSAB MAHOMED.

Knowledge of both parties—Alteration of position—"Act upon such belief", meaning of.

Where the true facts are within the knowledge of both parties there is no scope for the application of the doctrine of estoppel. [p. 792, col. 2.]

Honapa v. *Narsapa*, 23 B. 406 at p. 408; 12 Ind. Dec. (N. S.) 270, followed.

The phrase "act upon such belief" in section 115 of the Evidence Act, means that the party to whom the representation was made must have altered his position with reference to the subject-matter of the representation. The mere filing of a suit, which would have been filed even if the representation had not been made, does not amount to such alteration of position. [*ibid.*]

Plaintiff demised certain premises to the defendant for manufacturing purposes. On the expiry of the lease he served the latter with one month's notice to quit. Defendant replied by a letter which contained an admission that he was a monthly tenant. In answer to a suit for ejectment filed by the plaintiff, defendant set up a plea that he was entitled to six months' notice under section 106 of the Transfer of Property Act:

Held, that the statement contained in the defendant's letter that he was a monthly tenant did not operate as an estoppel, inasmuch as

(*a*) the facts affecting the tenancy were within the knowledge of both parties; and

(*b*) plaintiff did not alter his position with reference to the subject-matter of the statement. [*ibid.*]

Mr. *Coltman* with him Mr. *Kemp*, for the Plaintiffs.

Mr. *Kanga*, Advocate-General, (with him Mr. *F. S. Taleyarkhan*), for the Defendant.

JUDGMENT.—The plaintiffs in this suit granted to the defendant a lease of a part of a bungalow and compound in the Nesbit Road, Mazgaon, for the period of one year from 1st April 1918. The lease terminated by efflux of time on the 31st March 1919.

But the defendant held over. There had been a dispute as to alleged encroachments by the defendant and the plaintiffs now aver that they require the premises included in the original lease as well as those encroached upon for their own use and occupation, and gave notice on the 30th December 1922 terminating the tenancy as from 1st February 1923.

It is admitted that the defendant required the premises to the knowledge of the plaintiffs for manufacturing purposes and that he has so used them. The defendant accordingly pleads that he is entitled to six months' notice under section 106 of the Transfer of Property Act, and that the notice given on the supposition that the tenancy was monthly is ineffectual to terminate the lease. As against this the plaintiffs contend that the defendant is estopped from setting up a yearly tenancy by his letter in reply to the notice to quit. That letter is Exhibit G, dated 16th January 1923 of which the concluding paragraph is as follows:—

"Your clients' lease with their superior landlord has expired long since and their position is also that of a monthly tenant."

I have no doubt the word "also" means that you are, like me, a monthly tenant. This is an admission by the defendant that he is a monthly tenant but he would be entitled to show that this admission is wrong unless it operates as an estoppel. But I feel clear that there is no estoppel and for the following reasons:—

In the first place the facts affecting the tenancy were within the knowledge of both the parties, and when that is so, there is no scope for the doctrine of estoppel. *Honapa* v. *Narsapa* (1).

Again, the plaintiffs, before receipt of the letter, believed the defendant to be a monthly tenant, so that, the belief was not induced by the letter of 16th January 1923. But, I think, it must be conceded that the language of section 115 of the Indian Evidence Act extends to the encouragement of an erroneous belief as in *Ramsden* v. *Dyson* (2). But even so, can it be said that the plaintiffs have acted on such belief in consequence of the letter? I think not. The phrase "act upon such belief" means that the plaintiffs must have altered their position with reference to the subject-matter of the representation. What have the plaintiffs done but the filing of suit? Merely filing the suit does not alter their position. It is only a process of enforcement of the position taken up before the misrepresentation.

Again, even if the filing does fulfil the words of the section—"acts upon such

(1) 23 B. 406 at p. 408; 12 Ind. Dec. (N. S.) 270.
(2) (1866) 1 H. L. 129; 12 Jur. (N. S.) 506; 14 W. R. 926.

belief,"—is it certain that the plaintiffs would not have filed the suit if the letter had not been written? As to this the remarks of Jenkins, C. J., in *Narsingdass* v. *Rahiminbai* (3) are very pertinent (page 446):—

"The law of estoppel is defined by section 115 of the Evidence Act, and all the Judge is able to say is that it may well be doubted whether the plaintiff would have acted in the way he did but for the way in which the defendants had acted. That is not sufficient. It must be found as a fact that the plaintiff would not have acted as he did."

So here, I have no doubt that the plaintiffs would have filed this suit even if the defendant had made no reply to the notice to quit.

I accordingly find on the issue, namely, whether the defendant is estopped by his letter of 16th January 1923 from asserting that he is an yearly tenant?—in the negative.

Z. K. *Order accordingly.*

(3) 28 B. 440; 6 Bom. L. R. 440.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 425 OF 1923 AND CIVIL REVISION PETITION No. 943 OF 1923.

March 27, 1924.

Present:—Mr. Justice Krishnan and Mr. Justice Odgers.

RATNASAMI PILLAI—APPELLANT IN A. A. O. No. 425 OF 1923 AND PETITIONER IN C. R. P. No. 943 OF 1923

versus

SABAPATHY PILLAI AND OTHERS—RESPONDENTS IN BOTH.

Receiver, powers of—Auction sale by order of Court—Highest bid whether to be accepted.

The Receiver is an Officer of Court and whatever powers he exercises are delegated powers of the Court which it expressly gives him. He has no powers except what the Court grants him. [p. 794, col. 1.]

The ordinary rule regarding private auction is that where an auction is held without any reservation, there is an implied condition that the highest bid will be accepted. But that rule does not apply to a sale by a Court Officer under the directions of the Court. [*ibid.*]

In such a case it is acceptance by the Court that constitutes the contract, and the person who asserts that the Court Officer had power to bind the Court by his acceptance of a bid must prove it. The mere absence of a statement in the published conditions of sale that it is subject to the confirmation of Court cannot be treated as implying that the Court had abandoned its power of confirming the sale before it could take effect. [*ibid.*]

Surendro Keshub Roy v. *Doorgasoondery Dossee*, 15 C. 253 at p. 258; 7 Ind. Dec. (N. S.) 753, relied on.

Appeal against an order of the Court of the Subordinate Judge, Mayavaram, in I. A. No. 160 of 1923, in O. S. No. 11 of 1922 and petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the said order of the Court of the Subordinate Judge, Mayavaram, in E. A. No. 160 of 1923, in O. S. No. 11 of 1922.

Mr. *K. Narasimha Iyengar*, for the Appellant.

Messrs. *K. Bashyam Iyengar*, *T. V. Muthu Krishna Iyer*, for the Respondents.

JUDGMENT.—This is an appeal against the order of the Subordinate Judge of Mayavaram refusing to accept the bid of Rathnasami Pillai, the appellant for taking on lease certain property, the subject-matter of a suit before the Court, and directing a re-sale. What happened was, the Receiver, who had been appointed in the suit, was directed by the Court to sell by public auction the lease of certain lands in suit for a year. The condition of sale were printed and the printed leaflets were circulated. The Receiver held an auction in which the appellant before us, Rathnasami Pillai, was the highest bidder. When the matter was taken to the Sub-Judge for confirmation, he refused to accept Rathnasami Pillai's bid and directed a re-sale. It is against that order that this appeal is filed.

The appellant contends that a completed contract had been entered into with him by the Receiver and that the Court should, therefore, have directed a lease to be executed in his favour in the terms of his bid. At the re-sale ordered the second respondent took the lease at a higher rate. A preliminary

objection has been raised to this appeal that no appeal lies. The appeal has been filed under O. XLIII, r. 1, clause (s) as against an order under O. XL, r. 1, Civil Procedure Code. We need not, however, decide this question as we think that on the merits the appellant has no case. The Receiver is an Officer of Court and whatever powers he exercises are delegated powers of the Court which the Court expressly gives him. He has no powers except what the Court grants him. Unless the appellant can show us that in this case the Court has delegated its power of entering into a completed contract with third parties to the Receiver, any action taken by the Receiver cannot be binding upon the Court or upon the properties. All that the appellant is able to show us is that he made the highest bid and that the published conditions of sale did not expressly state that the sale was subject to the confirmation of the Court. The absence of such a statement cannot, in our opinion, be treated as implying that the Court had abandoned its power of confirming the sale before it would take effect. No doubt the ordinary rule regarding private auction is that where an auction is held without any reservation there is an implied condition that the highest bid will be accepted; but no authority has been cited to show that that rule applies to a sale by a Court Officer under the directions of Court. In Court sales, it is acceptance by the Court that constitutes the contract. See *Surendro Keshub Roy* v. *Doorgasoondery Dossee* (1). The person who asserts that the Court Officer had power to bind the Court by his acceptance of a bid must prove it. The appellant has not been able to refer us to any evidence to show that such a power had been granted by the Court in this case. We must, therefore, hold that the Court had ample authority as no contract had been concluded with him and the Court's order directing a re-sale was within its powers. The appeal fails and is dismissed with costs (costs one set).

(1) 15 C. 253 at p. 258; 7 Ind. Dec. (N. S.) 753.

C. R. P. No. 943 of 1923 is dismissed with costs.

S. D. *Appeal dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

June 26, 1924.

Present:—Lord Shaw, Lord Blanesburgh and Mr. Ameer Ali.

Maharajadhiraj SIR RAMESHWAR SINGH BAHADUR—APPELLANT

versus

HITENDRA SINGH AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 4—Decree for sale, effect of—Mortgagee-decree-holder allowed to remain in possession—Receiver appointed subsequently—Receiver's right to remove decree-holder from possession.

Once the holder of a mortgage-decree, under O. XXXIV, r. 4, Civil Procedure Code, asks for and obtains a decree for sale, he must be deemed to have given up all rights under the mortgage and the judgment. [p. 795, cols. 1 & 2.]

If the holder of a mortgage-decree remains by arrangement in possession of the mortgaged property and subsequently a Receiver is appointed, who is directed specifically to take charge of all properties of the judgment-debtor, he is entitled to remove the decree-holder and obtain *khas* possession of the property, especially if its income exceeds the amount with which the decree-holder was debited under his arrangement. [p. 795, col. 2.]

Appeal from the judgment and decree of the Patna High Court (Das, J. and Adami, J.) datedt he 19th November 1920, printed as 61 Ind. Cas. 67, reversing the judgment of the Subordinate Judge, Dharbhanga, dated the 16th June 1919.

Mr. *DeGruyther, K. C.*, and Dr. *Majid*, for the Appellant.

Sir *Lowndes, K. C.*, and Mr. *Dube*, for the Respondents.

JUDGMENT.

Lord Shaw.—This is an appeal from a judgment and decree of the High Court of Judicature at Patna, dated the 19th November, 1920. It reversed a judgment and order of the Subordinate Judge of Darbhanga, dated 16th June 1919. Their Lordships refer to the judgment of the Board [*Ramesh-*

war Singh v. *Hitindra Singh* (1)] just announced in the case between the same parties, namely, the Maharaja as judgment creditor, and the Receiver of the property and the judgment-debtors.

A Receiver was appointed in 1910 as a Receiver upon the entire estate of the judgment-debtors. It is not disputed that this estate included, and still includes, the mortgaged property of Jai Nagar which is in question in this case. Jai Nagar was expressly and by name included in the scheduled properties falling within the order for Receivership. Under transactions, upon which it is not necessary to enter, the appellant possessed the property, under an arrangement that he should be debited with the sum of Rs. 1,600 per annum in respect thereof. The arrangement appears for a period of years to have been not to the disadvantage of the estate. Of late years, however, the rental of the property has exceeded the Rs. 1,600 and, in or about the year 1918-1919, amounted to over Rs. 2,700 per annum.

In these circumstances the Receiver brought his suit before the Subordinate Judge of Darbhanga, claiming:—

"1. That the decree-holder may be directed to render an account of all his collections of the said *mauza* from the date of the decree to the present date.

"2. That the decree-holder may be directed to give up and make over possession of the said *mauza* to the Reciever with such amount as the decree-holder may be liable to pay to the judgment-debtors with interest at 12 per cent. per annum."

The question of accounts will be afterwards dealt with. The immediate question is whether the appellant "do make over to the Receiver *khas* possession of the judgment-debtor's share of *Mauza* Jai Nagore." The case has been carefully considered by the High Court and their Lordships see no reason to differ from these paragraphs of the judgment:—

"The decree which he (*i.e.*, appellant decree-holder) got was the usual mortgage-decree contemplated by O. XXXIV, r. 4, and whatever rights he may have had under the transaction he must be deemed to have given up these rights, once he asked for and obtained a decree for sale in respect of the property in question. That being so, have the judgment-debtors a present right to remove the decree-holder from the possession of the property in question? In my view, they have, because there is a prior order passed by a Court of competent jurisdiction appointing a Receiver and asking the Receiver to take charge of all the properties comprised in the mortgage. That order was final between the parties, and it was not open to the learned Subordinate Judge to ignore or disregard that order. . . . .

"No doubt there was an arrangement by which the decree-holder remained in possession of the properties and applied the income towards part satisfaction of the debt due to him. Subsequently, a Receiver was appointed who is a person to guard the interest of all the parties concerned, and that Receiver was specifically directed to take charge of all the properties. In my view, there cannot be any doubt whatever that the Receiver ought to be directed to take charge of the property in question, specially as it is suggested by Mr. K. B. Dutt, on behalf of the judgment-debtors, that the property has an income of Rs. 2,711-15-0."

The result will be that the Receiver will in future administer and manage this *mauza* as part of the estate under his charge. And it may be that, looking *inter alia* to the prolonged difficulty with the appellant the respondent may in the circumstances exercise his power of sale of this *mauza*—such a power resting with him in accordance with the judgment just pronounced in the other appeal.

With regard to the accounting, in respect of the returns from the *mauza*, the learned Counsel for the Receiver stated to the Board on behalf of the Receiver that he was willing that the years prior to the institution of the suit

(1) 81 Ind. Cas. 576, 5 P. L. T. 401; 47 M.L.J. 236; (1924) A. I. R. (P. C.) 202; 20 L. W. 456; 35 M. L. T. 182.

during which the appellant was in possession under an arrangement for an annual debit of Rs. 1,600—those years should not be gone back upon. It was further explained that a statement made by the appellant in his petition of objection of 14th December 1918, was correct:—"4. Although previously orders for the deduction of Rs. 1,600 from the decretal money were passed by this Court in Suit No. 62 of 1911, and No. 67 of 1914, it was due to an oversight as the decision of the Subordinate Judge of Muzaffarpur was lost sight of. The petitioners cannot take advantage of that mistake and this petitioner, the opposite party (that is to say the present appellant), has no objection to the deduction of Rs. 1,471-3-5. It is, therefore, prayed that the petition filed by the petitioners for an annual deduction of Rs. 1,600 be disallowed and that Rs. 1,471-3-5 only be ordered to be set off annually (against the decretal money)." In their Lordships' view it is proper that this correction should be given effect to.

In the matter of accounting it may be sufficient to satisfy the justice of the case that accounts be ordered upon the footing, first that the Receiver do obtain *khas* possession of this *mauza* from the appellant, and in the accounts he be credited by the appellant with Rs. 1,471-3-5 per annum as due for the appellant's possession up to 19th November 1920, being the date of the decree of the High Court. Thereafter the accounts will embrace the entire receipts.

With this variation their Lordships will humbly advise His Majesty that that decree be affirmed with costs.

S. D. *Decree modified.*

Solicitors for the Appellant.—Messrs. *Sanderson* and *Orr Dignans.*

Solicitors for the Respondent.—Messrs. *Watkins* and *Hunter.*

BOMBAY HIGH COURT.

LAND ACQUISITION REFERENCE No. 12 OF 1923.

September 11, 1923.

Present:—Mr. Justice Mulla.

THE GOVERNMENT OF BOMBAY

versus

MERWAN MOONDIGAR AGA—CLAIMANT.

Land Acquisition Act (I of 1894), s. 23—Acquisition of land—Compensation, assessment of, mode of—Market value, ascertainment of—Speculative sales, value of.

In assessing the amount of compensation to be paid for a piece of land which is being compulsorily acquired, the market value of the land should not be ascertained piecemeal. [p. 797, cols. 1 & 2.]

The correct method is to determine the market value of the land as a whole having regard to the sales in the locality. [p. 797, cols. 1 & 2.]

The mere fact that a parcel of land is bought by a speculator in land with the object of re-selling it at a profit is no ground for disregarding the sale in compensation cases under the Land Acquisition Act for the purpose of determining the market value of land. The real question is whether the price paid was such as a prudent man would have paid at the time the transaction took place. [p. 799, cols. 1 & 2.]

The expression "market value" means the price which a parcel of land would realise if sold in the market. The test is the test of a sale in the market. The seller must be a willing seller; a forced sale affords no criterion of market value. The purchaser must be a prudent purchaser, that is, one who makes his offer after making necessary inquiries as to the value of the land; an offer made by one who knows nothing of the value of the land in the locality and who makes no inquiries about it, affords no test of market value. The market may be dull or brisk, but whether it is dull or brisk it cannot be excluded from consideration. [p. 800, col. 1.]

Secretary of State for Foreign Affairs v. *Charlesworth, Pilling & Co.*, 28 I. A. 121 at p. 141; 26 B. 1; 8 Sar. P. C. J. 1 (P. C.), *Government of Bombay* v. *Merwanji Muncherji*, 10 Bom. L. R. 907 at p. 917, referred to.

Reference made under section 18 of the Land Acquisition Act, 1894, by the Land Acquisition Officer for the City of Bombay.

Mr. *Kanga*, Advocate-General, (with him Mr. *Coltman*), for the Government.

Mr. *Campbell* (with him Mr. *M. C Setalvad*), for the Claimant.

JUDGMENT.—This is a reference from the award of the Land Acquisition Officer under the Land Acquisition Act. The property was notified for acquisition for a park scheme on February 9, 1920, and the market value of the

property is to be determined as of that date.

The property is situated on Cadell Road, Mahim. The area is 5957 square yards. It has a frontage of 380 feet and an average depth of 138 feet. On the north of the property there is a passage about twelve feet wide. Beyond the passage there is a large tank which is Survey No. 1770. On the east there is another huge tank covered by Survey No. 1752. On the south there is a passage also about twelve feet wide. As regards frontage it is to be observed that a portion of it admeasuring about 150 feet abuts on Cadell Road, while the rest being about 230 feet abuts on a remnant of old Parbhadevi Road. Beyond that road there is a triangular piece of land shown in the plain, Exhibit 4, which belongs to the Municipality. This triangle consists of portions of Survey Nos. 1634 and 1635 which were acquired by the Municipality for Cadell Road under a previous Notification. The distance between the southern frontage of the land in reference and Cadell Road is about 75 feet wide.

At the date of the Notification there were three structures on the land in reference. These were valued by the Land Acquisition Officer as materials, and the whole property was valued by him as vacant land. The Land Acquisition Officer awarded compensation for the northern frontage of 150 feet at the rate of Rs. 25 per square yard, and for the southern frontage of 230 feet at the rate of Rs. 18 per square yard. This gives all over a rate of Rs. 21·25 for the whole land. The claimant says that the compensation awarded is inadequate, and he claims Rs. 35 per square yard. On the other hand, the Government expert has sworn that the market value of the land in reference is not more than Rs. 16 per square yard.

As regards the method of valuation adopted by the Land Acquisition Officer, I may say at once that it does not always lead to correct results. I do not propose to follow that method but to determine the market value of the land as a whole having regard to the sales in the locality.

Before dealing with the sales I may say that the claimant relied in support of his claim on an offer of Rs. 2,50,000 made to him for his land by one Mr. Baria, a wine merchant, by his letter of January 8, 1920 (Exhibit K), which gives a rate of about Rs. 40 per square yard. It appeared, however, from Mr. Baria's evidence that he made the offer under a misapprehension that the frontage was about 600 feet and that the distance between the southern frontage of the land in reference and Cadell Road was about ten feet. The offer having been made under a mistake of facts, it cannot avail the claimant, and no reference was made to it by Counsel for the claimant in his final address.

Coming now to the sales, the claimant relies on the sale of a plot of land exactly opposite this land at the rate of Rs. 33 per square yard. This plot consists partly of Survey No. 1634 and partly of Survey No. 1635. The history of this plot as disclosed in the evidence is as follows :—

In or about August 1919 three persons named Valimahomad, Jagjiwan and Chhotalal entered into a partnership for the purpose of buying Survey No. 1635 for Rs. 41,000, Chhotalal resides and carries on business at Pardi. The whole of the purchase-money was to be paid by Chhotalal. The share of Valimahomed was eight annas in the rupee, Jagjiwan's share was two annas, and that of Chhotalal was six annas. Valimahomed was the first who formed the idea of buying this land. He approached Jagjiwan and the latter introduced him to Chottalal. The agreement for sale was made on August 22, 1919, and the sale was eventually completed the whole of the purchase-money having been paid by Chhotalal. It would be seen from the plan, Exhibit No. 4, that what was bought by these three persons was a two legged plot, the legs resting on old Parbhadevi Road. The area was 5669 square yards and the rate worked out to Rs. 7·23 per square yard.

Valimahomed said in his evidence that he knew when he agreed to buy

the land that part of it was required by the Municipality for Cadell Road. In fact the Notification in respect of this part of Cadell Road was published on June 26th 1919, and the original owner of Survey No. 1635 had opened negotiations with the Municipality. These negotiations were continued by Valimahomed after he and his partners purchased the land, and an agreement was eventually made between Valimahomed and the Municipality whereby he transferred to the Municipality a portion of Survey No. 1635, got a transfer from the Municipality of a portion of Survey No. 1634 and another strip of land to the north of this land, and paid Rs. 10,110 to the Municipality which included his contribution towards the cost of making Cadell Road and a proposed forty feet road on the north of the land. The latter road is shown on the plan annexed to the conveyance (Exhibit No. 6) dated 11th March 1921, between the Municipal Corporation and Valimahomed.

The arrangement between Valimahomed and the Municipality was completed in November 1919. By this time the scheme for a park towards the east of Cadell Road was out and notices were issued in August 1919 by the Municipality under section 90 of the Bombay Municipal Act to the claimant and others whose land was acquired for the park (Exhibits Nos. 1, 2 and 3).

As a result of the arrangement with the Municipality, Valimahomed and his partners got a newly constituted plot having a frontage of 275 feet on Cadell Road—which is a 60 feet road—and another frontage about 150 feet on the proposed road to the north with a prospect of a park towards the east on the other side of Cadell Road. The area of the new plot was 3839 square yards. It cost Valimahomed and his partners Rs. 41,000 plus Rs. 10,110 equal to Rs. 51,110, which gives a rate of Rs. 13·25 per square yard.

On February 10, 1920, Valimahomed and his partners agreed to sell the newly constituted plot to Jamnadas Vithaldas and Chhaganlal Kakalbhai at the rate of Rs. 36 per square yard, that is, for Rs. 1,38,204. The agreement for sale is not forthcoming, but it appears from an entry in a book produced by Jagjiwan, which he says was copied from a book kept by Chhotalal, that Rs. 5,000 was paid as earnest on February 10th, 1920. Chhotalal had gone on a pilgrimage, and he was not called.

Jamnadas admitted in his evidence that he purchased the land in the hope of re-selling it at a profit. The profit, however, never came. The land remained in the hands of Jamnadas, and his partner Chhaganlal Kakalbhai dropped out. He then took another partner named Chhaganlal Valji. This new partnership made part-payments towards the purchese-money. They paid Rs. 6,000 in July 1920, Rs. 5,000 in August 1920, and Rs. 5,000 in September 1920, making in all including the earnest Rs. 21,000. It seems that the partnership then came to the end of its resources. No futher payments were made until August 1, 1921 when a payment of Rs. 5,000 was made. On that day, Valimahomed executed a conveyance of the land to Jamnadas and his partner. The purchase-money was calculated at Rs. 33 per square yard, instead of the agreed rate Rs. 36. The prices having gone down, Valimahomed gave a concession of Rs. 3 per square yard to the partnership. Calculating at Rs. 33 per square yard, the purchase-money came to Rs. 1,26,687. The balance after deducting Rs. 26,000 was rupees one lac. Jamnadas and his partner were unable to pay that sum, and they executed a mortgage on the same day of the land bought by them from Valimahomed and of another property situated at Pitha Street to Valimahomed to secure rupees one lac with interest at the rate of nine per cent. per annum. The due date of the mortgage expired in February 1923, and interest has been in arrears for the last six months The Pitha Street property fetches a nett rent of Rs. 250 per month. Jamnadas said that it was worth Rs. 57,000. But whether it was worth Rs. 57,000 or less, the fact

remains that the land which Jamnadas bought at Rs. 33 per square yard was not regarded by Valimahomed as a sufficient security at the date of the conveyance, and Jamnadas and his partner had to mortgage another property belonging to them. There is no doubt that the purchase was made by Jamnadas without proper enquiries. He had not the faintest idea when he bought the land of the great advantages attaching to it, namely, the proposed 40 feet road on the north, and the park on the west. He said that he consulted two or three brokers, but he could not give the name of any one of them. I am inclined to think that he did not consult any broker or any other person. On behalf of Government it was contended that the sale by Valimahomed to Jamnadas was a sham, or, in any event, it was a transaction of such a speculative character that it could not be taken as a basis for determining the market value of the land in reference. I do not think that the transaction was a sham. On the other hand. I am inclined to think that Jamnadas and his partner were the victims partly of ignorance and partly of the tremendous wave of speculation in land which was then passing over Bombay.

This brings me to the next contention on behalf of Government, namely, that the transaction was of a speculative nature and it should, therefore, be ignored. I am inclined to think that the mere fact that a parcel of land is bought by a speculator in land with the object of re-selling it at a profit is no ground for disregarding the sale in compensation cases under the Land Acquistion Act. In the present case, Valimahomed and his partners bought the land with the avowed object of re-selling it at a profit. They succeeded in selling it to Jamnadas and his partner who again bought the land with the sole object of re-selling it at a profit. If a person who buys land not as an investment, but to re-sell it at a profit, is a speculator, both the vendors and purchasers of Jamadas' land were speculators. But this certainly is no ground for ignoring the transaction altogether. The real question is whether the rate of Rs. 33 represented the fair price of the land in February 1920. It is urged on behalf of Government that it is not, and the reason given is that there was tremendous speculation in land in Bombay in 1919 and in 1920, which resulted in an enormous rise in the price of land; and that the rise being due to speculation, it should be disregarded in its entirety. It was also argued that the expression "market value" in section 23 of the Land Acquisition Act meant intrinsic value.

Now it is a notorious fact, and the fact was deposed to by Mr. Kanga, Surveyor for Government, that a huge wave of speculation in land passed over Bombay in 1919 and in 1920, that it started in the beginning of 1919 that the high water mark was reached in February 1920, that it maintained itself at that level until about August 1920, and that it then began to subside. It was not disputed on behalf of the claimant that the sale to Jamnadas was a sale at the top of the market, but it was urged that the claimant was entitled to the benefit of the rise on the ground that he could have obtained that benefit had he then sold his property in the market. It was also urged that the term "market value" in section 23 did not mean intrinsic value. Such being the contentions on both sides, it becomes necessary to determine whether, in ascertaining the maket value of land under the Land Acquisition Act, the element of rise in the price of land occasioned by speculation is to be taken into consideration. It seems to me, on principle, that if an owner of land could sell his land in the market at a a given time for Rs. 10 per square yard, it would be inequitable and unjust that because the land is compulsorily acquired under the provisions of the Land Acquisition Act, he should get less than Rs. 10 per square yard. But if the Statute under which the acquisition is made lays down in clear and unambiguous language that an acquiring body is to pay less than a purchaser in the market, it is the duty of the Court

to give effect to it regardless of considerations of what the Court may think to be the equities of the case. Does then the Land Acquisition Act contemplate such a result?

Section 23 of the Land Acquisition Act opens with the following words:—

"In determining the amount of compensation to be awarded for land acquired under this Act, the Court shall take into consideration—*first*, the market value of the land at the date of the publication of the declaration relating thereto under section 6."

This means that the owner is to be compensated for his land, the measure of compensation being the market value of the land. The expression "market value" means the value which a parcel of land would realise if sold in the market. The test then is the test of a sale in the market. The seller must be a willing seller; a forced sale affords no criterion of market value. The purchaser must be a willing purchaser, and further he must be a prudent purchaser, that is one who makes his offer after making necessary inquiries as to the value of the land; an offer made by one who knows nothing of the value of the land in the locality and who makes no inquiries about it, affords no test of market value. But what I am presently concerned with is the essential feature of market value. It is, as the term imports, the value that could be realised on a sale in the open market. The market may be dull or brisk. It may be as dull as it is to-day. It may be as brisk as it was in 1919 and 1920. But whether it be dull or brisk, it cannot be excluded from consideration; there is nothing in the Land Acquisition Act which requires the Court to do so. On the contrary, the state of the market at the material date is an important factor in determining the market value at that date. You cannot possibly ascertain the market value of a piece of land at a given time if you exclude from consideration the state of the market at that time. It follows then that the high rates prevailing in 1919 and the first half of 1920 cannot be ignored: *Secretary of State for Foreign Affairs* v. *Charlesworth, Pilling & Co.* (1) and *Government of Bombay* v. *Merwanji Muncherji* (2). The sale, therefore, to Jamnadas cannot be excluded merely because it was a transaction during the boom.

But the question still remains whether the price paid by Jamnadas was such as a prudent person would have paid even during the subsistence of the boom. In determining this question there are two factors to be taken into consideration, namely (1) the circumstances attending the sale, and (2) other sales in the locality during the boom. I have already dealt with the first of these two factors. As regards the second, there are three plots adjoining claimant's land which were sold during the boom. These are the sales relied upon on behalf of Government. Before examining these sales, it is necessary to dispose of one matter which, it was urged on behalf of Government, materially affected the value of the claimant's land. It relates to the triangular strip of land belonging to the Municipality in front of the claimant's land. On behalf of Government it was contended that the existence of that strip was a great drawback to the claimant's land and that it detracted considerably from its value. The Advocate-General suggested in the course of the hearing that it could be used for urinals. The Government expert, however, came forward with a pompous scheme of a lofty building which was to contain grand shops and residential quarters. He admitted, however, that the locality was not yet ripe for a building of that kind and that it was not likely to be so for another five years to come. If so, it is difficult to understand why such a scheme was put forward at all. This triangle, it may be observed, is to be thrown into a park, but even if it were not so. I do not think that the Muncipality would have put up the strip of land for sale by public auction, and, just for the sake of a few thousand rupees, sold it to an outsider, and maintained in tact the remnant of

(1) 28 I. A. 121 at p. 141; 26 B. 1; 8 Sar. P. C. J. 1 (P. C.).
(2) 10 Bom. L. R. 907 at p. 917.

the old Parbhadevi Road. Rather they would have allowed a set-forward to the claimant and to the owner of the land on the south, though on payment of a fair price. However, that may be, one cannot, in valuing the claimant's land, ignore the fact that the southern frontage of his land is separated from Cadell Road by a remnant of the old Parbhadevi Road and by the Municipal triangle.

I now turn to the sales relied upon on behalf of Government. They are four in number, and the plots are marked I, II, III and IV respectively on the plan, Exhibit No. 4

Instance No. I is a sale of a plot of land abutting on Cadell Road and admeasuring 800 square yards. It has a frontage of 60 feet on Cadell Road and a depth of 129 feet. The date of the agreement for sale is November 21, 1919. The rate works out to Rs. 14·75 per square yard. This plot along with another to its north belonged to a Hindu. He mortgaged the whole of it, and subsequently sold a portion, being Instance No. I, to the mortgagee. At the date of sale he had a minor son, and the conveyance was signed by him on behalf of himself and his son as his guardian. The purchaser stated in his evidence before the Land Acquisition Officer that the vendor had obtained an order of the Court sanctioning the sale, but no such order is forthcoming, nor is any order recited in the conveyance. The conveyance however, seems to have been prepared by a "bond-writer" Upon these facts it was contended for the claiment, first that the sale having been made by a mortgagor to the mortgagee, it must be treated as a forced sale; and, secondly that as no order of the Court was obtained, the minor could on attaining majority impeach the sale on the ground that the mortgage debt was contracted for unlawful purposes. I do not think that there is any substance in the first contention. As to the second, there is a possibility, though remote, if no order was obtained of the minor impeaching the sale on attaining majority to the extent of his interest. But the question is not in these cases, whether the title is good or defective. The real question is whether the vendor sold or the purchaser bought with knowledge of the infirmity of the title, and whether the price was fixed on that footing. There is no evidence of this in the present case. This sale, I think, is a good guide in determining the market value of the land in reference. No doubt the depth is about twice as much as the frontage, but it is 129 feet only, and almost the whole of it may be treated as front land. The plot having been sold at Rs. 14·75 per square yard, the rate awarded by the Land Acquisition Officer for the claimant's land is, I think, quite fair.

Instance No. II is a sale of a plot of land admeasuring 3000 square yards abutting on Cadell Road, in August 1918, at the rate of Rs. 5·25 per square yard. The plot was re-sold in February 1920 at a price which works out to Rs. 14·4 per square yard, that is about thrice the original price. The frontage of this plot is 55 feet only, the depth is 280 feet, and the shape irregular.

The next sale relied upon by Government is Instance No. III. It is a sale of a plot of land admeasuring 4,352 square yards' in July 1919 at the rate of Rs. 12 per square yard. It has a frontage of 105 feet of which about 30 feet is on the Cadell Road and the rest on the remnant of old Parbhadevi Road. The depth of the plot is 260 feet. So far as the frontage is concerned, it resembles to a certain extent the southern frontage of the claimant's land. This instance also supports the Land Acquisition Officer's valuation.

The last sale relied upon by Government is Instance No. IV, being the two-legged plot purchased by Valimahomed in August 1919 at the rate of Rs. 7·23 per square yard. It is impossible to treat this sale as a guide in determining the market value of the claimant's land.

I have inspected the locality, the land in reference, and the plots which are the subject-matter of the sales relied upon by the parties to this reference. On comparing Instances Nos. I, II and III with Jamnadas' land, I think that Jamnadas paid such an exorbitant price for the land as no prudent purchaser

LALJEE JAISING v. S. P. TEWARI.

would have paid even during the boom. On comparing the same Instances with the land in reference, I think that the rate awarded by the Collector is quite fair. I, therefore, dismiss the reference with costs.

Z. K. *Reference dismissed.*

RANGOON HIGH COURT.

SPECIAL FIRST CIVIL APPEAL No. 101 OF 1923.

January 10, 1924.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice May Oung.

LALJEE JAISING—PLAINTIFF—APPELLANT

versus

S. P. TEWARI—DEFENDANT—RESPONDENT.

Arbitration Act (IX of 1899), s. 11—Award not in writing, validity of—Signing, if necessary.

Under section 11, Arbitration Act, an award must be in writing and signed. The signing of the award is not a mere formality.

Cotha Krishnaswami Chetty v. *Thatha Seetharam Chetty*, 5 Ind. Cas. 374; 7 M. L. T. 355; (1910) M. W. N. 53, followed.

Special appeal from the decree and judgment in C. R. No. 1901 of 1922 of the Rangoon Small Cause Court.

Mr. *Das*, for the Appellant.

Mr. *Bose*, for the Respondent.

JUDGMENT.—The plaintiff in this suit sued on a promissory-note for Rs. 800. The defence at first was a denial of execution, and the matter was, by consent, referred to the Expert in handwriting, together with certain admitted signatures of the defendant. The Expert's opinion was that the promissory-note had been executed by the defendant. Thereupon, without abandoning the plea of non-execution, the defendant raised the defence that all matters in dispute between the parties had been referred to arbitration; that the arbitrators had come to a decision; and that the suit was, therefore, barred. The learned Judge of the Small Cause Court held that the suit was barred.

There is no doubt that all matters in dispute between the parties were referred to the arbitration of Mr. N. C. Sen and one Ganesh Das. We can see no reason to doubt that the liability on the promissory-note in suit was included in the submission. It appears to us that the defendant was the plaintiff's agent, managing his business, and the accounts between the parties were very long. Ganesh Das understood the Nagari character in which the accounts were kept; and according to him, both the parties brought their accounts to him. He appears to have looked at them, and thereafter, on the 2nd of October, (a Sunday), the parties met the arbitrators at Mr. Sen's house. It was then suggested to the parties that the plaintiff should pay the defendant Rs. 2,000 and that this should be in satisfaction of all claims between them. It is clear from the evidence of both the arbitrators that this was merely a settlement proposed to relieve the arbitrators of the labour in going through the long and complicated accounts and a possibly lengthy hearing.

It would appear that the defendant at first agreed to a settlement on these lines. The parties were told to come back in two days, bring the necessary stamp paper, but they never appeared, and they were finally sent for when the defendant declined to agree to any such settlement, and demanded that the reference should be properly heard. Thereupon the arbitrators appear to have sent them away and declined to do anything further in the matter.

There can be no question that this was not in any way a performance of their duties as arbitrators. The attempt at settlement failed, and they should, therefore, have gone into the accounts and considered the promissory-note and other matters before arriving at a decision.

To call this suggestion of a settlement an award under the Indian Arbitration Act appears to us to be untenable. An award under the Act must, by section 11, be in writing and signed. Before reducing their award to writing, the arbitrators must no doubt arrive at their decision; but having done so, they are bound to make an award in writing and signing of the award is not a mere formality, *Cotha Krishnasurami Chetty* v. *Thetha Seetharam Chetty* (1).

(1) 5 Ind. Cas. 374; 7 M. L. T. 355; (1910) M. W. N. 53.

Under the circumstances we must hold that the learned Chief Judge of the Small Cause Court was wrong in holding that there was an award which barred the present suit.

The defendant has now admitted execution, but there has been no decision on the question of his liability on the promissory-note and the case must be remanded to the Small Cause Court for hearing on the merits.

The decree of the Court below is set aside and the appeal accepted. The plaintiff will get his costs in this Court, and the costs of the original hearing will abide by the result of the suit.

N. H. *Appeal accepted.*

PATNA HIGH COURT.

CIVIL APPEAL No. 75 OF 1920.

July 12, 1921.

Present:—Mr. Justice Jwala Prasad, and Mr. Justice Ross.

Patait DINANATH SAHI—APPELLANT

versus

Patait MALHIJI BAID—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 2 (11), 47—Satisfaction of decree—Legal represntative, position of—Objection to liability—Executing Court, duty of.

An order of substitution as the legal representative of a deceased judgment-debtor by itself renders the legal representative liable to satisfy the decree.

An Executing Court is bound before granting substitution to decide whether an alleged legal representative, who denies his liability to satisfy the decree, is the heir of the deceased judgment-debtor and, therefore, bound by the decree.

Appeal against an order passed by the Special Sub-Judge, Palamou.

Messrs. *Ram Chander Bhaduri* and *Panchanan Banerji*, for the Appellant.

Mr. *Shambhu Sharan*, for the Respondent.

JUDGMENT.

Ross, J.—On the 8th September 1915, the respondents obtained a mortgage-decree against Tekait Koslesnath Sahi. In Sawan 1325 the judgment-debtor died. On the 8th of Febeuary 1919, the decree-holders applied for the substitution of the two minor sons of Tekait, namely, Tekait Goannath Sahi and Babu Juru Partapnath Sahi and of his brother, Patait Dinanath Sahi in his place. On the 17th September 1919, Patait Dinanath Sahi, the appellant, filed in the Court of the Subordinate Judge an objection petition alleging that he was not liable to satisfy the decree passed against his brother. He denied that the judgment-debtor was the *malik* and *karta* of the joint family and *gadinashin* of the objector's estate and that the *gadinashini* system was in vogue in his family. He alleged that he was a sharer in the estate and that his share was equal to that of the judgment-debtor; he further stated that he along with his brother supervised and managed the estate as *malik* and that the deceasad judgment-debtor never exercised any right over the objector's estate and that the mortgage did not affect the objector's property.

The Subordinate Judge held that the question raised in the petition of objection could not be gone into in execution proceedings. He further held that the *khewat* showed that the objector was jointly recorded with the deceased Tekait and that he was a co-parcener of a joint Mitakshara family and, therefore, a legal representative within the meaning of section 2, clause (11) of the Civil Procedure Code. He also held that the substitution of the objector in the place of the deceased judgment-debtor was not bad and that the question whether he was bound by the decree and was an heir of the Tekait was left open and undecided.

In my opinion, this order cannot stand; it is in fact self-contradictory. The Subordinate Judge in the first place refuses to go into the questions raised by the petition of objection on the ground that they cannot be gone into in execution proceedings. He then proceeds to hold on the strength of the *khewat* that the objector is a co-parcener in a joint Mitakshara family a fact which the objector had denied. This is in reality a decision of one of the

objections which the Subordinate Judge had declined to enter into. He then, after making the order for substitution which itself renders the objector liable to satisfy the decree says that the question whether the objector is bound by the decree is left open and undecided. This also seems to be a plain contradiction. It seems to me that as the objector was not a party to the decree, he was entitled to a decision on the points raised in his objection.

I would, therefore, allow this appeal with costs and remand the case to the Subordinate Judge for trial of the objection.

Jwala Prasad, J.—I agree.

N. H. *Case remanded.*

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

June 19, 1924.

Present:—Lord Shaw, Lord Blanesburgh and Sir John Edge.

VAIDYANATHA AYYAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

K. SWAMINATHA AYYAR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 92, scope of—Chatram—*"Interest in the trust", meaning of Consent of Advocate-General, whether sufficient—Descendants of founder, whether can maintain suit—Hindu temples, whether open to all Hindus—Muhammadan worshippers at mosque, whether have "direct interest"—Surviving descendant of founder of* chatram, *whether can appoint manager—Trust property described as private property—Appointment of Manager of such property, validity of.*

The consent in writing of the Advocate-General to the institution of a suit will not bring the suit within the meaning of section 92 of the Civil Procedure Code, unless the plaintiffs have an interest in the trust. The object of the section is to prevent people interfering in the administration of charitable trusts merely in the interests of others and without any real interest of their own. [p. 805, col. 2; p. 806, col. 1.]

Ram Chandra Iyer v. Parameswaram Unni, 50 Ind. Cas. 693; 42 M. 360 at p. 395; (1919) M. W. N. 370; 36 M. L. J. 396; 25 M. L. T. 304; 9 L. W. 492, referred to.

The fact that plaintiffs in a suit are descendants though only in the female line, of the founder of a *chatram*, gives them an interest in the proper administration of the trust sufficient to enable them to maintain the suit although they themselves may never use the *chatram*. [p. 807, col. 1.]

Hindu temples are *prima facie* to be taken to be dedicated for the use of all Hindus resorting to them. [p. 806, col. 2; p. 807, col. 1.]

Ram Chandra Iyer v. Parameswaram Unni, 50 Ind. Cas. 693; 42 M. 360 at p. 395; (1919) M. W. N. 370; 36 M. L. J. 396; 25 M. L. T. 304; 9 L. W. 492, approved.

That the bare possibility, however remote, that a Hindu might desire to resort to a particular temple gives him an "interest in the trust" would defeat the object with which the Legislature inserted these words in section 92, Civil Procedure Code. [p. 807, col. 1.]

The last survivor of the descendants in the male line of the founder of a *chatram* has a right to appoint a trustee of the charity but if he falsely describes the property to be his own property, an appointment by him of the Manager of such property is invalid. [p. 808, col. 2.]

Parthasarathi Pillai v. Thiruvengada Pillay, 30 M. 340; 17 M. L. J. 379; 2 M. L. T. 189, referred to.

Obiter.—Muhammadans who live in a vaillage and worship regularly in the mosque of the village have a direct interest in the trust relating to the mosque. [p. 806, col. 2.]

Ludlow Corporation v. Greenhouse, (1827) 1 Bligh (N. S.) 17; 4 E. R. 780; 30 R. R. 7, not approved.

Consolidated appeals from the judgment and decrees of the Madras High Court dated the 13th November 1919, affirming that of the Subordinate Judge, Kumbakonam, dated the 15th April 1918, and 30th September 1918.

Mr. *Upjohn, K. C.* and Dr. *Majid*, for the Appellants.

Messrs. *Dube, De Gruyther, K. C.*, and *Narasimham*, for the Respondents.

JUDGMENT.

Sir John Edge.—These are consolidated appeals by defendants in a suit, No. 1 of 1916, from two decrees, dated the 13th November 1919, of the High Court at Madras, which affirmed with a trifling variation as to some property claimed, a preliminary decree, dated the 15th April 1918, and a final decree, dated the 30th September 1918, of the Subordinate Judge of Kumbakonam.

The suit relates to a *chatram*, also called a choultry, at Kumbakonam and property alleged to be endowed property of the *chatram*. The *chatram* is now known as Kalyanarama Ayyar's *chatram*. Formerly it was known as Rajappa Ayyar's *chatram*. Two Brahmins were the plaintiffs. Since the suit was

in appeal in the High Court one of the plaintiffs died; his legal representative is now on the record and is one of the respondents.

The plaintiffs on the 13th November 1916 brought this suit and claimed a declaration that the *chatram* was a public charitable institution having the properties mentioned in Schedule B of the plaint and seven-ninths of the properties mentioned in Schedules C to F as endowments; a declaration that the defendants are not lawfully appointed trustees and are not entitled to any right to the management and administration of the institution or in the properties belonging to it; that the defendants be removed from the office; that fit and proper persons be appointed trustees for the administration of the trust and that the *chatram* and the properties belonging to it be vested in them; that a scheme for the administration of the trust be settled; and other reliefs. The case of the plaintiffs was that the *chatram* was a public *chatram*, which had been founded and dedicated to the public more than 60 years before suit as a charitable institution for the convenience of travellers as a halting place and for the feeding of poor Brahmins resorting to it. The plaintiffs had obtained under section 92 of the Code of Civil Procedure, 1908, the consent in writing of the Advocate-General to their institution of the suit.

The defendants denied that the plaintiffs were persons who had an interest in the trust within the meaning of section 92 of the Code of Civil Procedure, 1908. They alleged that the *chatram* was a private *chatram*, and they denied that it had ever been dedicated to the public, and that it had ever been endowed with any of the properties claimed as endowments; they pleaded that they had been duly appointed trustees, and other matters which are immaterial if they had not been duly appointed as trustees.

The learned Subordinate Judge who tried the suit recorded oral and documentary evidence, and he found that the plaintiffs having obtained the consent in writing of the Advocate-General were persons who were entitled to institute the suit; that the *chatram* had been dedicated to the public and had been endowed as alleged in the plaint; that the defendants were not duly appointed trustees, and decided that a scheme for the management of the trust should be framed; and he framed a scheme for the management of the trust. The learned Judges of the High Court on appeal concurred with the findings of the Subordinate Judge except that they found that a small portion of the property claimed as endowment was not endowed property and with that variation as to the endowed property affirmed by their decrees the decrees of the Subordinate Judge, and dismissed the appeals to their Court. From those decrees of the High Court these consolidated appeals have been brought.

Mr. Upjohn, who appeared for the appellants, in his very able and exhaustive argument in support of these consolidated appeals, took and relied upon four points only They were (1) that the plaintiffs were not persons who had an interest in the charitable trust within the meaning of section 92 of the Code of Civil Procedure, 1908, and consequently had no *locus standi* to institute this suit; (2) that the *chatram* was not proved to be a public trust; (3) that the Courts below had misconstrued the Will of Swaminatha Ayyar of the 7th November 1881; and (4) that the first defendant had been properly appointed a trustee and there was no ground for removing him from his office as trustee of the charity. Their Lordships will deal with these points in the order in which they were argued by Mr. Upjohn.

Mr. Upjohn's first point was that assuming for the purpose only of his argument that the *chatram* had been dedicated to the public with a trust created for public purposes of a charitable nature, the suit would not lie if the plaintiffs had not within the meaning of section 92 of the Code of Civil Procedure, 1908, an interest in the trust. That is a perfectly sound argument. The consent in writing of the Advocate-General to the institution of the suit by the plaintiffs would not bring the

suit within the meaning of section 92 of the Code of Civil Procedure, 1908, unless the plaintiffs had an interest in the trust. Mr. Upjohn contended that the plaintiffs had no interest in the trust within the meaning of section 92. The question is had the plaintiffs an interest in the trust within the meaning of the section? They were descendants in female lines of Rajappa Ayyar and his son Kalyanarama Ayyar, one of whom, probably the former, founded and dedicated to the public the *chatram* as a charitable institution, and are of the founder's kin. The *chatram* was at first known as Rajappa Ayyar's *chatram* and was subsequently known as Kalyanarama Ayyar's *chatram*.

On the 22nd August 1864, the five sons of Kalyanarama Ayyar executed a partition deed in which the *chatram* and the lands then belonging to it, from which the income of the *chatram* was derived, were mentioned. The lands belonging to the *chatram* were excepted from the partition, but it was agreed that the five brothers should manage the *chatram* lands according to the order of seniority. It is obvious that the *chatram* must have been endowed with these lands before the date of that deed of partition. Mr. Upjohn contended that "an interest in the trust" to be within section 92 of the Code of Civil Procedure, 1908, must be some special interest and not merely a sentimental interest, and he referred to the *dictum* of Lord Eldon, L. C., in *In re Master Governor and Trustees of the Bedford Charity* (1) in which in a reference to Sir Samuel Romilly's Act (52 Geo. 3, c. 101), which authorised persons other than the Law Officers to present petitions to the Court in certain matters of public charities, Lord Eldon said:

"The Act, indeed, authorises 'any two or more persons' to present a petition; but I conceive that those words must be understood to mean persons having an interest," which earlier at page 518 Lord Eldon interpreted as meaning "a direct interest in the charity."

(1) (1819) 2 Swan. 470 at p. 518; 36 E. R. 696; 19 R. R. 107.

Mr. Upjohn also referred to the observations of Lord Eldon, L. C., in *Ludlow Corporation* v. *Greenhouse* (2). It may be that the *dictum* of Lord Eldon in the *In re Master Governor and Trustees of the Bedford Charity* (1) caused those who were responsible for the drafting of section 539 of the Code of Civil Procedure of 1877 (Act X of 1877) to draft that section as giving a right in cases of a breach of a trust created for public charitable purposes to "two or more persons having a direct interest in the trust," and who had obtained the consent of the Advocate-General, to institute a suit under that section. It must, however, have subsequently appeared to the Governor-General of India in Council that the limitation of a "direct" interest was not expedient in India, and it was enacted by section 44 of the Civil Procedure Amendment Act, 1888, which amended the procedure then in force, "That in section 539, for the words 'having a direct interest' the words 'having an interest' shall be substituted."

It may be that Coutts Trotter, J., was correct in stating in *Ram Chandra Iyer* v. *Parameswaram Unni* (3) that it was in consequence of the decision in *Jan Ali* v. *Ram Nath Mundal* (4) that the change in the law was made by omitting the word "direct." In that case the High Court at Calcutta had held that the plaintiffs there, two Muhammadans who lived in a village and worshipped regularly at the village mosque, had no direct interest in the mosque. Their Lordships would have considered that Muhammadans who worshipped regularly in the mosque of the village had a direct interest in the trust relating to the mosque. But so that they may not be misunderstood as to the meaning of 'interest' in section 92 of the Code of Civil Procedure, 1908, they think it advisable to say that public "Hindu Temples are *prima facie* to be taken," as Sir John Wallis, C. J., said in *Ram*

(2) (1827) 1 Bligh (N. S.) 17; 4 E. R. 780; 30 R. R. 7.

(3) 50 Ind. Cas. 693; 42 M. 360 at p. 395; (1919) M. W. N. 370; 36 M. L. J. 396; 25 M. L. T. 304; 9 L. W. 492.

(4) 8 C. 32; 9 C. L. R. 433; 4 Ind. Dec. (N. S.) 21.

Chandra Iyer v. *Parameswaram Urni* (3) "to be dedicated for the use of all Hindus resorting to them." They agree with Sir John Wallis that the bare possibility, however remote, that a Hindu might desire to resort to a particular temple gives him an interest in the trust appears to defeat the object with which the Legislature inserted these words in the section. "That object was to prevent people interfering by virtue of the section (section 92) in the administration of charitable trusts merely in the interests of others and without any real interest of their own." In the present case their Lordships are of opinion that the fact that the plaintiffs are descendants although only in female lines of the founder of the *chatram* gave them an interest in the proper administration of the trust sufficient to enable them to maintain this suit, although they themselves may never find it necessary to use the *chatram* as a rest house or to obtain food there.

As to the second point argued by Mr. Upjohn it is sufficient to say that there are concurrent findings that the *chatram* was a public trust, and their Lordships may add they also find that the *chatram* is a public trust.

As to third point argued by Mr. Upjohn, that the Courts below misconstrued the Will of Swaminatha Ayyar of the 7th November 1881, that contention if well founded would show that the gift of some of the property to the *chatram* which each Court has found to belong to the *chatram* was a void gift within the decision of the Board in *Ranchordas Vandrawandas* v. *Parvatibai* (5). The testator was one of the five sons of Kalyanarama Ayyar. It is not necessary to set out the translation of the whole of his Will; the contention turns on the meaning of part of the Will.

After referring to the partition of 22nd August 1894 between him and his brothers and some other matters, the testator's Will as translated continues, so far as is material, as follows :—

"The arrangement which I make regarding the aforesaid properties is this.—After my decease my properties and my estate shall be managed with all rights by my divided brothers—K. Venkataranga Ayyar and K. Suryanarayana Ayyar as executors. The incomes from the villages and gardens shall be divided into 3 portions and 2 portions thereof shall be given to my wife, and the said house and the *Ethiradi manai* (*manai* in front of it) be given to her for her occupation ; and with the remaining one portion the debts due by me and the debts contracted by me and K. Venkataranga Ayyar on the security of our family properties shall be discharged. After the said two kinds of debts are discharged, the said executors shall with the said one-third portion of the said income make *Annadhanam* (feed poor people) in our family choultry in Perumbandi now under the management of K. Venkataranga Ayyar. My wife shall take all the aforesaid moveable properties and enjoy them according to her pleasure, and if she dies leaving any moveable properties, they shall be used by the said executors themselves for the said feeding charity. After my wife's decease, 2 out of 3 portions of the income enjoyed by her shall be utilised for the charity and the remaining one out of the 3 shares, and the dwelling house and *manai* in front, shall be taken by K. Venkataranga Ayyar and K. Suryanarayana Ayyar and their posterity. The other *dayadis* have no right whatever."

Their Lordships assume the words "the charity" in the translation are the correct rendering of the vernacular which they are informed is in *tamil*. If those words are the correct rendering of the vernacular they plainly refer to the *chatram* charity which had immediately before been indicated and the gift was not void for uncertainty. The original Will was before the learned Subordinate Judge who tried the suit and who understood *tamil*. This is what he said as to that part of the Will:—

"14. It is next contended that this gift of a $\frac{2}{3}$rd share in the $\frac{2}{3}$rd share to a '*Dharmam*' was invalid, and the decision in *Parthasarathi Pillai* v. *Thiruvengada*

(5) 26 I. A. 71; 23 B. 725; 1 Bom. L. R. 607; 3 C. W. N. 621; 7 Sar. P. C. J. 543 (P. C.).

Pillay (6) was relied upon. A persual of Swaminatha Ayyar's Will indicates to my mind that the "*dharmam*" he intended to create in respect of the $\frac{2}{3}$rd share in the $\frac{2}{3}$rd share was the *dharmam* to which he gave a $\frac{1}{3}$rd share in the income : and that the gift of $\frac{2}{3}$rd share of a $\frac{2}{3}$rd share is not void for uncertainty.

15. It was lastly contended that it was not open to this Court to construe the terms of Swaminatha Ayyar's Will in so far as they relate to the charity : but it appears to me that it is open to this Court to see what interest the charity has in Swaminatha Ayyar's properties. I, therefore, find that the *chatram* has a 7/9th share in the income from the C to F Schedule properties under Swaminatha Ayyar's Will."

This is what the learned Judges of the High Court said on that subject :—

"As regards $\frac{2}{3}$rd of the income of the properties given to the wife which the Will directs to be utilised for *dharmam* on her death, it is argued that the reference there is not to this choultry but to charity generally. The learned Subordinate Judge has held that the word '*dharmam*' refers to this choultry and we think he is right in that construction. In that view of the Will the choultry becomes entitled under Exhibit C to 7/9th of the income of the properties."

Their Lordships hold that the Will was not misunderstood by either of the Courts.

As to the fourth and last point argued by Mr. Upjohn that the first defendant, Vaidyanatha Ayyar, had been properly appointed a trustee of the *chatram* and ought not to have been removed, it is necessary to see what the appointment in fact was. His appointment was made by the 10th and 11th paragraphs of the Will of Suri Ayyar, Probate of which was granted on the 17th July, 1915. Suri Ayyar, was the last survivor of the five brothers who were the sons of Kalyanarama Ayyar. The 10th and the 11th paragraphs of the Will as translated, were as follows:

"10. The choultry mentioned in paragraph 3 aforesaid and the entire properties attached thereto shall be in the management of the aforementioned R. Vaidyanatha Ayyar. The Brahmin feeding and the Dwadasi Kattalai of the said choultry shall be conducted on a scale not inferior to what is being conducted now.

11. After the abovementioned Vaidyanatha Ayyar, his younger brother the said R. Narayanasami Ayyar and after him, my friend Jayakrishna Chariar residing in *melakkaveri achari agraharam* shall look after the management of the said choultry and of the entire properties attached thereto."

Turning to the 3rd paragraph of the Will it will be seen what were the properties for the management of which Vaidyanatha Ayyar was appointed. That 3rd paragraph is, as translated, as follows :—

"3. Besides the abovesaid properties there are in Kumbakonam Town to the northern side of the Cauveri, my family choultry, the buildings attachad thereto, lands, grounds, *bandy pettai* etc., properties. These belong to me and are in my possession and enjoyment."

Suri Ayyar was appointing Vaidyanatha Ayyar manager of properties which he falsely alleged belonged to himself as proprietor, and was not appointing him as a trustee of properties which were already trust properties. Suri Ayyar as the last survivor of the descendants in the male line of the founder of the *chatram* possibly had a right to appoint a trustee of the charity. See *Baidyo Gauranga Sahu* v. *Suderi Mada* (7). But that was not what he was professing to do. He was professing to appoint a manager of property which he falsely alleged to be his own private property and in the opinion of the Subordinate Judge his object was to afford a monthly income for the daughter of his late concubine and her children.

After Mr. Upjohn had concluded his arguments in support of the appeals his junior Counsel addressed the Board on a subject which Mr. Upjohn had not referred to and contended that some small portions of the properties did not belong to the trust, but

(6) 30 M. 340; 17 M. L. J. 379; 2 M. L. T. 189.

(7) 41 Ind. Cas. 589; 40 M. 612; 32 M. L. J. 597; (1917) M. W. N. 429.

they had been concurrently dealt with in the decrees of the Trial Judge and the High Court as the properties of the charitable trust, and the attention of their Lordships was not directed to any evidence sufficient to justify the contention.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be dismissed with costs.

S. D. *Appeals dismissed.*

Solicitor for the Appellants.—Mr. *Douglas Grant.*

Solicitor for the Respondent.—Mr. *H. S. L. Polock.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 184 OF 1922.

July 7, 1924.

Present:—Mr. Justice Devadoss.

CHELLAKUTTI NAICKEN—DEFENDANT—APPELLANT

versus

VENGAPPA PILLAI—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), ss. 60, 98—Possessory mortgage—Provision to treat as sale in case of non-payment—Conversion into anomalous mortgage—Clog on equity of redemption—Right of redemption.

The addition of a clause to an ordinary possessory mortgage to the effect that, should the mortgagor fail to pay the mortgage amount within a certain time, the transaction shall be treated as a sale, does not convert the usufructuary mortgage into an anomalous one.

Patte Muhammad v. *Davood*, 30 Ind. Cas. 569; 29 M. L. J. 525; 18 M. L. T. 209; (1915) M. W. N. 852; 39 M. 1010, distinguished.

The provisions of section 60 of the Transfer of Property Act are imperative and no mortgagor can lose his right to redeem even in the case of an anomalous mortgage.

Muhammad Sher Khan v. *Raja Seth Swami Dayal*, 66 Ind. Cas. 853; 44 A. 185; 30 M. L. T. 220; 9 O. L. J. 81; 42 M. L. J. 584; 25 O. C. 8; 20 A. L. J. 476; 35 C. L. J. 468; 24 Bom. L. R. 695; (1922) A. I. R. (P. C.) 17; (1922) M. W. N. 378; 4 U. P. L. R. (P. C.) 50; 28 C. W. N. 79; 49 I. A. 60 (P. C.), followed.

Second appeal against the decree of the District Court, Chingleput, in Appeal Suit No. 78 of 1921, preferred against the decree of the Court of the Principal District Munsif, Chingleput, in O. S. No. 991 of 1919.

Messrs. *N. S. Rangaswami Iyengar* and *N. K. Thirumalachari*, for the Appellant.

Mr. *S. Krishnamachary*, for the Respondent.

JUDGMENT.—The only point argued in this second appeal is that the mortgage in question is an anomalous mortgage, and, therefore, the provisions of section 98 of the Transfer of Property Act apply and reliance is placed upon the case reported as *Patte Muhamad* v. *Davood* (1) for the purpose of construing the document as an anomalous mortgage. Reading the suit document as a whole, it is quite clear that the parties intended to create an ordinary possessory mortgage. The only condition added is that should the mortgagor fail to pay the mortgage amount within a certain time the transaction should be treated as a sale. Adding a clause of this kind to an ordinary possessory mortgage would not make it an anomalous mortgage. The clause puts a clog on the equity of redemption. That by itself would not convert an ordinary possessory mortgage or a usufructuary mortgage with an anomalous mortgage. The case as *Patte Muhamad* v. *Davood* (1) is distinguishable on the facts. There the words are, if they do not act according to those conditions, they will surrender the house and the deed treating the transaction as a sale. That shows evidently that possession did not pass to the mortgagee but remained with the mortgagor. Here possession was given to the mortgagee. For the respondent reliance is placed upon a recent decision of the Privy Council reported in *Muhammad Sher Khan* v. *Raja Seth Swami Dayal* (2). There their Lordships held that the provisions of section 60 of the Transfer of Property Act are imperative and that no mortgagor can lose his right to redeem even in the case of an anomalous mortgage. Granting for arguments

(1) 30 Ind. Cas. 569; 29 M. L. J. 525; 18 M. L. T. 209; (1915) M. W. N. 852; 39 M. 1010.

(2) 66 Ind. Cas. 853; 44 A. 185; 30 M. L. T. 220; 9 O. L. J. 81; 42 M. L. J. 584; 25 O. C. 8; 20 A. L. J. 476; 35 C. L. J. 468; 24 Bom. L. R. 695; (1922) A. I. R. (P. C.) 17; (1922) M. W. N. 378; 4 U. P. L. R. (P. C.) 50; 28 C. W. N. 79; 49 I. A 60 (P. C.).

sake that this mortgage is to be read as an anomalous mortgage the decision of their Lordships makes it quite clear that the equity of redemption is not thereby lost. In Second Appeal No. 2096 of 1920 a Bench of this Court held that the equity of redemption is not lost even in the case of anomalous mortgage.

The second appeal fails and is dismissed with costs.

V. N. V. *Appeal dismissed.*

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 19 OF 1923.
April 15, 1924.
Present:—Mr. Kendall, A. J. C.
BHIKARI LAL—DEFENDANT—APPELLANT
versus
Moulvi HADI ALI KHAN AND ANOTHER—PLAINTIFFS AND *Musammat* NANKI—DEFENDANT—RESPONDENTS.

Custom—Landlord and tenant—House built by tenants in abadi—*Tenant's right to transfer such house—Burden of proof—Custom, whether question of law—Second appeal.*

An agricultural tenant allowed to build a house on a site belonging to a *zemindar* in the village *abadi*, has, in the absence of proof of some contract or custom to the contrary, only a right to use the house so long as he maintains it, without any right to transfer it. [p. 812, col. 1.]

The burden of proving the existence of a custom which gives a tenant a right of transfer lies on the tenant and it is not for the *zemindar* to prove a custom of forfeiture or escheat if the house is transferred. [*ibid.*]

Sri Girdhariji Maharaj v. *Chote Lal*, 20 A. 248; A. W. N. (1898) 27; 9 Ind. Dec. (N. S.) 520 and *Sheodat Prasad* v. *Suraj Bali*, 30 Ind. Cas. 295; 2 O. L. J. 305; 18 O. C. 138, followed.

The question of custom is one of mixed fact and law and can be raised in second appeal.[p. 811, cols. 1 & 2.]

Munna Lal v. *Jai Indar Bahadur Singh*, 76 Ind. Cas. 774; 26 O. C. 386; (1924) A. I. R. (O.) 157, followed.

Muhammad Kamil v. *Imtiaz Fatima*, 4 Ind. Cas. 457; 13 O. C. 183; 10 C. L. J. 297; 11 Bom. L. R. 1210; 14 C. W. N. 59; 31 A. 557; 19 M. L. J. 697; 36 I. A. 210 (P. C.), *Tilak Ram* v. *Sata Ram*, 30 Ind. Cas. 503; 2 O. L. J. 388, *Basdeo Singh* v. *Ram Phal Singh*, 32 Ind. Cas. 748; 2 O. L. J. 607 and *Kailas Chandra Dutta* v. *Padma Kishore Roy*, 41 Ind. Cas. 959; 45 C. 285; 25 C. L. J. 613; 21 C. W. N. 972, referred to.

Second appeal against the decree of the Third Additional Judge, Sitapur, dated the 22nd September 1922, in an appeal preferred against the decree of the Munsif, Sitapur, dated the 5th September 1921.

Messrs. *A. P. Sen* and *H. K. Ghose*, for the Appellant.

Mr. *M. Wasim*, for Respondent No. 1.

JUDGMENT.—This appeal arises from a suit brought by the plaintiff-respondent, for possession of a plot called No. 110/153 in village Alumnagar, Pargana Khairabad, District Sitapur, by pulling down the construction made thereon by the appellant. The respondent is one of the *zemindars* of the village and the plot in suit falls within his share. The plot used to be occupied by a house owned by one Mahabir. The facts that have either been admitted, or proved to the satisfaction of the Courts below are, that the original house built by Mahabir was swept away by the floods in 1915, that Mahabir is dead, that his widow made some temporary structure on the plot, and that in 1920 she executed a sale-deed in favour of one Bhikari Lal, the present appellant, who has started building a house on the plot without the permission of the respondent. It should be mentioned, that the lower Appellate Court found that the widow of Mahabir, who was defendant No. 1 in the suit, had abandoned the plot before executing the sale-deed, and that what she transferred to Bhikari was a right of occupation of the plot pure and simple.

The respondent claims in his plaint, that Bhikari had by law, and by custom, no right under any circumstances to obtain possession over the land in suit, or to build a house thereon. Bhikari set up the defence that in Alumnagar the owners of houses had a right to transfer them, and that there was no custom to the contrary. Two issues were framed in the First Court on the question of custom. In Issue No. 3 the plaintiff was called on to prove that there was a custom in Alumnagar, under which *raiyats* are debarred from transferring their houses, while in Issue No. 4 the defendant was called on to prove that *raiyats*

have the full right of transferring their houses. Both parties produced evidence on this point, and the suit has been contested principally on the issues of custom. Both the Courts below decided these issues in favour of the plaintiff, and against the defendant.

The grounds of appeal relate almost entirely to the question of custom, and to the evidence produced thereon, though there is a suggestion that the Courts have erred in holding that Mahabir's widow had abandoned the plot in ground No. 6.

As this has been regarded as a test case, and a good deal has been said on the question of custom, it is perhaps as well to dispose of these grounds of appeal though in my judgment it is not really necessary for the disposal of the present appeal. The first point that has been urged is that the existence of a custom is a question of fact, and not of law and that the findings of the lower Court are final. There is some conflict of authority on this point. In *Muhammad Kamil* v. *Imtiaz Fatima* (1), a Privy Council decision, it was held that the existence of custom is a question of fact, and in two decisions of this Court of 1915, it has been held that this Court is bound by findings of the Court below that certain documents prove a custom. [These are reported in *Tilak Ram* v. *Sata Ram* (2) and *Basdeo Singh* v. *Ram Phal Singh* (3).] On the other hand, a recent decision reported as *Munna Lal* v. *Jai Indar Bahadur Singh* (4) is to the effect that the question of custom is one of mixed fact and law, and this view has been clearly expressed in *Kailas Chandra Dutta* v. *Padma Kishore Roy* (5), where it has been held, that the question whether the facts found in any instance prove the existence of the essential attributes of a custom or usage, is a question of law, which may be discussed in second appeal. The question whether such a state of facts has been proved by the evidence is merely a question of fact. I am following the decision in *Munna Lal* v. *Jai Indar Bahadur Singh* (4), therefore, in allowing the question to be argued in second appeal.

The entries in the *wajib-ul-arz* and in the *fard-i-rewaj* have been fully set forth in the judgment of the learnad Additional District Judge. The value of such entries is a matter that has been the subject of some conflicting decisions. For instance, in a Privy Council ruling reported as *Anant Singh* v. *Durga Singh* (6) (an Oudh case) it was held that the evidence of the *wajib-ul-arz* varies greatly in value, and that in the case there decided it was full of inconsistencies, that it referred to a family custom, which was contrary to the ordinary law, and that it appeared to contain merely the views of interested individuals. The learned Counsel for the appellant relies on this ruling, and points out that in the present case, the entries in the *wajib-ul-arz* appear to have been merely dictated by the *zemindars*, while those in the *fard-i-rewaj* show that only a few tenants recorded their agreement, while in at least one case the tenant denied the custom recorded. On the other hand, it has been held in *Praji* v. *Baiju* (7) that an entry in one *wajib-ul-arz* raises a presumption in favour of the custom recorded, and in two Oudh decisions, on which the respondent relies, it has been held (*a*) that the entries in one *wajib-ul-arz* are sufficient if unrebutted to prove a custom and (*b*) that entries in the *malikan-e-deh*, as stated by the landlord, are, in the absence of fraud or grievous error, binding on the persons affected [*Punni* v. *Chet Ram* (8)]. The lower Appellate Court has given weight to these last rulings, although as has been pointed out in arguments they refer to groves.

In my view, the evidence in regard to custom adduced in this case is inconclusive. There was oral evidence to show

(1) 4 Ind. Cas. 457; 13 O. C. 183; 10 C. L. J. 297; 11 Bom. L. R. 1210; 14 C. W. N. 59; 31 A. 557; 19 M. L. J. 697; 36 I. A. 210 (P. C.).
(2) 30 Ind. Cas. 503; 2 O. L. J. 388.
(3) 32 Ind. Cas. 748; 2 O. L. J. 607.
(4) 76 Ind. Cas. 774; 26 O. C. 386; (1924) A. I. R. (O.) 157.
(5) 41 Ind. Cas. 959; 45 C. 285; 25 C. L. J. 613; 21 C. W. N. 972.
(6) 6 Ind. Cas. 787; 32 A. 363; 14 C. W. N. 770; 12 C. L. J 36; 7 A. L. J. 704; 13 O. C. 163; 37 I. A. 191; 12 Bom. L. R. 594; 8 M. L. T. 79; (1910) M. W. N. 327; 20 M. L. J. 604 (P. C.).
(7) 4 O. C. 71.
(8) 24 Ind. Cas. 640; 1 O. L. J. 319.

that the custom as recorded in the *wajib-ul-arz* had been departed from in some recent instance. If there had been no evidence of custom at all, however, I think that the plaintiff respondent was bound to succeed. He was the *zemindar* and the land belonged to him. The plot concerned was in *abadi* which still retained the characteristics of a village, although it has recently been included in a Municipal area. Mahabir had the status of an agricultural tenant, and his position was that he had been allowed by the *zemindar* to build a house on the plot in suit. In the absence of proof of some contract or custom to the contrary he could only be held to have the right to use the house so long as he maintained it, without any right to transfer it. This view has been taken by the Allahabad High Court in *Sri Girdhariji Maharaj* v. *Chote Lal* (9) and a very similar view was taken in a decision of this Court, recorded in 20 Oudh Law Journal 305 [*Sheodat Prasad* v. *Suraj Bali* (10)]. It was really for the defendant to show the existence of a custom under which he could transfer his house, and not for the plaintiff to prove a custom of forfeiture or escheat if the house were transferred. It was the defendant who first raised the question of custom. The suit has been practically decided by the lower Courts on the entries in the *wajib-ul-arz*. They held that Mahabir belonged to the record of the three classes of tenants described in the *fard-i-rewaj*. These tenants are recorded to have a right to transfer the materials of the houses. There is, however, no record of any custom by which a tenant can transfer the site of a house when the materials have disappeared. It is proved that when Mahabir's widow executed the sale-deed in favour of the appellant, even the temporary structure which she had been allowed to erect after the original house had been washed away, was no longer in existence. Even if the *wajib-ul-arz* and the *fard-i-rewaj* were to be accepted as sufficient proof of the custom recorded therein which, in my opinion, they cannot be they would not be sufficient to establish the right of a tenant to transfer a right of occupation of a building site where no house existed, nor has such a custom been proved by the oral evidence. There is, therefore, nothing to interfere with the landlord's right of possession of the land. The appeal is, therefore, dismissed with costs.

G. H. *Appeal dismissed.*
S. D.

(9) 20 A. 248; A. W. N. (1898) 27; 9 Ind. Dec. (N. S.) 520.
(10) 30 Ind. Cas. 295; 2 O. L. J. 305; 18 O. C. 138.

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS APPEAL No. 100 OF 1923.

March 24, 1924.

Present:—Mr. Justice Young.

MAUNG SHWE HLA—APPELLANT

versus

SOOLAY NAIDU—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, r. 21—Appeal, ex parte *hearing of—Application for re-hearing—Unrebutted oath of applicant effect of.*

An unrebutted oath of a respondent alleged to have been served with summons that he never was served and knew nothing of the appeal is sufficient to justify the re-opening of the appeal.

Sunder Spinner v. *Makan Bhula*, 64 Ind. Cas. 386; 46 B. 130; 23 Bom. L. R. 908; (1922) A. I. R. (B.) 377, and *Khiroda Sundari Dasi* v. *Nabin Chandra Saha*, 30 Ind. Cas. 64; 19 C. W. N. 1231; 21 C. L. J. 653, followed.

Civil miscellaneous appeal against an order of the District Court, Pegu, in Civil Appeal No. 41 of 1923.

JUDGMENT.—It is in the highest degree improbable that the appellant, who was successful in the Trial Court, would not have been present to resist the appellant if he had known anything about it, and this circumstance should have weighed with the Judge in considering the weight to be attached to the appellant's sworn statement that he knew nothing of the appeal and he had never received the summons.

The cases of *Sunder Spinner* v. *Makan Bhula* (1) and *Khiroda Sundari Dasi* v. *Nabin Chandra Saha* (2) are analogous cases showing that, under circumstances more or less similar the unrebutted oath

(1) 64 Ind. Cas. 386; 46 B. 139; 23 Bom. L. R 908; (1922) A. I. R. (B.) 377.
(2) 30 Ind. Cas. 64; 19 C. W. N. 1231; 21 C. L. J. 653.

of the person to be served that he never was served and knew nothing of the case is sufficient to require the re-opening of the case.

These were both cases of non-appearance before a Court of first instance.

This is the case of an appeal, where the appellant has the advantage of a decree in his favour, rendering it all the more improbable that he would not have appeared to support the decree, had he known anything about it.

The appeal is allowed with costs of two gold *mohurs*, and the case must be re-opened.

N. H. *Appeal allowed.*

PATNA HIGH COURT.

CIVIL RIVISION No. 348 OF 1923.

March 28, 1924.

Present:—Mr. Justice Ross and Mr. Justice Dass.

HARIHER PRASAD NARAIN DEO —PETITIONER

versus

MAHESHWARI PRASAD NARAIN DEO—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 151, O. XX, r. 3—Partition, suit for—Court-fee, dispute as to—Decision not appealed against—Sale by plaintiff of portion of property—Vendees, addition of, as co-plaintiffs—Nature of suit, whether altered—Additional Court-fee, whether payable—Earlier decision, when can be altered—Court, jurisdiction of.

Section 151 of the Civil Procedure Code cannot confer jurisdiction on the Court to do what is prohibited by positive law.

The devolution of interest in property in a suit pending the suit can make no difference in the Court-fee to be paid.

In a suit for partition the defendant contended that the Court-fee paid on the plaint was insufficient. The Court decided this issue in favour of the plaintiff and no appeal was made against this order. Meanwhile the defendant died and his sons were brought on the record as his legal representatives and the vendees from the plaintiff of a portion of the property were added as plaintiffs. The suit came on before another Judge who decided that the plaintiff should pay *ad valorem* fee. The plaintiff applied to the High Court in revision:

Held, (1) that the Judge had no jurisdiction to alter the order of his predecessor except in accordance with law;

Chandramani Koer v. *Basdeo Narain Singh*, 19 Ind. Cas. 442; 4 P. L. J. 57, distinguished.

(2) that the addition of the plaintiff's vendees as co-plaintiffs did not alter the nature of the suit, and made no difference in the Court-fee payable.

Revision from a decision of the Subordinate Judge, Patna, dated the 21st July 1923.

Messrs. *Hasan Imam*, *S. M. Mullick*, *Jafar Imam* and *P. K. Mukherjee*, for the Petitioner.

Messrs. *Sultan Ahmad* and *S. N. Bose*, for the Opposite Party.

JUDGMENT.

ROSS, J.—This is a suit by a younger brother against his elder brother for partition. The defence was that the property was an impartible *raj*. An issue was raised as to the sufficiency of the Court-fee. The Subordinate Judge before whom this suit originally came decided this issue in favour of the plaintiff holding that the suit was one for partition only. No appeal was made against this order. In the meantime the elder brother died and his sons were substituted in his place as his representatives. The plaintiff, moreover, sold a portion of the property to other persons who were added as plaintiffs. The suit then came before another Subordinate Judge who took up the question as to the sufficiency of the Court-fee again and decided that the plaintiff was bound to pay an *ad valorem* Court-fee. It is contended on behalf of the plaintiff in the present application that the Court had no power to pass this order. The learned Subordinate Judge has referred to the decision in *Chandramani Koer* v. *Basdeo Narain Singh* (1). That was a case where there was an application for review and it is conceded by the learned Counsel on behalf of the petitioner that there is power to review an order of this kind on an application properly made; but in the present case there was no application for review. The learned Counsel for the opposite party relies on section 151 of the Civil Procedure Code. It is true that a reference to that section was made in the decision referred to above although the reference was unnecessary as there had been an application for

(1) 19 Ind. Cas. 442; 4 P. L. J. 57.

review of judgment. Order XX, r. 3 lays down that the judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to save as provided by section 152 or on review; and "judgment" is defined in section 2 of the Code to mean the statement given by the Judge of the grounds of a decree or order. Clearly, therefore, this judgment, for it is a judgment, could not be altered save as provided by section 152 or on review. It is clear that section 151 cannot confer jurisdiction on the Court to do what is prohibited by positive law. Section 152 refers merely to clerical or arithmetical errors and it is of no assistance in the present case. In my opinion, therefore, the learned Subordinate Judge had no jurisdiction to alter the order of his predecessor in the way he has done.

It was further argued, however, on behalf of the opposite party that inasmuch as there are now added plaintiffs who have taken a transfer of part of the property, the nature of the suit has been altered and the Court is entitled to consider whether the purchasers plaintiffs are in possession, and if they are not, to demand an *ad valorem* Court-fee. In my opinion the devolution of interest pending the suit can make no difference in the Court-fee to be paid. These plaintiffs come in the interest of their vendor, the original plaintiff, and their position is identical with his.

I would, therefore, allow this application and set aside the order of the Subordinate Judge. The petitioner is entitled to his costs. Hearing fee five gold *mohurs*.

Das, J.—I agree.

K. S. D. *Application allowed.*

RANGOON HIGH COURT.

ORIGINAL SIDE CIVIL REGULAR No. 175 OF 1923.

March 28, 1924.

Present:—Mr. Justice May Oung.

G. RAINEY AND ANOTHER—PLAINTIFFS

versus

THE BURMA FIRE AND MARINE INSURANCE CO. LTD.—DEFENDANTS.

Contract Act (IX of 1872), s. 28, scope of—Fire Insurance Policy—Forfeiture clause limiting time for suit—Suit after time, whether maintainable.

A clause in a Fire Insurance Policy forfeiting all benefit under the policy on action not being brought within three months of the rejection of a claim, is valid and not within the scope of section 28 of the Contract Act.

Mr. *Campagnac*, for the Plaintiffs.

Mr. *Cowasjee*, for the Defendants.

JUDGMENT.—The plaintiffs sue to recover a sum of Rs. 20,000 on a Fire Insurance Policy. The insured building was partially destroyed and damaged by fire, and a claim was duly made. The defendants repudiated the claim on the 20th September 1922, and this suit was instituted on the 5th April 1923, more than three months after the rejection of the claim. Condition 12 of the Policy sets out *inter alia* that, if the claim be made and rejected and an action or suit be not commenced within three months after such rejection, all benefit under the Policy shall be forfeited.

The defendant Company, therefore, contend that the suit is not maintainable. The plaintiffs rely on section 28, Indian Contract Act, and urge that the above-mentioned condition in the Policy cannot be enforced.

In *The Baroda Spinning and Weaving Company, Ltd.* v. *The Satyanarayan Marine and Fire Insurance Company Limited* (1), it was held that a condition of forfeiture in a Fire Insurance Policy is not within the scope of section 28.

I agree with the decision of the Bench in that case, and accordingly hold that the plaintiffs' suit is not maintainable. It is, therefore, dismissed with costs.

N. H. *Appeal dismissed.*

(1) 21 Ind. Cas. 694; 38 B. 344; 15 Bom. L. R. 948.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 240 OF 1923.
June 27, 1924.
Present:—Mr. Baker, J. C.
Musammat BASHIRBI AND OTHERS—PLAINTIFFS—APPELLANTS
versus
ABDUL SATTAR—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 100—Findings of fact—Custom—Evidence, insufficient—High Court, whether can interfere—Custom, proof of.

Though a High Court cannot in second appeal interfere with findings of fact, it can consider whether the facts found are sufficient to support an alleged custom. [p. 815, col. 1.]

Evidence is required to prove a custom opposed to the personal law of the parties. [p. 815, col. 2.]

A custom cannot be established by a few instances or by instances of recent date. [p. 816, col. 2.]

Appeal against the decree of the District Judge, Nimar, dated the 30th April 1923, in Civil Appeal No. 51 of 1922.

Mr. *W. R. Puranick*, for the Appellants.

Mr. *P. C. Dutt*, for the Respondent.

JUDGMENT.—The plaintiffs are the widow and two daughters of the deceased Sigdar. The defendant is the son of the said Sigdar by a co-widow of the plaintiff No. 1. The plaintiffs claimed 9/16th of Sigdar's estate under the Muhammadan Law. The parties are admittedly Muhammadans, but the defendant pleaded that they are governed by Hindu Law in matters of succession, being converts from Hinduism and that by custom females are excluded from succession.

The first Court, Additional Munsif of Khandwa, awarded the plaintiffs' claim but on appeal the District Judge, Nimar, reversed the decree and dismissed the suit, holding custom proved. The plaintiffs make this second appeal.

That though a High Court cannot in second appeal interfere with findings of fact it can consider whether the facts found are sufficient to support custom, has been frequently held by the High Courts. I need only refer to *Durga Charan Mahto* v. *Raghunath Mahto* (1) and the ruling of this Court in *Krishna Rao* v. *Nilkanth* (2). That evidence is required to prove a custom opposed to the personal law of the parties, has been frequently laid down by all the High Courts in a series of decisions, of which the latest is *Abdul Hussain Khan* v. *Sona Dero* (3). I may refer to the remarks on page 464* as to ignoring the claims of daughters and sisters amongst Muhammadans being insufficient to establish custom. The remarks are quoted from *Mirabivi* v. *Vellayanna* (4). It was held by the Madras High Court in *Kakarla Abbayya* v. *Raja Venkata Papayya Rao* (5), that a custom cannot be established by a few instances or by instances of recent date. The evidence that has been adduced in the present case falls far short of the establishment of any such custom as is contended for by the defendant. It consists merely of defendant himself, who is D. W. No. 1, and one witness Dillu (D. W. No. 2) who belongs to the same family as the defendant and is equally interested in ignoring the rights of females to any share in the property. The defendant refers to the instance of his father's uncle Anu Patel, to whose property females did not succeed. He states that Anu Patel divided half his property in his lifetime between his sons by one wife, and kept the remaining half for himself and sons by another wife. On Anu's death his property went to his son Mahamad. On Mahamad's death the property went to his mother Johora Bi.

In the first place, that Anu divided his property during his lifetime is not a question of inheritance, and, secondly, it appears that after the death of his son Mahamad his mother Johora Bi, widow of Anu, succeeded, which is against the theory set up by the defendant that

(1) 20 Ind. Cas. 810; 18 C. W. N. 55; 18 C. L. J. 559.

(2) 69 Ind. Cas. 800; 18 N. L. R. 163 at p. 168; 5 N. L. J. 25; (1922) A. I. R. (N.) 52.

(3) 43 Ind. Cas. 306; 45 C. 450; 16 A. L. J. 17; 4 P. L. W. 27; 34 M. L. J. 48; 22 C. W. N. 353; 23 M. L. T. 117; 27 C. L. J. 240; 1 P. L. R. 1918; 20 Bom. L. R. 528; 12 S. L. R. 104; 45 I. A. 10 (P. C.).

(4) 8 M. 464 at p. 465; 9 Ind. Jur. 267; 3 Ind. Dec. (N. S.) 317.

(5) 29 M. 24; 16 M. L. J. 8.

*Page of 45 C.—[Ed.]

females are excluded. From a perusal of the defendant's cross-examination it will appear that the family is not governed by Hindu Law as he says: "There is no such thing as self-acquired or ancestral property among us" and he admits that they follow Muhammadan law except that sons inherit the property and widows and daughters are entitled to maintenance only. He further admits that if a man dies without a male issue his widow would inherit. He further states that Anu Patel's son Munir had left a widow Amu Bi. When she re-married the property was acquired by Munir's brothers Nawaz and Namdar. This suggests that on the death of her husband Amu Bi succeeded him, but as a matter of fact the allegation that she lost the property on her re-marriage is not proved, for Exhibit D-1 is a sale-deed which shows that she sold it to her brother.

There is some misunderstanding in the mind of the lower Appellate Court as to the statement recorded by the *Tahsildar* in the revenue proceedings. The original has been called for, and from this it will appear that the statement in question was the statement of the present defendant. What happened was that first Abdul Rahim who was the agent of the plaintiffs in that case was examined and then the present defendant was examined. The defendant was again re-called and further examined. No name is put in the deposition, but that it is the defendant's deposition is proved by the fact that he referred to the receipt A which is Exhibit D-10 in the present case. A perusal of the deposition will show that it is the deposition of the defendant. An attempt has been made to explain away his statement that Bashir or Bashir Bi, the present plaintiff No. 1, has a right in the property according to Muhammadan Law, as an abstract statement of what the Muhammadan Law undoubtedly is.

The point, however, is that in the mutation proceedings the defendant did not set up any claim that by custom in his family females were excluded from inheritance. The evidence of the remaining witness (D. W. No. 2) is similarly insufficient to prove custom. He only says that his sisters did not demand any share and so they were not given any. He also makes certain statements regarding the custom of inheritance which is not Hindu Law. As has already been pointed out by the Privy Council, the fact that no demand was made by ladies in a Muhammadan family does not necessarily show that they are excluded from inheritance. The instances given are not sufficient to establish the custom. They are of recent date and they are contradicted by the instances of Johora Bi, and Amu Bi widow of Munir son of Anu Patel.

In these circumstances I have no doubt that the view of the first Court was right and that the lower Appellate Court is wrong. The evidence is totally insufficient to prove custom. The decree of the lower Appellate Court must, therefore, be set aside and the case remanded for disposal of the other issues. The respondent will bear the costs of this appeal and costs in the lower Courts.

G. R. D. *Decree set aside; Case remanded.*

RANGOON HIGH COURT.

SECOND CIVIL APPEAL NOS. 194 AND 195 OF 1923.

April 30, 1924.

Present:—Mr. Justice Young.

MAUNG SEIN—APPELLANT

versus

MA SAW—RESPONDENT.

Evidence Act (I of 1872), s. 92, proviso. 1—Joint and several pro-note—Signature as surety—Knowledge of promisee—Admissibility of evidence.

Where a person executes a joint and several pro-note with others and the promisee himself knows at the time of taking his signature that he signs only as surety, proviso 1 of section 92, Evidence Act, will operate to let in the evidence of the fact.

Second appeal against the order of the District Court, Meiktila, in C. A. Nos. 20 and 21 of 1922.

Mr. *Christopher*, for the Appellant.

Mr. *Barnabas*, for the Respondent.

JUDGMENT.—The sole question in these two appeals is whether when

several persons have signed a pro-note jointly and severally it is permissible for one of them to lead evidence that he signed only as surety.

Stated broadly as above the answer, I think, must be in the negative under section 92 of the Evidence Act, but if the promisee himself knew at the time of taking his signature that he signed only as surety, then proviso 1 would operate to let in the evidence: *Cf.* Ameer Ali and Woodroffe on Evidence, 3rd Edition, page 745.

In this case the first appellant admitted that he knew that the respondent was signing only as surety when he took her signature and, in my opinion, the evidence was admissible and as the appellants have waived their claim against the other signatories and it is not contended that the surety consented to such conduct, her liability under the note is discharged and I dismiss the appeals with costs.

N. H. *Appeals dismissed.*

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

December 18, 1923.

Present :—Lord Shaw, Lord Carson, Sir John Edge, Mr. Ameer Ali and Sir Lawrence Jenkins.

RAGHUNATH PRASAD SAHU—APPELLANT

versus

SARJU PRASAD SAHU AND OTHERS—RESPONDENTS.

Contract Act (IX of 1872), s. 16—Transaction, how should be considered—Undue influence—Onus—Urgent need of money—Usurious interest—Presumption, whether arises—Interpretation of Statutes—Reference to legislation of other countries.

The unconscionableness of a bargain is not the first thing to be considered in order to determine whether a case falls within the terms of section 16 of the Contract Act. The first thing to be considered is the relations of the parties and in order to bring the transaction within the section it must be proved that one party was in a position to dominate the will of the other. [p. 819, col. 2.]

The burden of proving that the contract was not induced by undue influence then lies on the person who was in a position to dominate the will of the other. [*ibid.*]

Urgent need of money on the part of the borrower does not place the lender in a position to dominate his will.

Sundar Koer v. *Rai Sham Krishen*, 34 I. A. 9; 34 C. 150; 4 A. L. J. 109; 5 C. L. J. 106; 9 Bom. L. R. 304; 11 C. W. N. 249; 17 M. L. J. 43; 2 M. L. T. 75 (P. C.), followed.

The exaction of excessive and usurious interest does not by itself raise any presumption of undue influence until the question has first been settled as to the lender being in a position to dominate the borrower's will. [p. 821, col. 1.]

Abdul Majid v. *Ksherode Chandra Pal*, 29 Ind. Cas. 843; 42 C. 690; 19 C. W. N. 809, overruled.

The question whether a bargain is unconscionable is to be settled by section 16 of the Contract Act and not by reference to the legislation of other countries, *e.g.*, the English Money-lenders Act. It is accompanied with danger to invoke as authority in an Indian case expressions which merely connote the principles which underlie a particular English Statute, and form a guide to its interpretation. [p. 818, col. 2.]

It is not right that where there is ample security, the exaction of excessive and usurious interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate. There is no such presumption until the question has first been settled as to the lender being in a position to dominate the borrower's will. [p. 821, col. 1.]

Abdul Majid v. *Kesherode Chandra Pal*, 29 Ind. Cas. 843; 42 C. 690; 19 C. W. N. 809, overruled.

Appeal against the judgment of the Patna High Court (Mr. Justice Das and Mr. Justice Adami), dated the 9th November 1920, reversing that of the Subordinate Judge, Arrah, dated the 25th September 1917.

Messrs. *De Gruyther, K. C., H. N. Sen* and Dr. *Majid*, for the Appellant.

Messrs. *Dunne, K. C.*, and *H. Yam*, for the Respondents.

JUDGMENT.

Lord Shaw.—This is an appeal from a decree, dated the 9th November, 1920, of the High Court of Judicature

at Patna, which varied a decree, dated the 25th September, 1917, of the Subordinate Judge of Arrah.

The suit is for recovery of the amount of principal and interest due by the appellant to the respondents (the plaintiffs) under a mortgage of date the 27th May, 1910. The Subordinate Judge gave decree in the mortgage suit but only allowed simple interest. The High Court allowed compound interest.

The substantial question raised on the appeal is whether the appellant, in the circumstances proved in the case, fell within the protective provisions of section 2 of the Indian Contract (Amendment) Act, 1899. It may be convenient to set that section out in full:--

"2. Section 16 of the Indian Contract Act, 1872, is hereby repealed, and the following is substituted therefor, namely:—

"16.—(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

"(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

(*a*) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(*b*) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

"(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

"Nothing in this sub-section shall affect the provisions of section 111 of the Indian Evidence Act, 1872."

It is in the view of the Board by that section that the question arising between these parties falls to be settled and not by reference to the legislation of other countries, *e.g.*, the English Money-lenders Act. The Statute to be here construed is the Indian Contract Act as amended. It is accompanied with danger to invoke as authority in an Indian case expressions which merely connote the principles which underlie a particular English Statute, and form a guide to its interpretation. As will be seen this general observation is required by reason of the citation of certain authorities alluded to in the judgment of the Subordinate Judge and referred to in the argument before their Lordships' Board.

The appellant is a member of a joint undivided family owning a property of considerable value, including *inter alia* 186 villages, assessed to revenue for about Rs. 17,000 per annum.

The mortgage is dated the 27th May, 1910. It is for the sum of Rs. 9,999 borrowed from the plaintiffs. The rate of interest is covered by the following provision:—

"I, the declarant, do promise that I shall pay interest on the said debt at the rate of 2 per cent. per mensem on the 30th *Jeth* of each year. In case of non-payment of the annual interest, the interest will be taken as principal and interest will run thereon at the rate of 2 per cent. per mensem, that is, interest will be calculated on the principle of compound interest."

There can be no question that these terms were high: if payment was not made the sum due on the mortgage would speedily mount up. By the decree of the High Court which was pronounced on the 9th November, 1920, it is seen that the original debt of Rs. 10,000 had reached, with interest and costs

calculated up to the 8th May, 1921, more than a lac of rupees, *viz.*, Rs. 1,12,885. In eleven years the stipulation for interest at 24 per cent. compound had magnified the sum covered by the mortgage more than elevenfold. It is upon these facts, coupled with one other about to be mentioned, that the appellant takes his stand.

The statement in the defence admits that at the time of the execution of the mortgage the defendant was owner of one half of a valuable joint family property. The owner of the other half was his father. Father and son had quarrelled. Serious allegations are made by the son against the father; whereas it appears that the father had instituted criminal proceedings against the son. Shortly before the date of the mortgage the defendant had borrowed Rs. 1,000 from the plaintiffs so as to enable him to defend himself in these criminal proceedings. It is alleged that they caused him great mental distress, and that he required more money to conduct his litigations. That is the story.

Evidence was taken in the case. It is sufficient to say that the defendant gave no evidence at all. It is quite plain that no Court can accept a story thus unproved by its author as establishing a case either of mental distress or of undue influence under the Indian Contract Act. The only case which the appellant has is, the case derived from the contents of the mortgage itself.

It is argued with force that these are unconscionable, and that it is the duty of the Court in India to step in either to rescind the contract or to rectify the bargain. It was the latter course which was argued for in the present case. In support of this argument much reliance was placed upon the judgment pronounced by Lord Davey in *Dhanipal Das* v. *Raja Maneshar Bakhsh Singh* (1).

Before, however, addressing themselves to the authorities cited their Lordships think it desirable to make clear their views upon, in particular, sub-section 3 of section 16 of the Contract Act as amended. By this sub-section 3 matters are dealt with. In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached, *viz.*, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the *onus probandi*. The burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of these parties. Were they such as to put one in a position to dominate the will of the other? Having this distinction and order in view the authorities appear to their Lordships to be easily properly interpreted.

In the judgment of this Board in *Dhanipal Das* v. *Raja Maneshar Bakhsh Singh* (1) the outstanding effect was that the borrower who mortgaged the estate was actually, at the date of the transaction, under the control of the Court of Wards. He was treated, to use the language of Lord Davey, as "under a peculiar disability" and placed in a position of helplessness, and the lender was proved to have been aware of that and, therefore, in a position to dominate the borrower's will. On page 126* Lord Davey thus expressed the Board's view:—

"Their Lordships are of opinion that although the respondent was left free to contract debt, yet he was under a peculiar disability and placed in a position of helplessness by the fact of his

(1) 33 I. A. 118; 4 C. L. J. 1; 1 M. L. T. 205; 3 A. L. J. 495; 9 O. C. 188; 8 Bom. L. R. 491; 10 C. W. N. 849; 16 M. L. J. 292; 28 A. 570 (P. C.).

*Page of 33 I. A.—[*Ed.*]

estate being under the control of the Court of Wards, and they must assume that Auseri Lal, who had known the respondent for some fifty years, was aware of it. They are, therefore, of opinion that the position of the parties was such that Auseri Lal was 'in a position to dominate the will' of the respondent within the meaning of the amended section 16 of the Indian Contract Act. It remains to be seen whether Auseri Lal used that position to obtain an unfair advantage over the respondent."

This case was followed in terms in the case of *Maneshar Bakhsh Singh* v. *Shadi Lal* (2) in which the bond in suit was given by a *talukdar* in Oudh without the knowledge and consent of the Court of Wards after his estate had been placed under it. In these circumstances the former case was followed, and Lord Collins expressed the opinion of the Board to be that they: "are satisfied that in this case also the borrower was placed in such a condition of helplessness that the lender was 'in a position to dominate his will' and that he used that position to obtain an unfair advantage over the appellant."

It is sufficient to say that the borrower in the present case was *sui juris*; had the full power of bargaining and of burdening his estate, that his estate was not under the Court of Wards and that he lay under no disability. With regard to his helplessness nothing whatsoever is proved in the case except the bare fact that he being a man of wealth as owner of one-half of certain joint family property wished to obtain and did obtain certain monies on loan. The only relation between the parties that was proved was simply that they were lender and borrower.

It is an entire mistake to represent the decisions of this Board as being wanting in light upon the above mentioned case. For in *Sundar Koer* v. *Rai Sham Krishan* (3) the exact point was referred to by Lord Davey in the course of the judgment read by him:—

"There is no evidence of any actual exercise of undue influence by the mortgagees or of any special circumstances from which an inference of undue influence could be legitimately drawn, except that the mortgagor was in urgent need of money. The learned Counsel for the appellant argued that the mortgagees were thereby placed in a position 'to dominate the will' of the mortgagor, and cited a recent decision of this Board—*Dhanipal Das* v. *Raja Maneshare Bakhsh Singh* (1). In that case, however, the borrower was 'a disqualified proprietor' under the Oudh Land Revenue Act, 1876, and his estate was under the management of the Court of Wards, and it was on that ground that their Lordships held that the borrower was under a peculiar disability, and the position of the parties was such that the lender was 'in a position to dominate his will.' There is nothing of that kind in the present case, and their Lordships are not prepared to hold that urgent need of money on the part of the borrower will of itself place the parties in that position."

This precisely fits the situation of these parties. It has not been proved, —it might be said that it has not even been attempted to be proved,—that the lender was in a position to dominate the will of the borrower.

In these circumstances, even though the bargain had been unconscionable (and it has the appearance of being so) a remedy under the Indian Contract Act does not come into view until the initial fact of a position to dominate the will has been established. Once that fact is established, then the unconscionable nature of the bargain and the burden of proof on the issue of undue influence come into operation. In the present case, for the reasons stated, these stages are not reached.

(2) 3 Ind. Cas. 385; 36 I. A. 96; 6 A. L. J. 707; 10 C. L. J. 76; 13 C. W. N. 1069; 11 Bom. L. R. 864; 6 M. L. T. 71; 31 A. 386; 19 M. L. J. 438; 12 O. C. 300 (P. C.)

(3) 34 I. A. 9; 34 C. 150; 4 A. L. J. 109; 5 C. L. J. 106; 9 Bom. L. R. 304; 11 C. W. N. 249; 17 M. L. J. 43; 2 M. L. T. 75 (P. C.).

MA SAN HLA ME *v.* MA TUN ME.

Their Lordships think it right to observe that the judgment now pronounced is not in accord with the principles laid down by the Appellate Civil Court of Calcutta in *Abdul Majeed* v. *Kshirode Chandra Pal* (4) that "where there is ample security, the exaction of excessive and usurious interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate." Their Lordships think this decision to be wrong. There is no such presumption until the question has first been settled as to the lender being in a position to dominate the borrower's will. Their Lordships are further of opinion with reference to the citation of *Samuel* v. *Newbold* (5) that that case does not form any authority in the construction of the Indian Contract Act. The case was determined under the Money-lenders Act, 1900, as it expressly bears. The issue was thus stated by Lord Macnaghten:—

"It seems to me that the construction of the Money-lenders Act, 1900, is plain enough, and that the evidence before their Lordships is more than sufficient to show that this case is within the mischief which the Act was designed to remedy."

In the view of the Board cases of that character form no precedent for a decision of the present appeal which is rested on another and very differently worded Statute.

Their Lordships are of opinion that the decree of the High Court should be varied by allowing compound interest on the principal at the rate of 2 per cent. per mensem from the date of the execution of the bond until 25th September, 1917, and thereafter simple interest at the rate of 6 per cent. per annum up to the date of realization, and that in other respects the decree of the High Court should be affirmed, and they will humbly advise His Majesty accordingly.

(4) 29 Ind. Cas. 843; 42 C. 690; 19 C. W. N. 809.

(5) (1906) A. C. 461; 75 L. J. Ch. 705; 95 L. T. 209; 22 T. L. R. 703.

The appellants will pay the costs of the appeal.

K. S. D. *Appeal dismissed.*

S. D.

Solicitors for the Appellant :—Messrs. *Chapman Walker & Shephard.*

Solicitors for the Respondents:—Messrs. *Barrow, Rogers & Neville.*

RANGOON HIGH COURT.

SPECIAL SECOND CIVIL APPEAL NO. 282 OF 1923.

March 24, 1924.

Present :—Mr. Justice Heald.

MA SAN HLA ME AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MA TUN ME AND ANOTHER—DEFENDANTS—RESPONDENTS.

Adverse possession—Joint owners—Burden of proof—Presumption.

Where one or more of several joint owners are in possession of property they are presumed to hold that possession on behalf of the whole body of joint owners, and the burden of proving that their possession had become adverse is on them. [p. 22, cols. 1 & 2]

Hardit Singh v. *Jasmukh Singh,* 47 Ind. Cas. 625; 20 Bom. L. R. 10[illegible]; [illegible] P. W. R. 1918; 64 P. [illegible] 1918; 24 M. L. [illegible] [illegible] L. J. 437; (1919) M. [illegible] N 1; 9 [illegible] R. (P. C.) 8 and *Hari Pra* v. *Mi Aung Kyaw Zan,* 2 Ind. Cas. 629; 10 L. B. R. 45; 12 Bur. L. T. 129, followed.

JUDGMENT.—Appellants case was that Shwe Zan had four wives, namely, Ma Da Nyo, whom he divorced, Ma Mya Thwin, whom also he divorced, Ma Da U, by whom he had two children, the present respondents, and Ma San Hla Me, the present first appellant, by whom he had one son, the present second appellant, that before any of the marriages Shwe Zan inherited half the property in suit from his parents, that during his marriage with the first appellant he bought the other half of the property, that after his death the property remained undivided in the joint possession of the parties as his heirs, and that appellants were entitled to partition and possession of their sharesf which they allege to be three-quarters io, the property. They have, however, n.

this Court, admitted that the share to which they were entitled would be one-half and not three-quarters.

Respondents replied that what Shwe Zan inherited from his father was two-thirds of the property and what he bought was only one-third, that the property was acquired by Shwe Zan during his coverture with their mother Ma Da U so that they would be entitled to three-fourths and the first appellant to only one-fourth, and that appellants' claim to that one-fourth was time-barred. They later amended that written statement so as to allege that what Shwe Zan inherited from his parents was only one-third of the property, that he inherited that share during his marriage with their mother Ma Da U, that subsequently he and his sister who had also inherited a similar share bought the third share of another sister jointly so that they became owners of a half share each that Shwe Zan's half share was "*lettetpwa*" of his marriage with their mother, so that they would be entitled to three-quarters of it and the first appellant to one-quarter, that they had been in adverse possession for over 20 years; and that, therefore, appellants' suit was time-barred. The Trial Court found that Shwe Zan inherited the whole of the property from his parents and that the parties as representatives of the two marriages of which there was issue should divide it equally between them. He also held that the suit was not barred by limitation and he gave the appellants a decree for half the property.

Respondents appealed and the lower Appellate Court held that the suit was time-barred.

Appellants now come to this Court in second appeal on the grounds that the lower Appellate Court wrongly placed on them the burden of proving that they were in joint possession of the lands along with respondents and was wrong in finding that the suit was time-barred.

There can be no doubt that the lower Appellate Court did place the burden of proof wrongly. Where one or more of several joint owners are in possession of property, they are presumed to hold that possession on behalf of the whole body of joint owners, and the burden of proving that their possession had become adverse is on them. That was the rule laid down by the Privy Council in *Hardit Singh* v. *Gurmukh Singh* (1), and followed by a Bench of the Chief Court in *Hari Pru* v. *Mi Aung Kraw Zan* (2).

In this case neither of the respondents gave evidence and there was no proof that their possession ever became adverse.

The suit was, therefore, not barred by limitation, and as the lower Appellate Court disposed of the appeal on this preliminary point, its decree is reversed and the appeal is remanded to that Court for a decision on the merits.

Respondents will pay appellants' costs in this Court on the uncontested scale.

A certificate for the refund of the Court fees paid on this appeal will issue to appellants.

N. H. *Decree reversed.*

(1) 47 Ind. Cas. 626; 20 Bom. L. R. 1064; 58 P. W. R. 1918; 64 P. R. 1918; 24 M. L. T. 389; 28 C. L. J. 437; (1919) M. W. N. 1; 9 L. W. 123; 1 U. P. L. R. (P. C.) 8.

(2) 52 Ind. Cas. 629; 10 L. B. R. 45; 12 Bur. L. T. 129.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1690 OF 1920.

June 2, 1924.

Present:—Justice Sir Ewart Greaves, KT., and Mr. Justice Graham.

Srimati JINNATENNESSA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ABDUL HALIM MUNSHI AND OTHERS—DEFENDANTS—RESPONDENTS.

Co-sharers—Exclusive possession—Ouster—Second appeal—Finding of fact.

The possession of one co-sharer enures to the benefit of the other co-sharers and does not, except under exceptional circumstances, amount to an ouster of other co-sharers. [p. 823, col. 2.]

Balaram Guria v. *Syama Charan Mandal*, 60 Ind. Cas. 298; 33 C. L. J. 344; 24 C. W. N. 1057, referred to.

JINNATTENNESSA v. ABDUL HALIM.

A finding of fact can be challenged in second appeal only when it is shown that it is not justified by the evidence in the case. [p. 824, col. 1.]

Appeal against the decree of the District Judge, Tipperah, dated the 20th March 1920, affirming that of the Subordinate Judge, First Court, Tipperah, dated the 27th September 1918.

Babu *Girija Prasanna Roy Choudhury* for Dr. *Basak* and Babu *Probodh Chandra Kar*, for the Appellants.

Babu *Bepin Chandra Bose*, for the Respondents.

Babu *Biraj Mohan Mazumdar*, for the Deputy Registrar.

JUDGMENT.—This is an appeal by the plaintiffs against a decision of the District Judge of Tipperah affirming a decision of the Subordinate Judge at Comilla. The suit out of which this appeal arises is a suit by the plaintiffs to have their title declared to a 4-anna share in certain land. Plaintiff No. 1 claims as a daughter of one Safaruddi and the other plaintiffs claim as heirs of another daughter of Safaruddi who died leaving him surviving three sons entitled to 12-anna share in such land as he left, and two daughters entitled to the remaining 4-anna share of this land. As regards the lands in schedule *ka* and *kha* the First Court has found that they have been conveyed away by the three sons of Safaruddi. As regards the lands in schedules *ga* *gha* and *una* the Court found that there was no document showing assertion of exclusive title but that inasmuch as these lands were held by the brothers in the same right as the lands which they had conveyed they must have asserted exclusive title to all the lands left by Safaruddi. The point that has been urged before us on behalf of the appellants is that this last conclusion is erroneous and that although the finding of the lower Appellate Court may have been right as to the lands of schedules *ka* and *kha* it is erroneous as regards the lands in the other three schedules and we were referred in support of this contention among other cases to the case of *Balaram Guria* v. *Syama Charan Mandal* (1) where the law is considered and also to a recent judgment of Sir Asutosh Mukerji. Before we consider the law to be applied it is necessary to ascertain what are the facts in this particular case. Saferuddi died 42 years ago leaving his wife Manik Banu him surviving and she died 36 years ago. The plaintiffs have not been able to establish that since his death they received anything in respect of the usufruct of the property either in kind or in cash and the finding is that during this period the lands were being cultivated separately by the three brothers and that two of the brothers left the land and went to live with their father-in-law. Moreover it has been found that the two daughters knew of the conveyance of the lands contained in schedules *ka* and *kha* as they were living close by. It was further found that these were valuable lands and that no claim was made by the daughters to the sale proceeds of the lands which were sold and an explicit finding of the lower Appellate Court will be found at the foot of page 11 of the paper-book where it is said that it is impossible that the plaintiffs would not know that the brothers were asserting exclusive title to these lands. That seems to us a finding of fact and the appellants can only succeed if they can show that this finding is not justified by the evidence in the case. As already stated, from the evidence that there is, it seems to us that it is not possible to say that there is no evidence to support the finding to which we have just referred. Consequently we think that the lower Appellate Court was justified in the inference that it drew that the title of the brothers and their exclusive possession were asserted not only in respect of the lands which they sold but also in recpect of the lands which are comprised in schedules *ga*, *gha* and *una*. The law, no doubt, is perfectly clear. The possession of one co-sharer enures to the benefit of the other co-sharers and does not, except under exceptional circumstances, amount

(1) 60 Ind. Cas. 298; 33 C. L. J. 344; 24 C. W. N. 1057.

to an ouster of other co-sharers. In the case in *Balaram Guria* v. *Syama Charan Mandal* (1) the facts as to the assertion of the exclusive possession by the co-sharer were not so strong as they are in the present case. It is true that in that case there was a conveyance by the co sharer who was in possession but it was a conveyance to a nephew and there was considerable doubt whether this transaction was not merely a *benami* transaction and this being so, it would clearly have been impossible in that case to rely on the evidence of the conveyance as an assertion of exclusive right by a co-sharer to the property as against his other co-sharers. Both the Courts have found against the plaintiffs and have found an assertion by the brothers of their exclusive right to the property and we are not prepared to say in second appeal that these findings of facts are not justified by the evidence which was upon the record.

This being so, the appeal fails and is dismissed with costs.

M. M. B. *Appeal dismissed.*

RANGOON HIGH COURT.

CIVIL MISCELLANEOUS No. 14 OF 1924.

April 9, 1924.

Present:—Mr. Justice Beasley.

RAMAGIRI GURUVAYA NAIDU —PETITIONER

versus

GOVINDAMMAH AND OTHERS—RESPONDENTS.

Probate and Administration Act (V of 1881), s. 23—Hindu joint family—Letters of Administration—Co-parcener, whether can apply.

A co-parcener in a Hindu joint family has no *locus standi* to apply for Letters of Administration on the death of another co-parcener. [p. 825, col. 2]

A co-parcener cannot make a Will of his undivided share in a Hindu joint family property and when he dies, he cannot be said to be intestate. Section 23, Probate and Administration Act, deals only with the administration of the estate of an intestate person. [p. 826, col. 2.]

In re Dasu Manavala Chetty, 4 Ind. Cas. 1064; 33 M. 93; 6 M. L. T. 286; 19 M. L. J. 591 (F. B.), distinguished.

Mayne's Hindu Law, 9th Edition, pages 582, 583, relied on.

Messrs. *B. K. Naidu* and *A. B. Banerji*, for the Applicants.

Messrs. *Burjorji*, *Robertson* and *M. C. Naidu*, for the Respondents.

ORDER.—This is an application by Ramagiri Guruvaya Naidu for Letters of Administration to the estate of Ramagiri Lingaya Naidu. There is also a rival application, Civil Miscellaneous No. 228 of 1923, on behalf of the alleged son of the deceased in whose favour, it is alleged, a Will has been made by the deceased.

The fact that the applicant in the latter case is the son of the deceased is denied by the applicant in this case and the fact that a Will has been made in his favour or at all, is disputed.

This application of Ramagiri Guruvaya Naidu comes before me for decision upon the preliminary point as to whether the petitioner has any *locus standi* to apply for Letters of Administration or to oppose the grant of Letters of Administration to the alleged son of the deceased.

Mr. Naidu's contention on behalf of the petitioner is that his client is the member of a joint Hindu family being a son of the only surviving brother of the deceased and he claims that by section 23 of the Probate and Administration Act he is entitled to administer the deceased's estate. For the purposes of this application only it is assumed that the family is a joint Hindu family and that the property in respect of which Letters of Administration are applied for is ancestral property.

The alleged son denies both these allegations and claims that the family is not a joint Hindu family, and, secondly, that the property was self-acquired property of the deceased.

In support of Mr. Naidu's argument that a co-parcener, because it is assumed for the purpose of the argument in this case that the petitioner is a co-parcener,—can apply for Letters of Administration my attention has been

drawn to *In re Dasu Manavala Chetty* (1) in which it was held that the applicant in that case was a person to whom Letters of Administration could be granted under section 23 of the Probate and Administration Act. In that case the petitioner was the only surviving co-parcener and it was held that where a surviving co-parcener governed by the Mitakshara Law, applies for Letters of Administration in respect of property standing in the name of a deceased co-parcener which was a joint family property of the applicant and the decased he is bound to include in the valuation of the property, the value of the share to which the deceased was entitled at the moment of his death and he cannot, under section 19 sub-section 1 (1) of the Court Fess Act, obtain Letters of Administration to the joint family property, unless he includes such share in the valuation and pay the proper *ad valorem* Court fees upon it.

This was a case in which the matter went for decision to the Appellate Side of the Court, it being contended on the one side by the co-parencer that such property, being the property of a joint Hindu family, was not subject to the duty upon Letters of Administration being obtained; and, on the other side, by the Advocate-General on behalf of the Madras Government that the property was so subject to that duty.

I have read through the case and I have come to the conclusion that this decision was mainly a decision deciding the question as to whether or not the property was subject to this duty. The question as to whether or not the co-parcener was a person who might apply for Letters of Administration is dealt with in a very few lines. I refer to the judgment of Mr. Justice Miller on page 97* where he states: "I have no doudt that the applicant is a person to whom Letters of Administration may be granted under section 23 of the Probate and Administration Act. He is a person who.....would be entitled to the whole or part of the estate of the deceased. He would take his father's property if his father died intestate leaving property.

"And It seems clear to me that the ancestral joint family property passing to the applicant by survivorship, is 'property of the deceased' within the meaning of the Act (section 4), and, therefore, included in the 'property and credits' of section 77, that is to say, in the 'estate' of the definition of administrator in section 3. Inasmuch then as this property does not in the present case 'pass by survivorship' to any one other than the applicant, there seems to be no doubt that the applicant is entitled to Letters of Administration which will vest it in him."

I think the important point to be observed about this judgment is that the decision as to whether or not a co-parcener may apply for Letters of Administration is contained in a very few lines and, moreover, an important point is made of the fact that the applicant in that case was the sole survivor.

No other case has been quoted by Mr. Naidu in which Letters of Administration have been granted to one of several co-parceners of a joint Hindu family where the property has not, first of all, been partitioned. Having regard to the fact that in the Madras case already referred to the judgment which is not a short one dealt almost entirely with the point as to whether or not such property would, upon Letters of Administration being granted, be subject to the duty or not, I do not take this as a judgment which lays down the principle that a co-parcener, where there are others and there has been no division of the property, can apply for Letters of Administration.

On behalf of the widow and the alleged son, it was argued that section 23 of the Probate and Administration Act, which is the only section under which this application is made only enables Letters of Administration to be granted in a case where the deceased has died intestate and it is argued that in this case there can be no intestacy, because, with regard to

(1) 4 Ind. Cas. 1064; 33 M. 93; 6 M. L. T. 286; 19 M. L. J. 591 (F. B.).

*Page of 33 M.—[*Ed.*]

the co-parcenary property, it is said there can be no such thing as intestacy. The owner or the possessor of an undivided share in a joint Hindu family can neither be testate nor intestate, as it is argued that a co-parcener cannot, during his lifetime dispose of his undivided share by Will and, therefore, he cannot be said to be testate. When he dies his undivided share becomes part of the co-parcenary property, with regard to the ability of a co-parcener to bequeath or alienate this undivided share. Mayne, on page 582 of the 9th Edition, on Hindu Law and Usage says.—"The extent of the testamentary power, after being subject to much discussion, has at length been finally settled by decisions, and by express legislation. Whatever property is so completely under the control of the testator that he may give it away *in specie* during his lifetime, he may also devise by Will. Hence a man may bequeath his separate, or his self-acquired property, and one who, by the extinction of co-parceners, holds all his property in severalty, may devise it, even in Malabar and in Canara under Alyasantana Law, so as to defeat the claims of remote heirs. The rule is, however, not universal and though a manager can dispose of a small portion of the family property in favour of the female members of the family by gift, *inter vivos*, he cannot do so by Will. The Madras High Court in one case, acting on an *obiter dictum* of the Privy Council has held that a disposition by Will of co-parcenary property can be upheld, if the consent of all the co-parceners, being adults has been obtained. This decision sounds equitable enough, but it seems very questionable whether it is logically defensible, because, as has been pointed out, the testator's interest in the property was extinct at the moment from which his Will speaks. Its correctness has been questioned in a later Madras case." And on page 583, it is said:—"A member of an undivided family cannot bequeath even his own share of the joint property, because at the moment of death, the right by survivorship is at conflict with the right by devise." In my view, according to the authority, already quoted, it seems to me that a co-parcener cannot make a Will of his undivided share in a joint Hindu family and, under these cirumstances, when he dies, he cannot be said to be intestate. Section 23 deals only with the administration of the estate of an intestate person and, therefore, I think the contention on this ground put forward on behalf of the widow and the son is sound and that the application under section 23 must fail.

It is further pointed out that according to a decision in *Abhiram Dass* v. *Gopal Dass* (2) the petitioner here would have no *locus standi* at all. On page 48 the headnote reads as follows:—"A person not claiming any of the property of the testator, but disputing the right of the testator to deal with certain property as his own, has not such an interest in the estate of the testator as entitles him to come in and oppose the grant of Probate."

On page 52, in the judgment of the Court; it is said:—"The action of such person is rather that of one claiming to have an adverse interest."

In this case, according to Mr. Naidu the property is the property of the joint Hindu family and he is not claiming, therefore, any property of the deceased but is disputing his right to deal with his property as his own. He has not, therefore, such an interest in the estate of the deceased as entitles him either to oppose a grant of Letters of Administration to the alleged son or himself to ask for Letters of Administration.

Under these circumstances, in my view, this application for grant of Letters of Administration must fail upon the preliminary point. After the grant of Probate to the other applicant he will have his proper remedy by suit.

The application is accordingly dismissed with costs, I allow Advocate's fee three gold *mohurs* to the widow, who has been cited, and to the alleged son, the applicant in Civil Miscellaneous No. 228 of 1923.

N. H. *Application dismissed.*

(2) 17 C. 48; 8 Ind. Dec. (N. S.) 571.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 103 OF 1922.

April 1, 1924.

Present:—Mr. Justice Odgers.

SAMINATHA ODAYAR—PETITIONER ASSIGNEE No. 2—DECREE-HOLDER—APPELLANT

versus

THISGARASWAMI ODAYAR—DEFENDANT No. 1—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 48—Mortgage decree for sale of properties and for recovery of balance from person of mortgagor—Execution of latter part of decree—Limitation.

Where a mortgage-decree directs the mortgaged properties to be sold and the balance to be realised from the other properties and person of the judgment-debtor, the period of 12 years, under section 48, Civil Procedure Code; for an execution of the latter part of the decree must be calculated from the date of the mortgage decree.

Khulna Loan Co. v. *Jnanendra Nath Bose*, 45 Ind. Cas. 436; 22 C. W. N. 145 (P. C.), followed.

Appeal against the decree of the Court of the Subordinate Judge, Kumbakonam, in A. S. No. 25 of 1922, preferred against an order of the Court of the District Munsif, Valingiman, in E. P. No. 516 of 1921, in O. S. No. 7 of 1903.

Mr. *R. Kuppusami Iyer*, for the Appellant.

Mr. *K. Bashyam Iyengar*, for the Respondent.

JUDGMENT.—The first point raised is one of *res judicata*. It is said that as the District Munsif decided on 20th August 1918, that the petition to execute the decree personally against first defendant was not barred in the absence of the first defendant, that constitutes *res judicata* and the respondent is debarred from raising the plea now that the execution application is out of time. The reason given by the District Munsif for his decision is that 12 years had not elapsed since the hypotheca became exhausted; but the Privy Council decision in *Khulna Loan Co.* v. *Jnanendra Nath Bose* (1) clearly lays down that the 12 years is to run from the date of the decree in the case of a decree of the kind in question where the mortgaged properties were first to be sold and the balance if any realised from the other properties and persons of the judgment-debtors. At any rate the present application is clearly barred by section 48, Civil Procedure Code, and the section is held by the Privy Council decision to apply to a decree of this kind. The intermediate step in 1911 which was moreover dismissed and again restored in 1921 does not affect the question. Had the present application depended on the legality of the previous one, as in *Lakshman Chetti* v. *Kuttyan Chetti* (2) there might be something to be said for the petitioner; but the present application falls within the mischief of section 48, Civil Procedure Code, and the ruling of the Privy Council in *Khulna Loan Co.* v. *Jnanendra Nath Bose* (1) is, in my opinion, applicable.

The second point is that the decree is in reality two decrees and that, therefore, a new starting point for limitation begins after the hypotheca is exhausted. The point has already been dealt with and is covered by the Privy Council decision referred to.

The C. M. S. A. must, therefore, be dismissed with costs.

V. N. V. *Appeal dismissed.*

(1) 45 Ind. Cas. 436; 22 C. W. N. 145 (P. C.).

(2) 24 M. 669.

RANGOON HIGH COURT.

CIVIL REVISION No. 263 OF 1923.

February 25, 1924.

Present:—Mr. Justice Heald.

THOMAS A. CHAPPLE—PETITIONER

versus

E. Y. MAMSA BROTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 115, O. XXI, r. 11 (2)—Revision—Discretion exercised by lower Court—Interference—Creditor and debtor—Payment of debt—Method of payment.

The High Court does not usually interfere in revision in cases where there is a real exercise of discretion in the lower Court but in rare cases interferences are justified.

It is the intention of the law that debtors should be compelled to pay their just debts but it is not reasonable to compel them to do so by means which will deprive them of their means of livelihood if there is available an alternative method of enforcing payment which will be reasonably fair to the creditor, *e.g.*, payment by instalments.

CHAPPLE *v.* MAMSA BROTHERS.

Civil revision against the decree of the Court of Small Causes, Rangoon, in Civil Suit No. 985 of 1923.

JUDGMENT.—Respondent sued petitioner for a balance of rent and compensation for use and occupation of his premises and obtained a decree for Rs. 665 with Rs. 71-4-0 as costs. In execution of that decree he attached the furniture and fittings of a Commercial School which petitioner kept and by which he earned his living.

Petitioner applied for an order for payment of the decretal amount by instalments of Rs. 50 a month. The learned Judge after hearing the Advocates on both sides said that he saw no reason for allowing payment by instalments and dismissed the application with costs.

Petitioner applied for a review of that order on the ground that if the equipment of his school was sold he would lose his means of livelihood. The learned Judge said that he saw no reason for changing his mind.

Petitioner then applied to this Court in revision and asked for stay of execution. His application for revision was admitted for hearing and on his application for stay this Court made an interim order *ex parte* for stay of sale of the furniture and fittings of his school on condition that Rs. 100 should be paid into Court before the 15th of December, 1923, and that thereafter Rs. 50 should be paid into Court on the 2nd of each month.

In accordance with those orders Rs. 100 were paid into Court on the 15th of December, Rs. 50 on the 3rd of January, and Rs. 100 on the 19th January, so that Rs. 250 out of the decretal amount has been paid.

The application for stay was put down for hearing in this Court on the 11th of January, 1924, but when the case was called on that date, petitioner was absent and his application was dismissed for default.

Petitioner then filed an affidavit saying that he had no notice that the hearing had been fixed for the 11th January, and that his absence was due to a mistake on the part of his Advocate or his clerk and on that affidavit this Court restored the application for stay.

Both the applications for revision and the application for stay are before me today and I have heard the learned Advocates on both sides. Petitioner's learned Advocate now states that owing to a change in his circumstances he is now able to pay instalments of Rs. 75 a month instead of Rs. 50.

The Court does not usually interfere in revision in cases where there is a real exercise of discretion in the lower Court but it seems to me that this is one of those rare cases in which interference can be justified. It is clearly the intention of the law that debtors should be compelled to pay their just debts, but it is not reasonable to compel them to do so by means which will deprive them of their means of livelihood if there is available an alternative method of enforcing payment which will be reasonably fair to the creditor. There is no sense in killing the goose which lays the golden egg. Petitioner now owes respondent about Rs. 500 which respondent is entitled to recover as soon as possible. But the Court has a discretion to allow payment by instalments and I am of opinion that in this case it should do so.

I, therefore, direct under the provisions of O. XX, r. 11 (2) that the amount standing in respect of the decree in Civil Regular Suit No. 6857 of 1923 of the Court of Small Causes be paid by instalments of Rs. 100, such instalments to be paid within the first seven days of each month beginning from March 1924.

The attachment will be removed and the parties will bear their own costs in this Court and on petitioner's application to be allowed to pay by instalments. The order for costs on his application for review will stand.

S. D. *Order accordingly.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 785 OF 1922.

May 19, 1924.

Present:—Justice Sir William Ewart Greaves, KT., and Mr. Justice Chakravarti.

BHARAT CHANDRA DHUPI—DEFENDANT—APPELLANT

versus

HARI KRISHNA PATARI—PLAINTIFF AND ANOTHER—PRINCIPAL-DEFENDANT—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 153—Suit for rent—Second appeal.

Under section 153 of the Bengal Tenancy Act a second appeal does not lie when no question as to the amount of rent is either raised or decided in a suit for rent, where the value is below 100 rupees.

Sudhanya Santra v. *Basanta Kumar Sirkar*, 64 Ind. Cas. 733; 49 C. 538; 26 C. W. N. 96; 34 C. L. J. 579; (1922) A. I. R. (C.) 417, distinguished.

Appeal against the decree of the District Judge, Noakhali, dated the 22nd December 1921, reversing that of the Munsif, Additional Court at Lakhipur, dated the 12th of September 1919.

Babu *Bhagirath Chandra Das*, for the Appellant.

Babu *Ramesh Chandra Sen* (with him Babu *Bankim Chandra Banerjee*), for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal by the defendant against a decision of the District Judge of Noakhali reversing a decision of the Munsif. The suit out of which this appeal arises was brought to recover rent from the defendant. The suit was valued at Rs. 79-13 annas.

A preliminary objection was taken before us that having regard to the provisions of section 153 of the Bengal Tenancy Act no appeal lies as the value is below Rs. 100 It was urged before us on behalf of the appellant that the preliminary objection is not well founded and we have been referred to the case of *Sudhanya Santra* v. *Basanta Kumar Sirkar* (1) as an answer to the preliminary objection. It seems to us that the case does not help the appellant. Section 153 is clearly a bar to the present appeal unless it can be shown that a question arose in the suit as to the amount of rent. We cannot find that this was so, for a reference to the issues raised in the First Court shows that the only issues raised were (1) whether the suits were bad for defects of parties and (2) whether certain pleas of payments were true. Consequently there was no question raised as to the amount of rent as was raised in the decision in *Sudhanya Santra* v. *Basanta Kumar Sirkar* (1) nor was such a question decided in the suit.

In the circumstances the preliminary objection must prevail and the appeal fails and must be dismissed with costs.

Chakravarti, J.—I agree.

N. H. *Appeal dismissed.*

(1) 64 Ind. Cas. 733; 49 C. 538; 26 C. W. N. 96; 34 C. L. J. 579; (1922) A. I. R. (C.) 417.

RANGOON HIGH COURT.

SECOND CIVIL APPEAL No. 105 OF 1923.

March 21, 1924.

Present:—Mr. Justice Lentaigne and Mr. Justice Carr.

MG. SAN CHEIN—APPELLANT

versus

Ma DAUNG U AND OTHERS—RESPONDENTS.

Mortgage—Forfeiture clause—Adverse possession by mortgagee—Suit for redemption.

A mortgagee's possession under the clause, "if interest is not paid in any year the mortgagee shall take over the land as owner" is as owner and adverse to the mortgagor and if it exceeds 12 years, it bars a suit for redemption.

Second appeal against the decree of the Divisional Court, Myaunmya, in C. A. No. 144 of 1922.

Mr. *Burjorjee*, for the Appellant.

Mr. *Hay*, for the Respondents.

JUDGMENT.—This suit arises out of a registered mortgage-deed the terms of which are unusual. This deed, Exhibit I, was executed on the 7th September 1905. The mortgagors were the plaintiffs, San Chein and one Maung Po Gyi, deceased. The mortgagee was Mg. Tha Byaw, original defendant, who died after filing his written statement, after which his representatives were substituted.

The deed expressly says that the mortgage was one with possession. But there is further provision for payment of interest at 2½ per cent. per mensem.

It is agreed that the interest shall be paid annually and there is a clause providing that if interest is not paid in any year the mortgagee shall take over the land as owner. Nothing is said about the usufruct.

The plaint alleges that Po Gyi was a prior mortgagee who was paid off out of the money borrowed on this mortgage, and that he joined in executing the deed because the land was assessed in his name.

The written statement alleges that plaintiff was not the owner of the land, having previously sold it to Po Gyi, and that he joind in executing the deed because the land was assessed in *his* name.

A map of the land for the year 1904-05 is on the file. This shows Po Gyi's name as owner with the plaintiff San Chein as tenant. It certainly supports the plaintiff's version.

The principal defence was that the defendant had taken over the land as owner in 1906 and that since then he had been in adverse possession.

The plaintiff worked the land for the first year after the mortgage and paid rent. Thereafter he never worked it again and admittedly has paid no interest since then.

Both the lower Courts have found that the defendant took over the land as owner under the forfeiture clause. They held that section 60 of the Transfer of Property Act was not then in force, that clause was effective. The rulings cited by them support this view: but they have been overruled by a Bench of this Court in a later case *Ma Min Byu* v. *Maung Chit Po* (1) and the Bench decision is binding on us.

But I do not think that the question whether the forfeiture clause was effective or not is important in this case. On the facts I have no doubt that it was in fact enforced in 1906 and that ever since then Tha Byaw has been holding the land as owner and that the plaintiff was fully aware of this. Tha Byaw has thus been in adverse possession as owner, and not as mortgagee, for over twelve years.

In my view the plaintiff's suit was time barred.

I would, therefore, dismiss this appeal with costs.

S. D. *Appeal dismissed.*

(1) 76 Ind. Cas. 685; 1 R. 419; (1921) A. I. R. (R.) 83.

CALCUTTA HIGH COURT.

CIVIL RULE No. 30 OF 1924.
May 22, 1924.
Present:—Mr. Justice Mukerji.
NANA MIA—DEFENDANT—PETITIONER
versus
MANU MIA—PLAINTIFF—OPPOSITE PARTY.

Usurious Loans Act (X of 1918), s. 3—Court, duty of.

Under section 3 of the Usurious Loans Act a duty is cast upon the Court in cases to which the Statute applies, to apply its mind to its provisions even in a suit heard *ex parte* and to take up the question of its own motion, where it has not been raised by the defence.

Rule against an order of the Court of the Sub-Judge, Noakhali, exercising the powers of a Court of Small Causes, in S. C. C. Suit No. 382 of 1923.

Babu *Jitendra Coomer Sen Gupta*, for the Petitioner.

Babu *Ramendra Chunder Ray*, for the Opposite Party.

JUDGMENT.—Plaintiff sued upon a *khata* for recovery of Rs. 294 made up of principal Rs. 100 and interest at the rate of 6¼ per cent. per mensem. Defendant repudiated the execution of the *khata* entry and denied the loan.

The entry in the *khata* shows a stipulation to pay interest at 6¼ per cent. without mentioning whether it was per mensem or per annum. Defendant in several places in his written statement adverted to the plaintiff's allegation in the plaint of the stipulated rate of interest being per month but did not controvert it

specfically or plead its excessive or unconscionable character, beyond denying the transaction *in toto*. Paragraph 5 of the written statement, however, when translated runs thus : "The stipulation mentioned in the plaint is illegal and no claim for interest is sustainable on the basis of the same. It is exceedingly improbable and unnatural to borrow money at the rate of 6¼ per cent. per mensem for the purposes of business; and if such a transaction ever took place it is humanly improbable that the debt should have been left unpaid or unrealised for such a long time. Besides interest at the rate claimed is penal and unconscionable". Whether by this statement the defendant invited the Court to adjudicate on the question as to the character of the interest or he merely pleaded it as showing the improbability of the transaction is not very clear. From the Summons book all that appears is that only one witness for the plaintiff stated and that in cross-examination that the rate of interest stipulated was 6¼ per cent. per mensem.

The Court has disbelieved the defence and decreed the plaintiff's suit in full.

Defendant complains that he had seven witnesses in attendance, and that he had tendered seven witnesses to prove his case including the unreasonableness and penal nature of the interest claimed, but the learned Judge closed the case upon examination of only three witnesses on the petitioner's side. I quote this from the affidavit filed in support of the petition of motion. To this allegation there is no reply on the other side. The statement however is not quite clear, whether the examination of the remaining witnesses was in fact refused by the Court or whether it was given up in consequence of some discussion that may have transpired; the insinuation is there was a refusal.

At one stage in the hearing of this Rule I was inclined to take the view that upon the denial of the whole transaction by the defendant and upon the fact that no real attempt was made to prove that if the transaction did at all take place, the rate of interest was otherwise than what was claimed and upon the vagueness of the statement referred to above the Rule should be discharged. On a further consideration I have come to the opinion that it would not be right to do so.

The Usurious Loans Act, 1918, applies to the transaction. Section 3 (1) of that Act provides that notwithstanding anything in the Usury Law Repeal Act, 1855, where in any suit to which the Act applies, whether heard *ex parte* or otherwise the Court has reason to believe that the interest is excessive and that the transaction was, as between the parties thereto, substantially unfair and the Court may exercise all or any of the powers which are mentioned in the various clauses therein. The proviso to sub-section (1) need not be referred to as it has no bearing on the present case. Sub-section (2) is important. It lays down certain principles for determining whether the interest is excessive and whether the transaction was as between the parties substantially unfair. The Explanation to clause *(d)* of sub-section (2) is also important. It says that interest may of itself be sufficient evidence that a transaction was substantially unfair. The other sub-sections need not be referred to.

Upon the plain words of the Statute a duty is cast upon the Court, in cases to which the Statute may be applicable to apply its mind to its provisions even in a suit heard *ex parte*. The expression "Has reason to believe" clearly indicates that the intention of the Legislature was to enable the Court to take up the question, of its own motion, whether it has been raised by the defence or not. The section is founded upon section 1 of the English Money Lender's Act. In *Samuel* v. *Newbold* (1) Lord Macnaghten observed: "what an intolerable strain would be thrown upon inferior Courts, unfamiliar with the doctrines and the practice of Courts of Equity, if they were privileged or condemned to listen to lengthy arguments and venerable precedents before deciding a question that any man of common sense is just as capable of deciding as the most learned

(1) (1906) A. C. 461; 75 L. J. Ch. 705; 95 L. T. 209; 22 T. L. R. 703.

Judge in the land, provided he is not hampered by authorities, which require no little training to discriminate and appreciate at their true value". This observation appears to have been borne in mind in the Usurious Loans Act, 1918. While keeping in view the principle of the English Act it has rendered the application of the principle much simpler by substituting the words "substantially unfair" for the words "harsh and unconscionable" and instead of referring the Court to considerations of general principles of equity has laid down certain practical tests for its guidance. The Act, therefore, will relieve the Courts from the necessity of going into elaborate and often very intricate questions which arise under sections 16 and 19A of the Indian Contract Act. Once a proper case presents itself the rules of evidence disentitling a party from varying the terms of a written agreement by evidence of a parol agreement inconsistent therewith are suspended, the rules prohibiting the setting up of inconsistent defences cease to have operation and the Court can, nay ought to, go behind the written document, find out the real nature of that transaction by admitting evidence relating thereto and do justice to the cause.

It is obvious that 75 per cent. per annum is a high rate of interest it is, at any rate, more than the ordinary. The plain duty of the Court in such a case is to apply its mind to consider whether it is excessive and then; if necessary, to apply the provisions of the Act, which it does appear to have done.

I accordingly set aside the decree of the learned Munsif and send back the case to him to admit relevant evidence for the purpose of considering the provisions of the Act and dispose of the suit in accordance with law. I am of opinion that the dishonest defence set up by the defendant led the Court astray. I accordingly make no order as to costs in this Rule.

M. M. B. *Case remitted.*

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 25 OF 1923.

August 6, 1924.

Present:—Mr. Kendall, A. J. C., and Mr. Pullan, A. J. C.

Musammat RAJ KUNWARI AND OTHERS —PLAINTIFFS—APPELLANTS

versus

Musammat Rani MAHARAJ KUNWAR KUNWARI—DEFENDANT—RESPONDENT.

Benami *transaction—Presumption of advancement—Criterion—Burden of proof—Trusts Act (II of 1882), s. 82—Hindu Law—Widow, decree against, when binds reversioners—Bond by widow, recitals in, value of.*

Where a transfer has been made ostensibly in favour of a wife or a son, there will not in dealing with Indians be the same presumption of advancement as there would be in the case of English people. [p. 836, col. 1.]

The criterion in these cases in India is to consider from what source the money comes with which the purchase-money is paid. But the source of the purchase-money is to be the criterion in the absence of all other relevant circumstances. [p. 836, cols. 1 & 2.]

Bilas Kunwar v. *Desraj Ranjit Singh*, 30 Ind. Cas. 299; 37 A. 557; 19 C. W. N. 1207; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; 22 C. L. J. 516; (1915) M. W. N. 757; 42 I. A. 202 (P. C.) and *Bai Motivahoo* v. *Purshotam Dayal*, 29 B. 306; 6 Bom. L. R. 975, relied upon.

The burden of proving that a transaction was a *benami* one is on the assertor; even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose. Such a transfer, however, cannot be considered as nothing and the person who impugns its apparent character must show something or other to establish that it is a *benami* or sham transaction. [p. 837, cols. 1 & 2.]

Muhammad Mahbub Ali Khan v. *Bharat Indu*, 53 Ind. Cas. 54 at p. 56; 23 C. W. N. 321; (1919) M. W. N. 507 (P. C.) and *Uman Parshad* v. *Gandharp Singh*, 15 C. 20; 14 I. A. 127; 5 Sar. P. C. J. 71; Rafique and Jackson's P. C. No. 98; 11 Ind. Jur. 474; 7 Ind. Dec. (N. S.) 599 (P. C.), relied upon.

That a large portion of the consideration money was paid by a husband for the purchase of property in the name of his wife does not relieve those, who allege the transaction to be a *benami* one, from proving it to be so. This burden is greatly enhanced if a great length of time has passed since the transaction impugned. [p. 837, col. 1]

Uman Parshad v. *Gandharp Singh*, 15 C. 20; 14 I. A. 127; 5 Sar. P. C. J. 71; Rafique and Jackson's P. C. No. 98; 11 Ind. Jur. 474; 7 Ind. Dec. (N. S.) 599 (P. C.) and *Midnapur Zemindori Co.* v. *Naresh Narayan Roy*, 64 Ind. Cas. 231; 48 C. 460 at p. 468; 14 L. W. 265; 30 M. L. T. 279; (1922) A. I. R. (P. C.) 241; 48 I. A. 49 (P. C.), relied upon.

In deciding whether a sale in execution of a decree against a widow would bind the rever-

sioners; the Court should look beyond the decree to the form of the suit or possibly even to the terms of the document on which the claim for the decree was based. [p. 839, col. 1.]

If the form of the suit is a claim based on a mortgage-deed, the widow in defending such a suit is acting in defence of the estate and on behalf of the reversioners, whereas if the form of the suit is a claim on a personal bond she can not be held to be acting on behalf of the reversioners. [p. 839, col. 1.]

Jugul Kishore v. *Jotendra Mohun Tagore*, 10 C. 985; 11 I. A. 66; 8 Ind. Jur. 455; 4 Sar. P. C. J. 553; 5 Ind. Dec. (N. S.) 657 (P. C.), *Subbammal* v. *Avudaiyammal*, 30 M. 3 and *Veerabadra Aiyar* v. *Marudaga Nachiar*, 8 Ind. Cas. 1072; 34 M. 188; (1910) M. W. N. 799; 9 M. L. T. 235; 21 M. L. J. 320, referred to.

A widow's personal bond even for legal necessity does not bind her husband's property. [p. 839, col. 1.]

Kallu v. *Faiyaz Ali Khan*, 30 A. 391; 5 A. L. J. 367; A. W. N. (1908) 173, relied upon.

The recitals in a bond executed by a widow that she had borrowed money for paying the debts of her deceased husband cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain. [p. 840, col. 1.]

Nanda Lal Dhur Biswas v. *Jagat Kishore Acharjya*, 36 Ind. Cas. 420; 44 C. 186 at p. 196; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177; 43 I. A. 249 (P. C.), relied upon.

Appeal against a decree of the Sub-Judge, Gonda, dated the 14th February 1923.

Messrs. *A. P. Sen*, *H. K. Ghose*, *M. H. Qidwai* and *Girja Sankar*, for the Appellants.

Mr. *Bisheshwar Nath Srivastava*, for the Respondents.

JUDGMENT.—The plaintiffs in this suit are the daughters of Babu Kunj Behari Singh and Thakurain Durga Dei, and they sued for possession of the entire village Kharawan, *Pargana* Nawabganj in Gonda District from *Musammat* Rani Maharaj Kunwar, and subsequently from the latter's heirs. *Musammat* Rani Maharaj Kunwar had bought the village at an auction sale on March 20, 1894. On that occasion the property was sold to her and to Bala Prasad jointly but Bala Prasad subsequently sold her half to the lady, who thus became the owner of the whole property. The judgment-debtor in the decree in execution of which the property was sold was Thakurain Durga Dei, and the suit of the plaintiffs-appellants—her daughters—was based on the allegation that she was not the owner of the whole proprietary rights in the village, but only of a widow's limited right, having succeeded to it as heir of her deceased husband Babu Kunj Behari Singh who died in 1886. The determination of this question, again, depends on whether Thakurain Durga Dei, who had become the ostensible owners of the village in 1882, in circumstances which will be described more fully later on, was only a *benamidar* on behalf of her husband. The learned Subordinate Judge decided that Durga Dei was not a *benamidar*, but the real and absolute owner of the property, and that the reversioners, *i. e.*, the plaintiffs-appellants, are bound by the auction sale in which Durga Dei's rights had passed to *Musammat* Rani Maharaj Kunwar and Bala Prasad and subsequently to the former alone. He, therefore, dismissed the suit and the plaintiffs have now appealed to this Court.

It will be necessary first to consider the circumstances in which the village in suit passed into the ownership of Durga Dei, for it is admitted by Mr. Sen on behalf of the appellant that if this transaction was not a *benami* one the appeal must fail. The property used to belong to *Musammat* Mirzai Khanam, and had been attached and put up for sale in execution of a decree against her. Before the auction sale, however, it was transferred by private sale by means of a sale-deed executed on July 17th 1882 by *Musammat* Mirzai Khanam in favour of Thakurain Durga Dei. In this deed the village in suit together with two others in the Gonda District are conveyed to the vendee for Rs. 33,000, and the vendor states that she has put the vendee in possession of the aforesaid villages and has received from her, the vendee, the entire consideration money by obtaining from her a trust deed and the receipts evidencing payment. The trust deed dated 17th July 1882 recites that Thakurain Durga Dei had received as a deposit from *Musammat* Mirzai Khanam by way of trust money Rs. 31,000 of which Rs. 5,130 were deposited in the Government

Treasury on July 18th towards the decree of Janki Das, and that the balance was to be paid towards the other debts found due from Mirzai Khanam in respect of Kharua estate, etc.

The appellants' first task has been to show that all the arrangements for this sale in favour of Durga Dei had been made by her husband Kunj Behari Singh, and that the consideration money had been paid by the latter and not by Durga Dei. The oral evidence on the point has been discarded by the Court below as worthless. There is, however, a certain amount of documentary evidence which throws some light on the way in which the negotiations were conducted. It has been pointed out that on 19th May, 1882, Kunj Behari had opened negotiations with Mirzai Khanam regarding the sale of some of the latter's property, and in fact made an application for the postponement of the auction sale, alleging that he had arranged with the judgment-debtor to purchase several villages of her, including the one in suit, for Rs. 50,000 and was ready to deposit Rs. 5,000 as earnest money. This particular transaction seems to have fallen through, but the evidence is relied on by the appellants in order to show that at that stage Kunj Behari intended to purchase the property himself. On July 17th an application was made by the judgment-debtor through her agent to the effect that she had sold three villages including the one in suit to Kunj Behari Singh and deposited a sum of Rs. 4,275. Accompanying this document is a general power-of-attorney executed by the judgment-debtor in favour of her agent, reciting that she appoints him her agent in effecting mutation of names in regard to these villages in favour of Kunj Behari. Next we find that on August 3rd, the decree-holder in the proceedings against *Musammat* Mirzai Khanam certified payment of Rs. 27,181 in two items, namely, Rs. 22,051 by transfer receipt of Gonda District, and Rs. 5,130 by cheque from the Judge, Fyzabad. Up to the date of the sale-deed July 17th, therefore, the name of Thakurain Durga Dei does not appear in these documents, and on the very day on which the deed was executed in favour of Durga Dei by Mirzai Khanam herself, we find that the agent of the latter made an application in the Court of the Judge executing the decree to the effect that the villages had been sold, not to Durga Dei, but to Kunj Behari Singh, and depositing a sum of Rs. 4,275 which purported to be part of the consideration money received from Kunj Behari Singh. Later on, on August 21st we find that Kunj Behari Singh borrowed a sum of Rs. 9,500 on a mortgage-deed wherein he states that he has purchased the property in suit from Mirzai Khanam, and that he has to pay up certain liens with which that property is encumbered. He makes no reference in this mortgage deed to his wife, a fact which may be explained on behalf of the respondents by the arguments that Kunj Behari was mortgaging his own property, and that the mortgagees had nothing to do either with the lady or with the property which had been conveyed to her. On August 19th, Kunj Behari borrowed Rs. 5,000 from Itraji Muari to pay off the mortgage on these three villages, which he says he had bought, without mentioning his wife. On September 15th, Kunj Benari borrowed Rs. 5,000 from Mata Prasad specifically for the balance of the consideration money for the leases and mortgage-deeds relating to the village Karna, etc., but in this deed he clearly stated that it is his wife Durga Dei who owned the money, and that it was she who had purchased the villages. It is only in the last of these deeds, therefore, that he suggests that Durga Dei had bought the villages and that the mortgage debt is due from her. These documents are relied on by the appellants to prove that the consideration money for the villages in suit was paid by Kunj Behari and not by his wife and that he had to borrow money in order to raise the necessary sum. It is argued that he would not have been likely to borrow money for such a purpose unless he wanted the property for himself. On the other hand it is shown that Durga Dei's name is entered as the vendee in the sale-deed, and that although there is no mention of her name in the proceedings

previous to the date of the sale-deed on the 17th July, there is a distinct recital by Kunj Behari Singh in the mortgage-deed of September 15th, that the property was purchased by his wife and that she still owes part of the money due on the leases and mortgage-deeds. In this connection it is interesting to note that on July 11th Durga Dei succeeded to the ownership of a village in Gonda District in the same Tahsil as the property in dispute though in a different *pargana*, and there it is at least a plausible theory that Kunj Behari had originally intended to purchase the property for himself but had afterwards decided to convey it to his wife in order that she might have a compact property in the Gonda District He himself was a resident of Basti District and most, so far as are aware, all of his property was there. The appellants have attempted to show that the whole of the consideration money was paid by Kunj Behari, and the lower Court has come to the conclusion that he did pay the consideration money, though with the intention of making his wife the absolute owner of the property. The learned Judge was influenced by the consideration that Durga Dei was not in a position to purchase property worth Rs. 33,000 on the 17th July 1882. We must, however, take into consideration two qualifying circumstances. In the first place these various sums which are alleged to have been borrowed by Kunj Behari and paid either to the vendee or to the mortgagee do not amount to much more than half of Rs. 33,000. In the second place although Durga Dei is not shown to have owned any other landed property except the small one in which she succeeded in July 1882, yet there is a possibility that she owned moveable property and cash in her own right, and that she may at any rate have contributed to the sale price.

Later on it is pointed out that in 1885 Durga Dei and Kunj Behari together with a third person named Suraj Bali executed a joint deed which is called a hypothecation bond in favour of Salig Ram for Rs. 15,000. The properties mortgaged consisted of the three villages in Gonda District which were purchased in the deed of 1882. This is a curious deed, for the three parties executing it refer to themselves as owing and possessing the villages. Suraj Bali so far as we know had nothing whatever to do with these villages, and there is nothing to show that Kunj Behari and Durga Dei were joint owners of them. In 1886 Kunj Behari died, and later on Durga Dei mortgaged various parts of the property in suit to different people. The evidence as to any transfer she made after Kunj Behari's death, however, is clearly of less importance than the transactions into which she entered during his lifetime, for it is quite probable that she would have been able to obtain money on the security of property of which she was the ostensible owner even if her legal right in such property was only the limited estate of a widow. The village in suit was finally sold as mentioned above in execution of the decree obtained by Salig Ram on the basis of the bond of 1885 and others.

It has been advisable to recount at some length the circumstances surrounding the purchase of the property in suit by or on behalf of Durga Dei, in view of the appellants' contention that the whole of the consideration money was paid by Kunj Behari, and that the transaction was a *benami* one. The property was conveyed to Durga Dei in 1882, mutation was effected in her name and she remained in possession, nominally at any rate until Kunj Behari's death in 1886, and thereafter either as full owner or as her husband's heir until the property was sold in the auction sale of 1894. Owing to the long period that has elapsed since Durga Dei acquired her title the evidence is scanty, and it must be admitted that the plaintiffs are largely responsible for this, for delaying matters so long before bringing them into Court. It is a fair statement that they had no *locus standi* until Kunj Behari's death in 1886. It is argued that they had no reason to sue for a declaration after that date because they imagined that Durga Dei was only enjoying the interest of a widow in the

property. Even this argument, however, fails to hold good from the date that the auction-purchasers obtained possession of the property in 1894. It is evident that the reversioners have delayed matters till the last possible moment. It is worthy of notice that the second plaintiff-appellant is the wife of Sarju Prasad who is the son of Suraj Bali. The latter was evidently thoroughly familiar with all the circumstances of these transfers. He joined Kunj Behari and Durga Devi in 1885 in executing that curious hypothecation bond and he was actually made a party to the suit brought by Salig Ram in 1890 on the basis of that bond. For some reason or other however, he disappeared from the part of the judgment-debtor in the execution proceedings, but later we find him taking an active part in the same execution proceedings as the agent of Bala Prasad (his son) who had also obtained a decree against Durga Dei, which appears to have been executed jointly with Salig Rams. It was Suraj Bali who bid at the auction sale on behalf of the decree-holder Bala Prasad, who jointly with *Musammat* Rani Maharaj Kunwar, respondent, finally brought the property. It is impossible to believe, therefore, that he was not in a good position to advise his son's wife as to the proper time for filing a claim in Court.

The case-law in regard to *benami* transactions has been quoted in this Court at some length, but it is not necessary for us here to do more than notice the main principles which according to our judgment are to guide us in the decision of this case. It is universally acknowledged that *benami* transactions are by no means unusual in India, that where a transfer has been made ostensibly in favour of a wife or a son, there will not in dealing with Indians be the same presumption of advancement as there would be in the case of English people. It was laid down by their Lordships of the Privy Council so long ago as 1854 that the criterion in these cases in India is to consider from what source the money comes with which the purchase-money is paid. A more recent decision of the Privy Council on the precise point before us is that quoted as *Bilas Kunwar* v. *Desraj Ranjit Singh* (1) in which the above passage is quoted, but with the important qualification that the source of the purchase-money is to be the criterion "in the absence of all other relevant circumstances". This latter decision has been relied on by the appellants not only on account of the principle laid down, but of the circumstances of the case there decided which correspond with the present ones. In that case the *taluqdar* had purchased a house with his own money in the name of his mistress, and he had registered the deed also in her name. Their Lordships nevertheless held that the transaction was a *benami* one, and they considered the facts that the house was useless to the mistress for any personal use and was wholly inappropriate as a provision for her, and that there was no evidence of an intention to give the house to her, beyond the fact of the registration in her name. In the present case, however, there are reasons for believing that the transfer to Durga Dei of this property was particularly appropriate, as she had other property in the same District, and Kunj Behari has not only referred to her as the owner of the property in the sale-deed itself but in other documents. No direct reference has been made in *Bilas Kunwar* v. *Desraj Ranjit Singh* (1) to section 82 of the Indian Trusts Act, which is subsequent to the Privy Council ruling of 1854, but it has probably influenced the decision: "Where property is transferred to one person for a consideration paid or provided by another person, and *it appears that such persons did not intend to pay or provide such consideration for the benefit of the transferee*, the transferee must hold the property for the benefit of the person paying or providing the consideration."

(1) 30 Ind. Cas. 299; 37 A. 557; 19 C. W. N. 1207; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; 22 C. L. J. 516; (1915) M. W. N. 757; 42 I. A. 202 (P. C.).

The words italicized appear to throw the burden of proving that a transaction is *benami* in such a case as the present on the plaintiff, whereas previously to that enactment of law, the position may well have been that a plaintiff who came into Court with proof that he had paid the consideration money himself would have been able to throw the burden of proving that the transaction was not *benami* on the other side. Reliance has been placed by the appellants on a decision in *Bai Motivahoo* v. *Purshotam Dayal* (2) in which it is said: "The presumption of advancement that would arise in England does not arise in India, the source from which the purchase-money was paid shifting the onus...Section 82 of the Trusts Act of 1882 does not diminish the effect of the Privy Council ruling above cited...But I think that a purchase made by a Hindu husband from his own money in his wife's name, cannot be held sufficient evidence of intent to confer on her an absolute estate, merely because no special reason has been shown in the particular case for a practice so general in India." In that case the evidence was comparatively recent, and the learned Judges did not consider that it was sufficient to establish the intention to convey a gift. So far as the question of the burden of proof is concerned, the decision is certainly in favour of the appellants; but it appears to be at variance with the principle laid down in 1919 by their Lordships of the Privy Council in the case of *Muhammad Mahbub Ali Khan* v. *Bharat Indu* (3): "*Benami* transactions are very familiar in Indian practice, and as Lord Hobhouse said in *Uman Parshad* v. *Gandharp Singh* (4) 'even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose.'" Their Lordships, however, added "Still, such a transfer cannot be considered as nothing, the person who impugns its apparent character must show something or other to establish that it is a *benami* or sham transaction." Moreover, their Lordships remark in the same judgment: "The action is brought after years of possession, and when the principal parties to the transaction challenged..... are dead. This is a circumstance not without weight in such cases, and it involves a certain addition to that duty or onus of proof which, in *benami* cases, does undoubtedly rest upon the assertor." It may be mentioned in this connection that the learned Subordinate Judge referred with approval to recital from a judgment of 1884 which disposed of the suit brought by Mata Prasad against Kunj Behari in connection with the property concerned in this suit. That recital is to the effect that *Kunj Behari intending to make his wife proprietor of the properties after they had become free from encumbrances* purchased the mortgagee and leasehold rights. The question of whether such a recital may be used as evidence does not appear to have been finally decided in the ruling of the Calcutta High Court printed as *Basi Nath Pal* v. *Jagat Kishore Acharjee* (5) for as Lord Dunedin remarked in *Midnapur Zemindari Co.* v. *Naresh Narayan Roy* (6): "It is the finding of a Court which was dealing with facts nearer to their ken than the facts are to the Board now, and it certainly creates a paramount duty on the appellants to displace the finding, a duty which they have not been able to perform."

We consider, therefore, that the appellants were faced with the task of proving that the transaction was a *benami* one, and that they were not relieved from this burden by being able to show that a large proportion of the consideration money was almost certainly paid by Kunj Behari. Their burden was greatly enhanced by the length of time that has passed since the transaction

(2) 29 B. 306; 6 Bom. L. R. 975.

(3) 53 Ind. Cas. 54 at p. 56; 23 C. W. N. 321; (1919) M. W. N. 507 (P. C.).

(4) 15 C. 20; 14 I. A. 127; 5 Sar. P. C. J. 71; Rafique and Jackson's P. C. No. 98; 11 Ind. Jur. 474; 7 Ind. Dec. (N. s.) 599 (P. C.)

(5) 35 Ind. Cas. 298; 20 C. W. N. 643; 23 C. L. J. 583.

(6) 64 Ind. Cas. 231; 48 C. 460 at p. 468; 14 L. W. 265; 30 M. L. T. 279; (1922) A. I. R. (P. C.) 241; 48 I. A. 49 (P. C.).

impugned. Beyond the inconclusive evidence as to the source of the consideration money, there is nothing to show that the property was not intended to be conveyed in fact to Thakurain Durga Dei. On the other hand we find not a little evidence that *Musammat* Durga Dei was intended to be the full owner of the property and that she really exercised possession over it. There is no evidence on the file as regards Kunj Behari's age or his expectation of life in 1882, when the sale deed in favour of his wife was executed, but we know that he died in 1886 and that between 1882 and 1886 he referred in more than one deed to Durga Dei as owner and possessor of the property. In the mortgage-deed of 1885 in favour of Salig Ram, Durga Dei is named first of the three executants, who are described as owning and possessing the property, and of the others Suraj Bali had no interest in the property at all. It is quite possible, therefore, that Kunj Behari had also no interest in it. Mutation, as has already been remarked, was effected in Durga Dei's name, and we also find that notices for the ejectment of tenants were issued in her name, and that tenants contested these notices by suits filed against Durga Dei during Kunj Behari's lifetime. On the other hand no single act of ownership has been proved to have been performed by Kunj Behari. We consider, therefore, that Durga Dei has not been proved to be a *benamidar* and that the appeal must fail on this ground.

In view of the fact, however, that our judgment may be the subject of an appeal to a higher Tribunal we think it advisable to deal with the second part of the appellants' arguments, which are based on the assumption that the transaction is a *benami* one. We have, therefore, to assume for the moment that Durga Dei had no interest in the property except a widow's limited interest, which she acquired on Kunj Behari's death in 1886. The property was brought to sale in 1894 in execution of a decree obtained by Salig Ram on the basis of the mortgage-of 1885 to which reference has already been made. Salig Ram in 1890 instituted a suit against Durga Dei "herself and as the heir of her deceased husband Kunj Behari Lal," and Suraj Bali, and prayed for a decree for Rs. 30,000 by sale of the property hypothecated and also against the person of the defendants; and he obtained a decree on December 2nd, 1890. In the meantime Bala Prasad had also sued Durga Dei on the basis of two bonds, the first of which was a mortgage bond hypothecating not the property in suit but Durga Dei's own private property in Gonda, and also some villages in Basti which had been the property of Kunj Behari. Bala Prasad made an application for execution of his decree in October 1891, in which he stated that as he could not obtain satisfaction of his decree from the property mortgaged, he might be allowed rateable distribution of the sale-proceeds of the property attached in Salig Ram's decree. This was allowed, and when the property was eventually put up for sale in 1894 the sale-proceeds, Rs. 17,700, were applied in the first place to the payment of Salig Ram's decree and secondly to the payment of Bala Prasad's. It may be noted here that the accounts filed by these two decree-holders show that the amount then owing to Salig Ram was Rs. 5,867-7 and to Bala Prasad Rs. 7,006-6.

We have been asked on behalf of the appellants to hold in the first place that Salig Ram's decree was not a mortgage decree. The form of the decree is certainly incorrect, as it is not a preliminary decree and no final decree was ever framed. The District Judge simply ordered that a decree be granted *ex parte* against the two defendants (Suraj Bali was the other defendant but execution was never enforced against him and he afterwards appeared as agent for Bala Prasad who is his son and bought in the property at the auction sale). The Judge's order added that the decree could be executed by sale of the villages hypothecated. It is argued that this could not be considered as an order for a

mortgage decree, not only on account of the form, but because the property was attached, and because in the Court's statement of property proposed for sale a list of subsequent mortgages is entered. This last circumstance, however, is explained by the fact that the subsequent mortgages were all usufructuary and the mortgagees were in possession. For the rest the decisions referred to by the respondents—[*Lal Behary Singh* v. *Habibur Rahman* (7), *Muthukaruppan Chattiar* v. *Chinnasawamy Pillai* (8), *Totaldas* v. *Utumal Thakurmal* (9), and *Pahalwan Singh* v. *Narain Das* (10)]—are sufficient to show that the decree must be regarded as a mortgage decree. The point, however, is not of vital importance because we are of opinion that in deciding whether a sale in execution of that decree would bind the reversioners, we shall have to look beyond the decree to the form of the suit or possibly even to the terms of the bond itself: *Jugul Kishore* v. *Jotendra Mohun Tagore* (11), *Subbammal* v. *Avudaiyammal* (12) and *Veerabadra Aiyar* v. *Marudaga Nachiar* (13). The principle underlying these decisions appears to be this. If the form of the suit is a claim based on a mortgage-deed, the widow in defending such a suit is acting in defence of the estate and on behalf of the reversioners, whereas if the form of the suit is a claim on a personal bond she could not be held to be acting on behalf of the reversioners. In the present case, it cannot be denied that the plaint represented a claim based on a mortgage-deed, and Durga Dei must be held to have represented the reversioners. If we go still further back to the bond itself the case becomes clearer still, because Kunj Behari was one of the executants of the deed. As he was, according to the present line of argument, the owner of the estate it can hardly be denied that a genuine debt which would be binding on him would also bind his personal estate. So far as Salig Ram's decree is concerned, therefore, the sale must undoubtedly be held to be binding on the reversioners. The case of Bala Prasad's decree is different. This decree was based on two bonds, one of which was a mortgage bond but the property mortgaged was not that in suit, and, therefore, the form of the suit is no safe criterion. This mortgage bond and this simple money bond were both executed by Durga Dei herself. The mortgage bond was for Rs. 7,000, the ostensible object of the loan being the payment of the debt of Kunj Behari, and the money bond was for Rs. 1,000 which was to be used for Durga Dei's own purposes. As neither of these bonds created any charge on the estate in suit they must both be considered as mere money bonds. It is argued for the appellants that as such they cannot bind the reversioners. There is authority for this view, because in *Kallu* v. *Faiyaz Ali Khan* (14) it was held that a widow's personal bond even for legal necessity does not bind her husband's property. Reference has also been made to *Baij Nath* v. *Sheoraj Singh* (15) but that decision is not really relevant. On the other hand the view taken in the Madras case which has already been quoted [*Veerabadra Aiyar* v. *Marudaga Nachiar* (13)] is that the question is to be decided by the nature of the debt, and even if the debt could have bound the whole estate, the widow's personal bond is sufficient to bind the reversioner. There is, however, in the present case no reliable evidence that the debt would have bound the estate. The respondents have pointed to the wording of the deed, which shows that Durga Dei borrowed the money for the payment of the debt of her deceased husband. The value of such a

(7) 26 C. 166; 3 C. W. N. 8; 13 Ind. Dec. (N. S.) 711.
(8) 22 Ind. Cas. 293; (1914) M. W. N. 152.
(9) 10 Ind. Cas. 975; 4 S. L. R. 244.
(10) 22 A. 401; A. W. N. (1900) 131; 9 Ind. Dec. (N. S.) 1303.
(11) 10 C. 985; 11 I. A. 66; 8 Ind. Jur. 455; 4 Sar. P. C. J. 553; 5 Ind. Dec. (N. S.) 657 (P. C.).
(12) 30 M. 3.
(13) 8 Ind. Cas. 1072; 34 M. 188; (1910) M. W. N. 799; 9 M. L. T. 235; 21 M. L. J. 320.
(14) 30 A. 394; 5 A. L. J. 367; A. W. N. (1908) 173.
(15) 53 Ind. Cas. 761; 22 O. C. 260; 6 O. L. 469.

recital has been now well defined by their Lordships of the Privy Council, whose latest decision on the point is reported as *Nanda Lal Dhur Biswas* v. *Jagat Kishore Acharjya* (16): "It is well established that such recitals cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain; the recital is clear evidence of the representation, and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible the recital coupled with such circumstances would be sufficient evidence to support the deed." The respondents rely on the mere recital that the money was borrowed to pay Kunj Behari's debts, combined with the circumstances that Kunj Behari is known to have been borrowing money for some years and that the recital is now over 30 years old, but Kunj Behari according to the evidence on the file possessed a good deal of property and there is nothing to show that he was in great need of money. Moreover, although the bond was executed some 35 years before the institution of the suit, it is by no means clear that the production of other reliable evidence on the point was impossible. It appears an undoubted fact that the older the recitals are the less need there is for confirmation by other circumstances, and in the case with which the Privy Council were dealing in the decision already quoted, the recitals were 60 years old. On the whole we consider that the learned Subordinate Judge was not justified in deciding that so far as Bala Prasad's decree is concerned, sale was binding on the reversioners, and as for the balance it must be presumed to have been handed over to Durga Dei for her own uses. If we had been called on to decide the appeal on these issues, therefore, we should have had to find that the reversioners were only bound to the extent of Rs. 5,867-7 and that they would have been entitled to recover possession of the property in suit on payment of that amount. As it is we find that the appeal fails and it is dismissed with costs.

S. D. *Appeal dismissed.*

(16) 36 Ind. Cas. 420; 44 C. 186 at p. 196; 20 M. L. T. 335; 31 M. L. J. 563; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 21 C. W. N. 225; 10 Bur. L. T. 177; 43 I. A. 249 (P. C.).

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 761 AND 765 OF 1922.

June 17, 1924.

Present:—Justice Sir William Ewart Greaves, Kt., and Mr. Justice Chakravarti.

SRIPATI CHATTERJEE AND OTHERS MINORS, BY THEIR FATHER AND NEXT FRIEND BAGHAMBAR CHATTERJEE—DEFENDANTS—APPELLANTS

versus

KHUDIRAM BANERJEE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Religious endowment—Shebait's *appointment — Succession — Rules—Additional endowment—Indication*—Shebait's *position*—Shebait's *office, whether transferable—Gift in favour of co*-shebait, *validity of.*

The appointment and succession to the office of a *shebait* must follow the line laid down in the original grant and in the absence of special direction and usage the heirs of the donor succeed. [p. 843, col. 1.]

A donor is at liberty to alter the appointment of a *shebait* to the office, or the rules regulating the worship, except on the ground that he has expressly precluded himself from doing so or that such an alteration affects some right of property of the *shebait* so appointed or the right of a third party which had already been created, provided always that any such alterations do not affect any of the fundamental gifts. [p. 844, col. 1.]

All the *shebaits* if they agree, and if it is for the benefit of the endowment, may introduce changes without changing the rules of the founder in any vital matter. [*ibid.*]

Additional endowments, if allowed, must be accepted with the terms and conditions in the deed but subject always to the limitation that such endowments are for the benefit of the *Thakur* and the new rules are not inconsistent with the rules already made. [p. 845, col. 2.]

The right of a *pujari* of a *Thakur* is not that of a *shebait* and he is merely a servant appointed by the *shebait* for the performance of the ceremonies. [p. 843, col. 1.]

A dedication to a *Thakur* is irrevocable. [p. 843, col. 2.]

SRIPATI CHATTERJEE *v.* KHUDIRAM BANERJEE.

The rules laid down for the worship of a *Thakur* and for the management of the charities, if any, connected with the endowment are binding. [p. 843, col. 2.]

The rules laid down for the appointment of *shebaits* and their succession in the deed of endowment are binding. [*ibid.*]

A *shebait* has no right to the property but is merely an officer with the rights and limitations as are applicable to the guardian of a minor. [*ibid.*]

The rules laid down in a deed of endowment are binding and are unalterable after the death of the donor by any successor in estate or office. [*ibid.*]

The office of a *shebait* is not transferable either by sale or gift. [*ibid.*]

A gift in favour of a co-*shebait* is not invalid provided it is for the benefit of the endowment. [*ibid.*]

Appeals against the decrees of the Subordinate Judge, Burdwan, dated the 25th of July 1921, affirming those of the Munsif, Assansol, dated the 28th of May 1920.

Babu *Hiralal Chakrabarty* for Babu *Bankim Chandra Mukerjee*, for the Appellants.

Babu *Rishindra Nath Sarcar*, for the Respondents.

JUDGMENT.

Chakravarti, J.—These two appeals arise out of two suits, the plaintiffs in one suit being the defendants in the other, in respect of the right of *shebaitship* of a *Thakur* named Radha Benode Jew. The facts which are necessary for the determination of these appeals are these:—*Thakur* Radha Gobinda Jew was the family diety of one Man Govinda Banerjee who had only a turn in the worship of the said *Thakur* and his agnate relations were also co-*shebaits* with him. The *Thakur* had some *debutter* lands dedicated by the ancestors of Man Gobinda of about 120 *bighas* in area. Man Gobinda had no children. By a registered Will executed in 1306 he appointed one Tarak Nath Chatterjee and his heirs to act *shebaits* of the *Thakur* after his and his wife's death. Dissatisfied with the conduct of Tarak, Man Govinda, when he was about 70 years old, by an *arpannamah* executed in 1308, dedicated certain immoveable properties in favour of the family *Thakur* for the better performance of the worship during his turn of worship, and also for the annual festivals of the *Thakur* and by the said deed he provided that during his life he shall continue to be the *shebait* and after his death his widow will succeed to the office and then on her death, his agnatic relatives, the plaintiffs in Suit No. 1951 of 1919 and their heirs in succession will become the *shebaits* in his place. In 1316 Man Gobinda executed another deed of gift by which he dedicated some further immoveable properties to the said *Thakur* and made a gift of his right as a *shebait* of his turn of the worship in favour of one Nil Kumari Devi, the mother of the Chatterjees the plaintiff in Suit No. 2094 of 1919. This gift was given immediate effect and Nil Kumari Devi was installed as *shebait* in his own place and she managed the dedicated properties and acted as *shebait* of the *Thakur*. It appears that in a rent suit in 1911, while Man Gobinda was still alive she was made a party in that suit and she was treated as a co-*shebait*, taking the place of Man Gobinda, by the other co-*shebaits* of the *Thakur*. Man Gobinda died in 1319 and his widow died in 1320. Then a dispute broke out between the parties as to the possession of the properties dedicated to the *Thakur* by Man Gobinda, and it culminated in a proceeding under section 145 of the Criminal Procedure Code with the result that the Banerjees were maintained in possession of 6 *bighas* and the Chatterjees, the heirs of Nil Kumari, were maintained in possession of 2 *bighas* of the endowed lands. Each party brought a suit with respect to the land which was declared in possession of the other under section 145 of the Criminal Procedure Code. As I have already stated the Banerjees brought Suit No. 1951 and the Chaterjees brought Suit No. 2094 both of 1919, the plaintiffs in one suit being the defendant in the other. Both the Courts below have found in favour of the Banerjees and, therefore, decreed Suit No 1951 and dismissed the Suit No. 2094. The Chatterjees have brought these second appeals against the judgment and decree of the Subordinate Judge of Assansol who affirmed the decree of the Munsif of the said place.

Both the Courts came to the conclusion that the appointment of the Banerjees by the *arpannamah* of 1308 was not revocable by Man Gobinda and, therefore, the subsequent appointment of Nil Kumari by the deed of gift of 1316 was invalid. Consequently the Banerjee were declared as the *shebait* of the *Thakur* of the dedicated properties and as such they got a decree for possession of the lands held by the Chatterjees whose suit was dismissed.

The Subordinate Judge further finds that the gift by Man Gobinda to Nil Kumari was operative so long as he was alive; and that Nil Kumari acted as *shebait* even during the lifetime of Man Gobinda and that she was treated as a co-*shebait* by the other *shebaits* of the family *Thakur*. It is then observed by the learned Subordinate Judge that "the god was not the property of Man Gobinda alone" and later on he says: "Man Gobinda was not the founder of god or of god's estate, he added to that estate, with the consensus of all the *shebaits* this change in the succession was not made." It is difficult to follow what the learned Judge meant to decide on the basis of his observations that Man Gobinda was not the founder and that he was one of the many *shebaits*. If the learned Subordinate Judge was thinking that a subsequent *shebait* has no right, although he might make additional gifts to a family *Thakur*, to alter the rule of succession established by the founder, then Man Gobinda had no authority to appoint either the Chatterjees or the Banerjees who base their claim only on the *arpanammah* and not on their right as the successor of the original founder who apparently has more successors than the Banerjees, the plaintiffs in Suit No. 1951. It was the common case of the parties that Man Gobinda could and did appoint *shebaits* with reference to the properties dedicated by himself and also by his ancestors but the question as to the validity of such appointment has not been determined having regard to the fact that Man Gobinda was merely a co-*shebait*. Upon the facts admitted by the parties and on the findings arrived at by the lower Appellate Court the following questions arise and must be decided before the rights of the parties can be determined.

(1) Was the appointment of the Banerjees by the deed of 1308 revocable by Man Gobinda?

(2) Was the appointment of Nil Kumari and her heirs as *shebaits* in the place of the Banerjees by the deed of 1316 valid?

(3) What is the effect of the two deeds in respect to the lands dedicated by Man Gobinda by these deeds?

In order to answer the above mentioned questions, it is necessary to bear in mind some of the general principles as regards the endowments made in favour of a family *Thakur*. The gift of land to the service of the diety was not only permitted but highly extolled for inducing pious men to make such dedication: "The bestower of skin of land to Vishnu is promised fortune and prosperity for seven births; he who dedicates a field or a house for the enjoyment of Vishnu is released from all sins". *See Hemadridankhaida* quoted by Pran Nath Saraswati in his Tagore Law Lectures, p. 137. There are numerous such other texts, and it is unnecessary to multiply them. The *Thakur* could not obviously enjoy any property unless, some one manages the same for him and utilises the income for his worship. This is usually done by the appointment of a *shebait*. In an early case, the Judicial Committee said as follows:—"The *taluk* itself, with which these *jamas* were by tenure, was dedicated to the religious sevices of the idol. The rents constituted, therefore, in legal contemplation its property. The *shebait* had not the legal property, but only the title of manager of a religious endowment". See *Maharanee Shibessouree Debea* v. *Mathooranath Acharjo*, (1).

In the case of *Prosunna Kumari Debya* v. *Golab Chand Baboo* (2) the Judicial Committee of the Privy Council referred to the case of *Maharanee Shibessouree Debea* v. *Mathooranath Acharjo* (1) and

(1) 13 M. I. A. 270; 13 W. R. P. C. 18; 2 Suth. P. C. J. 300; 2 Sar. P. C. J. 528; 20 E. R. 552.

(2) 2 I. A. 145; 14 B. L. R. 450; 3 Sar. P. C. J. 449; 23 W. R. 253; 3 Suth. P. C. J. 102 (P. C.).

said as follows:—"The authoruty of the *shebait* of an idol's estate would appear to be in this respect analogous to that of a manager for an infant heir, which was thus defined in the case of *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree*, (3)". On these authorities, it is clear that the dedicated properties belong to the *Thakur* and that the *shebait* is a mere officer and has no right therein. The gift to the *Thakur* is absolute and cannot be revoked nor can any one misappropriate it. "He who seizes the subsistence of the gods or priests whether given by himself or another is born a reptile for a million of years": Macnaughton's Principles of Hindu Law, Vol. II, p. 305. It is now settled law that the appointment and succession to the office of a *shebait* must follow the line laid down in the original grant and in the absence of special direction and usage the heirs of the donor succeed. See *Gossami Sri Gridhariji* v. *Romanlalji Gossami* (4) also *Kali Krishna Roy* v. *Makhan Lal* (5) and *Ananda Chandra Chakravarti* v. *Broja Lal Singh* (6).

The right of a *pujari* of the *Thakur* is not that of a *shebait* and he is merely a servant appointed by the *shebait* for the performance of the ceremonies. See *Ananda Chandra Chakravarti* v. *Broja Lal Singh* (6).

Now it may be borne in mind that the rule laid down in the *Jotendromohun Tagore* v. *Ganendromohun Tagore* [*The Tagore case*], (7) prohibiting a Hindu from creating a special line of succession unkown to Hindu Law does not apply to the case of appointment of a *shebait* of a family *Thakur* and the reason is obvious, for an appointment to such an office creates no interest in property. See *Mathura Nath Mukherjee* v. *Lakhi Narain Ganguly* (8). The appointment of a *shibait*, therefore, is obviously not a gift of any property to the *shebait* but it is purely an appointment to an office without, it may be, any remuneration whatsoever. The dedication to a *Thakur* is irrevocable but on what principle can it be said that the appointment of a *shebait* for the management of an endowed property is also irrevocable by the donor although it is unalterable after his death by a succeeding *shebait* of the *Thakur*. If the donor during his lifetime cancels the previous appointment and appoints a new person, on what ground can the dismissed nominee enforce his right?

From the authorities, which I have quoted, the rules which, in my opinion, are laid down and are deducible are these: *First*: That the dedication to the *Thakur* is irrevocable. *Second*: The rules laid down for the worship of the *Thakur* and for the management of the charities, if any connected with the endowment, are binding: *Third*: That the rule laid down for the appointment of *shebaits* and their succession in the deed of endowment are binding. *Fourth*: That the *shebait* had no right to the property but is merely an officer with the rights and limitations as are applicable to the guardian of a minor. *Fifth*: That the rules laid down in the deed of endowment are binding and are unalterable after the death of the donor by an successor in estate of office. *Sixth*: That the office of a *shebait* is not transferable either by sale or gift. See *Raja Vurmah Valia* v. *Rani Vurmah Kunhi Kutty* (9) and *Gnanasambanda Pandara Sannadhi* v. *Velu Pandaram* (10). *Seventh*: That the gift in favour of a co-*shebait* has been recognised. See *Radha Rani Dasi* v. *Doyal Chand Mullick* (11) but this is not allowed except on the ground that such transfers are for the benefit of

(3) 6 M. I. A. 393; 18 W. R. 81n; Sevestra 253n; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

(4) 16 I. A. 137; 17 C. 3; 13 Ind. Jur. 211; 5 Sar. P. C. J. 350; 8 Ind. Dec. (N. S.) 541 (P. C.).

(5) 72 Ind. Cas. 686; 50 C. 233; 36 C. L. J. 441; 27 C. W. N. 411; (1923) A. I. R. (C.) 160.

(6) 74 Ind. Cas. 793; 50 C. 292; 36 C. L. J. 356; (1923) A. I. R. (C.) 142.

(7) I. A. Sup. Vol. 47; 18 W. R. 359; 9 B. L. R. 377; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82 (P. C.).

(8) 75 Ind. Cas. 435; 50 C. 426; (1924) A. I. R. (C.) 68.

(9) 4 I. A. 76; 1 M. 235; 1 Ind. Jur. 134; 3 Sar. P. C. J. 687; 3 Suth. P. C. J. 382; 1 Ind. Dec. (N. S.) 156 (P. C.).

(10) 27 I. A. 69; 23 M. 271; 4 C. W. N. 329; 10 M. L. J. 29; 2 Bom. L. R. 597; 7 Sar. P. C. J. 671 (P. C.).

(11) 62 Ind. Cas. 222; 33 C. L. J. 141.

the endowment. See *Gobinda Kumar Roy Chowdhury* v. *Debendra Kumar Roy Chowdhury* (12).

There is no authority, so far as I know, with the exception of a case which I shall discuss later, nor is there anything on principle which would stand in the way of the donor to alter the appointment of a *shebait* to the office or the rules regulating the worship except on the ground that the donor has expressly precluded himself from doing so or that such an alteration affects some right of property of the *shebait* so appointed or the right of a third party which had already been created; provided always that any such alterations do not affect any of the fundamental gifts. So far as I know, such alterations, as stated above, are frequently made, and if not allowed, may lead to needless complications and difficulties and it may be observed that Man Gobinda himself executed three deeds by which he changed the *shebaits* from time to time. Ordinarily these appointments are without remuneration and *shebaits* are appointed in many instances without their knowledge or consent and consequently *shebaits* so appointed are not bound to accept the office. Tarak Nath Chatterjee, who was appointed by Man Gobinda in 1306, refused to act and then the Banerjees were appointed.

It is needless to point out that all the *shebaits* if they agree and if it is for the benefit of the endowment may introduce changes without changing the rules of the founder in any vital matter.

In this case the appointment of the Banerjees was to take effect after Man Gobinda's death and his widow's death. It was not an appointment which had taken immediate effect, it was in the nature of a testamentary arrangement to come into effect after his death and after the death of his widow. If the appointment was to a mere office, as I think it was, I do not see any reason why Man Gobinda could not alter what was really a testamentary provisions. A donor may think a particular person was a fit and proper person, at the time when he executed the deed, why can he not take a different view as to the fitness of that individual before he died. Take the analogy of the testamentary appointment of a guardian of a minor. Surely the testator can alter it by a subsequent Will.

The learned Vakil for the respondent relied upon the case of *Gouri Kumari Dasi* v. *Ramanimoyi Dasi* (13) in support of his contention that the appointment of the Banerjees was irrevocable. The learned Judges held that "the creator of a *debutter* could not make any change in the order of succession of *shebait* unless he had made a reservation to that effect in the deed." On the principles and authorities I have discussed, the appointment being an appointment to an office of the peculiar kind as indicated above I am inclined to think that the power should be presumed to exist unless expressly given up. In the present case the Courts below have held that the deed of 1308 contains provisions by which Man Gobinda precluded himself from making any further change. Although I feel considerable doubt as to the construction put upon the deed, I do not, however, feel justified in holding that both the Courts are clearly wrong in the view taken by them as to the effect of Bengali deed. Man Gobinda consequently precluded himself by terms of the deed of 1398 from revoking the appointment of the Banerjee as *shebait* for the management of 6 *bighas* of land endowed by that deed. In this view of the matter, the case of *Gouri Kumari Dasi* v. *Ramanimoyi Dasi* (13) is in support of the decision of this case

What then is the effect of these two deeds as to the rights of the contending parties in the additional endowments made by Man Gobinda.

Before we can answer this question another question arises and that is this: Could Man Gobinda appoint a new line of *shebaits* to a family diety who was established by

(12) 12 C. W. N. 98.

(13) 70 Ind. Cas. 175; 50 C. 197; 26 C. W. N. 920; (1923) A. I. R. (C.) 30.

his ancestor and the line of successors after the death of that ancestor seem to be his heirs? In the present case it appears that the legal heirs of the donor are the *shebaits* of the old endowement. It is clear on the authorities, Man Gobinda who had only a turn in the worship could not alter the line already established but without doing that could he fix a new line for the property endowed by himself? That he could appoint the new *shebaits* so far as his own endowements are concerned, as I have already said, is the common case of both the parties but how are these appointments valid.

Additional endowments are frequently made to a family diety by the descendants of the original donor and this is highly desirable and is to the benefit of the *Thakur* and I am of opinion that there is no objection to the donor appointing a new line of *shebaits* for the management of the property dedicated by himself. But he cannot alter any of the rules laid down specifically by the founder. Such new *shebait* may manage the property and he would be ordinarily allowed to place the income in the hands of the *shebaits* under the original founder's rules. If the old *shebaits* agree, the new *shebait* may act as a joint *shebait* as Nil Kumari was allowed to do from 1316 to 1320. The cardinal points to be kept in view in these matters, are, first that additional endowments are for the benefit of the *Thakur*. Secondly, that the new endowment and the rules laid down for its management and the use of the income should not be in any way inconsistent with the rules and usage of the original foundation in any material particular. In thisconnection see the case of *Pradyumna Kumar Mullik* v. *Pramatha Nath Mullik* (14). The *Thakur* in the nature of the thing, cannot express any view, he must speak through the *shebaits* who have the control of the original endowment.

As I have already stated, Man Gobinda by the deed executed in 1316 endowed additional lands, and appointed Nil Kumari the *shebait* even of the land covered by the deed of 1308 and put her in immediate possession of both the properties and Nil Kumari was accepted as *shebait* by all the *shebaits* under the original endowment, including the Banerjees, who are the plaintiffs in Suit No. 1951.

As I have pointed out before, the deed of 1316 made an additional endowment of some more properties including 2 *bighas* the subject-matter of the suit instituted by the Banerjees. On the principle already discussed and accepted, there was nothing to prevent Man Gobinda to appoint Nil Kumari and her heirs as *shebait* of these additional endowed properties. I am clearly of opinion, that the right created in favour of Nil Kumari has not ceased on the death of Man Gobinda's widow and that under the circumstances the Banerjees have no right under which they could recover possession of the properties in the hands of Nil Kumari's heirs. The deed of 1308 deals only with 6 *bighas* and not the 2 *bighas* granted in 1316. Additional endowements, if allowed, must be accepted with the terms and conditions in the deed but subject always to the limitation that such endowments are for the benefit of the *Thakur* and the new rules are not inconsistent with the rules already made.

Then let us see how the matter really stands. As regards the *shebaitship* of the *Thakur*, as created by the original founder, Man Gobinda could not alter it either in favour of the Banerjees who are only some of the heirs of the founder nor could he alter in favour of Nil Kumari who was not a member of the family. So far as the properties endowed by him by the deed of 1308, Banerjees were appointed *shebaits* and Man Gobinda was not competent by the terms of the deed to alter this appointment, under which the Banerjees are entitled to manage the 6 *bighas* of land endowed by the deed of 1308 but the Banerjees had no right as *shebaits* to the property created *debutter* by the deed of 1316, by which Nil Kumari and her heirs were appointed. It is found by the First Court

(14) 77 Ind. Cas. 833; 27 C. W. N. 684; (1923) A. I. R. (C.) 708.

that both the Banerjees and Chatterjees are performing the *pujas* and are in possession of some of the lands.

What the effect of the acceptance of Nil Kumari as a co-*shebait* by the other *shebaits*, is, need not be considered in this case because that question relates to the *shebaitship* of the *Thakur* under the original grant and I have that question open for decision if and when occasion arises for its determination in the presence of all the necessary parties.

The result of the foregoing considerations, is that both the suits must fail and should be dismissed with costs throughout. Appeal No. 764 of 1922 is allowed with costs in all Courts, and Appeal No. 765 of 1922 is dismissed with costs.

Greaves, J.—I agree.

S. D. *Suits dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 113 OF 1922.
July 14, 1924.
Present:—Mr. Justice Devadoss.
AVUDAI AMMAL—DEFENDANT NO. 2—APPELLANT
versus
CHINNA RAMASAMI NAICK AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 AND 3—RESPONDENTS.

Mortgage—Decree on prior mortgage without impleading puisne mortgagee—Fresh mortgage to discharge decree—Suit by last mortgagee—Subrogation—Priority—Civil Procedure Code (Act V of 1908), s. 47, whether bars suit.

Where to discharge a decree on a prior mortgage in a suit brought without impleading the puisne mortgagee as a party, the mortgagor executes a third mortgage, the third mortgagee is entitled to priority over the puisne mortgagee and section 47, Civil Procedure Code, is not a bar to a suit brought by him to enforce his mortgage. [p. 848, cols. 1 & 2.]

Bulter v. *Rice*, (1910) 2 Ch. 277; 103 L. T. 94; 79 L. J. Ch. 652, *Ram Narain Singh* v. *Sahadeo Singh*, 67 Ind. Cas. 221; 1 Pat. 332; 3 P. L. T. 261; (1922) Pat. 174; (1922) A. I. R. (Pat.) 181, *Het Ram* v. *Shadi Ram*, 45 Ind. Cas. 798; 40 A. 407; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 24 M. L. T. 92; 28 C. L. J. 188; (1918) M. W. N. 518; 20 Bom. L. R. 798; 22 C. W. N. 1033; 9 L. W. 550; 12 Bur. L. T. 73; 45 I. A. 130 (P. C.), *Sukhi* v. *Ghulam Sardar Khan*, 65 Ind. Cas. 151; 43 A. 469; (1921) M. W. N. 445; 14 L. W. 162; 26 C. W. N. 279; 42 M. L. J. 15; 30 M. L. T. 175; 24 Bom. L. R. 590 (P. C.), *Sundara Reddiar* v. *Subbiah Koundan*, 18 Ind. Cas. 610; 24 M. L. J. 28; 13 M. L. T. 266; (1913) M. W. N. 369, relied on.

Gurdeo Singh v. *Chandrika Singh*, 1 Ind. Cas. 913; 36 C. 193; 5 C. L. J. 611, *Karuppan Ambalagaran* v. *Muhammad Sakuth*, 22 Ind. Cas. 253; 26 M. L. J. 74; 14 M. L. T. 478; (1914) M. W. N. 133, *Govinda Padayachi* v. *Lokanatha Aiyar*, 62 Ind. Cas 291; 40 M. L. J. 114; (1921) M. W. N. 87; 29 M. L. T. 156, *Pingali Venkataramana Reddi* v. *Kotigari Rangian Chetti*, 70 Ind. Cas. 212; 41 M. L. J. 399 at p. 420; (1922) M. W. N. 15; (1922) A. I. R. (M.) 249, distinguished.

Second appeal against the decree of the Court of the Additional Subordinate Judge, Tinnevelly, in Appeal Suit No. 85 of 1921 (A. S. No. 63 of 1920 on the file of the District Court of Tinnevelly) presented against the decree of the Court of the Additional Temporary District Munsif, Tinnevelly, in O. S. No. 108 of 1919 (O. S. No. 34 of 1918 on the file of the Court of the District Munsif, Koilpatti).

Mr. *K. S. Sankara Iyer*, for the Appellant.

Mr. *K. Bhashyam Iyengar*, for the Respondents.

JUDGMENT.—The question argued in this second appeal is whether the third mortgagee is entitled to priority over the second mortgagee. There were three mortgages, one of 1900, in favour of one Veerappa Naick Exhibit B, another in 1904 in favour of the second defendant Exhibit I; and the third in favour of the plaintiff in 1912; Exhibit C. Veerappa Naick brought a suit and obtained a decree without impleading the second defendant as a party. In order to discharge the decree: the mortgagor borrowed from the plaintiff Rs. 3,350 on 28th July 1912 and paid the amount to Veerappa's Vakil in discharge of the decree-debt. The mortgage-deed, Exhibit C, in favour of the plaintiff was executed on 16th August 1912 and the stamp paper for the deed was purchased on 27th July 1912.

Both the lower Courts have found in favour of the plaintiff's contention that he is entitled to priority over the second mortgagee.

It has been urged before me that the plaintiff is a volunteer and that he had

no subsisting interest on the date of his mortgage to enable him to get the benefit of the principle of subrogation and that in order to stand in the shoes of the first mortgagee Veerappa Naick, the plaintiff, ought to have had an interest in the mortgaged property before he discharged the amount due to Veerappa, and reliance is placed on *Gurdeo Singh* v. *Chandrika Singh* (1) and *Govinda Padayachi* v. *Lokanatha Aiyar* (2). In *Gurdeo Singh* v. *Chandrikah Singh* (1) the learned Judge observes: "That principle is, that subrogation as a matter of right is never applied in aid of a mere volunteer. Legal substitution into the rights of a creditor for the benefit of a third person takes place only for his benefit, who, being himself a creditor, satisfies the lien of a prior creditor, or for the benefit of a purchaser, who extinguishes the encumbrances upon his estate, or of a co-obligor or surety, who discharges the debt, or of an heir, who pays the debts of the succession....Any one, who is under no legal obligation or liability to pay the debt,...he is a mere volunteer." Now the question is whether a person who advances money for the purpose of getting a mortgage and pays the consideration for the mortgage of a prior encumbrancer is a volunteer or not. The authorities cited by the learned Vakil for the appellant do not support him in the contention that the mortgagee who pays off the prior encumbrance is a volunteer. In *Govinda Padayachi* v. *Lokanatha Aiyar* (2) the learned Judges find that the person who claimed priority did not get any title to the property. At page 120*, they observe. "Their claim, therefore, rests only on the fact that they made payments to free property from encumbrances in the belief that in the future they might acquire from a third party an interest in that property, by which their payments could be justified. On those facts no authority supports their claim to reimbursement." The case of *Karuppan Ambalagaran* v. *Muhammad Sakuth* (3) does not support the appellant's contention. In *Pingali Venkataramana Reddi* v. *Kotigari Rangian Chetty* (4) also, the person who claimed to stand in the shoes of a prior encumbrancer was a volunteer. That a person who takes a mortgage interest or any other interest on the property is entitled to keep alive a prior encumbrance which he pays off requires no authority. In *Butler* v. *Rice* (5) the facts were that the plaintiff advanced £450 on the representation of Mr. Rice that the property was his and that the Bank had lien on the property. The plaintiff paid off the debt due to the Bank and got possession of the title-deeds. It turned out afterwards that the property did really belong to his wife Mrs. Rice. Warrington, J., on the facts held that the plaintiff was entitled to priority in respect of the amount paid by him to the Bank. The learned Judge observes at page 282: "The statement of claim proceeds on the well-known equitable doctrine that if a stranger pays off a mortgage on an estate he presumably does not intend to discharge that mortgage, but to keep it alive for his own benefit. The statement of claim asks for a declaration that the plaintiff is entitled to a charge on the Manor Road property for £450 and interest at 5 per cent. The charge referred to is the Bank's charge, which the plaintiff says was kept on foot in his favour, and the question is whether his position is well-founded. In the first place I find from the facts I have stated that it was not the intention of the plaintiff, nor indeed is it possible to suppose that any sensible man would have such an intention, to discharge the property from the debt. There are only two questions which have to be dealt with in order to arrive at the further conclusion that in equity the debt is still kept alive. The first is this: is it

(1) 1 Ind. Cas. 913; 36 C. 193 at p. 219; 5 C. L. J. 611.

(2) 62 Ind. Cas. 291; 40 M. L. J. 114; (1921) M. W. N. 87; 29 M. L. T. 156.

*Page of 40 M. L. J.—[*Ed.*]

(3) 22 Ind. Cas. 253; 26 M. L. J. 74; 14 M. L. T. 478; (1914) M. M. N. 133.

(4) 70 Ind. Cas. 212; 41 M. L. J. 399 at p. 420; (1922) M. W. N. 15; (1922) A. I. R. (M.) 249.

(5) (1910) 2 Ch. 277; 103 L. T. 94; 79 L. J. Ch. 652.

material that the owner of the property, the mortgagor, has not requested the person who paid the money to make the payment? and secondly, is the plaintiff's right affected by the further intention that, when the transaction was fully carried out, his position should be secured by a legal mortgage for £300 and a guarantee £150?" In that case the learned Judge held that, even if Mr. Rice was not a party to the transaction, the plaintiff was entitled to stand in the shoes of the Bank so far as the amount which he paid to discharge the debt due to the Bank was concerned. It is unnecessary to refer to all the cases quoted at the Bar. It is sufficient to refer to the case reported as *Ram Narayan Singh* v. *Sahadeo Singh* (6) the facts of which are very similar to those of the present. In that case it was held that mortgagee who advanced money to pay off prior encumbrances was entitled to be subrogated to the rights of the prior encumbrancer. The learned Judges rely on the Privy Council decision in *Het Ram* v. *Shadi Ram* (7) and *Sukhi* v. *Ghulam Safdar Khan* (8). Their Lordships of the Privy Council in the latter case feel no difficulty in holding that "the law remains as it certainly was before the Transfer of Property Act, 1882, namely, that an owner of a property who is in the rights of a first mortgagee and the original mortgagor as acquired at a sale under the first mortgage is entitled at the suit of a subsequent mortgagee who is not bound by the sale or the decree on which it proceeded to set up the first mortgage as a shield." I find against the appellant so far as this contention is concerned.

The next contention is that section 47 is a bar to this suit, I do not see how section 47 can be a bar. When a person wants to have the benefit of the discharge of a prior encumbrance he can only bring a suit on the prior encumbrance; he cannot claim to be substituted for the plaintiff in the mortgage-decree obtained by the prior encumbrancer and execute the decree. The amount due to the prior encumbrance having been paid off, there can possibly be no decree which has to be realised by execution. That being so, a suit is the only remedy. This point is set at rest by the decision in *Sundara Reddiar* v. *Subbiah Koundan* (9).

In the result the appeal fails and is dismissed with costs. Time for redemption by the appellant three months.

V. N. V. *Appeal dismissed*

S. D.

(6) 67 Ind. Cas. 221; 1 Pat. 332; 3 P. L. T. 261; (1922) Pat. 174; (1922) A. I. R. (Pat.) 181.

(7) 45 Ind. Cas. 798; 40 A. 407; 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 21 M. L. T. 92; 28 C. L. J. 188; (1918) M. W. N. 518; 20 Bom. L. R. 798; 22 C. W. N. 1033; 9 L. W. 550; 12 Bur. L. T. 73; 45 I. A. 130 (P. C.).

(8) 65 Ind. Cas. 151; 43 A. 469; (1921) M. W. N. 445; 14 L. W. 162; 26 C. W. N. 279; 42 M. L. J. 15; 30 M. L. T. 175; 24 Bom. L. R. 590 (P. C.).

(9) 18 Ind. Cas. 610; 24 M. L. J. 28; 13 M. L. T. 266; (1913) M. W. N. 369.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 99 OF 1923.

August 14, 1923.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justie Panton.

JOGGESWAR MAHATA AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

JHAPAL SANTAL AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Bengal Tenancy (Amendment) Act (II of 1918), s. 49K—Sale of tenure of aboriginal, whether nullity—Waiver of provisions of Act—Application to set aside sale—Limitation—Interpretation of Statutes—Statute for benefit of particular class—Public policy.

A sale of the tenure of an aboriginal in execution of a decree in contravention of the provisions of section 49K of the Bengal Tenancy (Amendment) Act of 1918 is a nullity. [p. 850, col. 1.]

The Bengal Tenancy (Amendment) Act of 1918 was enacted with the object of protecting the aboriginals against indiscreet transactions. It is not, therefore, open to an aboriginal to waive the benefit of the provisions of the Act. [*ibid.*]

The question of limitation arises only where a sale is a valid sale until it is set aside; it does not arise where the sale is altogether void. [*ibid.*]

When the provisions of a Statute have been contravened, if a question arises as to how far the proceedings are affected by such contravention the matter must be determined with regard to

the nature, scope and object of the particular provision which has been violated. No hard and fast line can be drawn between a nullity and an irregularity. [p. 849, col. 2.]

Rajani Kanta Ghose v. *Sheikh Rahaman Gazi*, 82 Ind. Cas. 507; 27 C. W. N. 765 at p. 768; 37 C. L. J. 447; (1914) A. I. R. (C.) 408, followed.

Liverpool Borough Bank v. *Turner*, (1860) 2 De G. F. & J. 502 at p. 508; 129 R. R. 172 at p. 175; 30 L. J. Ch. 379; 7 Jur. (N. S.) 150; 3 L. T. 494; 9 W. R. 292; 45 E. R. 715, referred to.

The mere fact that the provisions of a Statute are intended for the benefit of a class of persons does not necessarily show that the Statute is not based on grounds of public policy. [*ibid.*]

Appeal against an order of the District Judge, Midnapore, dated the 21st November 1922, affirming that of the Munsif, Jhargram, dated the 24th July 1922.

Dr. *Dwarkanath Mitter* (with him Mr. *J. M. Mitra*), for the Appellant.

Babu *Pyarimohan Chatterjee*, for the Respondents.

JUDGMENT.—The question involved in this appeal is whether a sale held in contravention of the provisions of the Bengal Act II of 1918 is merely an irregular sale or a nullity.

The appellant obtained a decree for money against the respondent who is an aboriginal residing in the District of Midnapore, to which the Act applies, and in execution of the decrees put up his tenure to sale and purchased it himself on the 20th August 1920. An application was made to set aside the sale on the 13th January 1922. It was far beyond the period prescribed by Art. 166 of the Limitation Act or even Art. 12 of the Limitation Act. The Courts below, having come to the conclusion that the sale was a nullity, overruled the objection of limitation and set aside the sale.

The decree-holders have appealed to this Court and it is contended that the sale was not a nullity and that the provisions of the Act having been made for the benefit of a particular class of persons and not for the general public, the respondents could waive the irregularity of the sale and the sale, therefore, was not altogether invalid. We have been referred to certain observations made by Mookerjee, J., in the case of *Ashutosh Sikdar* v. *Behari Lal Kirtania* (1). The learned Judge observes—"When the object of the Statute has been determined, if the statutory provision is not based on grounds of public policy, and is intended only for the benefit of a particular person or class of persons the conditions prescribed by the Statute are not considered as indispensable and may be waived, because every one has a right to waive, and to agree to waive, the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, and which may be dispensed with without infringement of any public right or policy." The mere fact that the statutory provisions are intended for the benefit of a class of persons does not necessarily show that it is not based on grounds of public policy. As was observed by Lord Campbell, L. C., in *Liverpool Borough Bank* v. *Turner* (2), that "No universal rule can be laid down for the construction of Statutes, as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of Courts of Justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the Statute to be construed" and in the case of *Rajani Kanta Ghose* v. *Sheikh Rahaman Gazi* (3), Mr. Justice Mookerjee observes: "The only rule that may be adopted is, that when the provisions of a Statute have been contravened, if a question arises as to how far the proceedings are affected by such contravention, the matter must be determined with regard to the nature, scope and object of the particular provision which has been violated. No hard and fast line can be drawn between a nullity and an irregularity." We, therefore, have to consider the object of the Act. The preamble states—"Whereas it is expedient to supplement and amend the Bengal Tenancy Act, 1885." Section 49B of the Act

(1) 35 C. 61 at p. 74; 11 C. W. N. 1011; 6 C. L. J. 320 (F. B.).

(2) (1860) 2 De. G. F. & J. 502 at p. 508; 129 R. R. 172 at p. 175; 30 L. J. Ch. 379; 7 Jur. (N. S.) 150; 3 L. T. 494; 9 W. R. 292; 45 E. R. 715.

(3) 82 Ind. Cas. 507; 27 C. W. N. 765 at p. 768; 37 C. L. J. 447; (1924) A. I. R. (C) 408.

lays down, "No transfer by an aboriginal tenure-holder, *raiyat* or under-*raiyat* of his right in his tenure or holding, or in any portion thereof, by private sale, gift, Will, mortgage, lease or any contract or agreement, shall be valid to any extent except as provided in this Chapter." The voluntary alienation, therefore, is absolutely prohibited except as provided for in that Chapter, and section 49 K lays down "Notwithstanding anything in this Act, no decree or order shall be passed by any Court for the sale of the right of an aboriginal tenure-holder, *raiyat* or under-*raiyat* in his tenure or holding, or in any portion thereof, nor shall any such right be sold in execution of any decree or order." There are certain provisos to which we need not refer. Section 49K, therefore, clearly lays down that there shall be no decree for sale of a tenure of an aboriginal and no sale shall be held in execution of a decree except a rent-decree and certain other cases mentioned in the proviso. It is not reasonable to hold that the Legislature having enacted that there shall be no voluntary alienation by an aboriginal to any extent except as provided in this Chapter should allow an involuntary sale in the same Chapter. The enactment is for the protection of the aboriginals against any indiscreet transaction. That being the object of the enactment, we think it was not open to him to waive the benefit of the provisions. We do not think that the mere fact that the enactment was made for the benefit of a class of persons, *viz.*, the aboriginals in certain district, shows that that it was not on the ground of public policy. We are, therefore, of opinion that the sale was a nullity and, if the sale is altogether void, the question of limitation does not arise. That question arises where the sale is a valid sale until it is set aside, as it was in the case of *Malkarjun* v. *Narhari* (4). Having regard to the view taken by us that the sale in the present case was not an irregular sale but a void one, we are of opinion that the application is not barred by limitation.

(1) 25 B. 337; 5 C. W. N. 10; 2 Bom. L. R. 927; 27 I. A. 216; 10 M. L. J. 368; 7 Sar. P. C. J. 739 (P. C.).

The appeal is accordingly dismissed with costs.

Z. K. *Appeal dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 32 OF 1923.

July 21, 1924.

Present:—Mr. Justice Reilly.

MULKI NARAYANA KAMMATHU AND OTHERS—DEFENDANTS Nos. 2 TO 4—PETITIONERS

versus

KOLATHINGAL KUNHI MOYI AND OTHERS—PLAINTIFFS Nos. 1 AND 2 AND DEFENDANTS Nos. 1 TO 5—RESPONDENTS.

Contract Act (IX of 1872), ss. 95, 96, 107—Sale of goods—Vendee's failure to take delivery—Repudiation of contract—Vendor's lien on goods sold—Re-sale.

If a sale of goods is on credit and no time is fixed for delivery, the vendor has no lien and the vendee is entitled to immediate delivery. But where the vendee fails to take delivery within the time fixed and repudiates the contract, he cannot take advantage of the provisions of section 96, Contract Act. The general provision of section 95 of the Act giving the seller a lien on sold goods remaining in his possession has effect unless some exception applies, and the vendor in such a case has a right under section 107, to re-sell the goods and recover the loss from the vendee. [p. 851, col. 1.]

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the Subordinate Judge, South Malabar at Calicut, in S. C. S. No. 138 of 1922.

Mr. *K. P. Ramakrishna Iyer*, for the Petitioner.

JUDGMENT.—The plaintiffs allege that they sold 2,500 cocoanuts to defendants at Rs. 41 a thousand, that the defendants agreed to remove the cocoanuts from plaintiffs' warehouse within four days, that the defendants did not remove them and, therefore, plaintiffs after notice to defendants sold the cocoanuts by auction at Rs. 35 a thousand. Plaintiffs sued defendants for the amount of the loss on the re-sale. Defendants denied the sale to them, but the Subordinate Judge

made a decree for plaintiffs as sued for. Defendants Nos. 2, 3 and 4 pray for revision.

It is urged before me that there was no completed contract between the parties but only negotiations for the sale of the cocoanuts at Rs. 41 a thousand from plaintiff and that even if defendants agree to buy 25000 cocoanuts, those cocoanuts were never ascertained and appropriated to the sale from among the cocoanuts in plaintiffs' warehouse. But on examining the record, I find that there is evidence, not only that defendant No. 4,'on behalf of defendants, agreed to buy 25,000 cocoanuts at Rs. 41, but also that he inspected the cocoanuts at the plaintiffs' warhouse, where they were store din one lot, and agreed to take that lot. The Subordinate Judge was entitled to find on that evidence that the sale was complete.

The only other point urged for defendants is that plaintiffs had no right to re-sell the cocoanuts. The argument is that they could do that under section 107 of the Contract Act, only if they had a lien on the cocoanuts and that in this case they had no lien, as it does not appear that any definite time was fixed for payment. For this defendants' Vakil relied on section 96 of the Contract Act. Under that section, if the sale was on credit and no time was fixed for delivery, then plaintiffs would have no lien and defendants would have been entitled to immediate delivery. But in this case, the time for taking delivery passed and defendants repudiated the contract. If the sale was on credit, as appears to have been the case, defendants would have had the right to immediate delivery, against which plaintiffs could not have set up any lien. But as defendants failed to take delivery within the time fixed and repudiated the contract, they cannot take advantage of the provisions of section 96 which give the buyer a right to delivery without payment in certain circumstances. The general provision of section 95 of the Act giving the seller a lien on sold goods remaining in his possession has effect unless some exception applies. In the present case the Subordinate Judge was right in finding that plaintiffs were entitled to re-sell the cocoanuts and to recover the loss from defendants.

The petition is dismissed with costs of respondents Nos. 1 and 2.

V. N. V. *Petition dismissed.*

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 586 OF 1922.

May 15, 1924.

Present :—Justice Sir William Ewart Greaves, KT., and Mr. Justice Chakravarti.

KRISHNA MOHAN CHOWDHURY—PLAINTIFF—APPELLANT

versus

GOUR SUNDAR CHOWDHURY—AND ANOTHER—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42—Declaratory suit—Consequential relief, question of—Duty of Court.

It is not open to a Court to dismiss a suit filed under section 42, Specific Relief Act, on the ground that a mere declaration will not suffice, without taking evidence and going into the facts. [p. 852, col. 1.]

Gokul Nath Jiu v. *The New Birbhum Coal Co., Ltd.*, 80 Ind. Cas. 589; 27 C. W. N. 972; (1924) A. I. R. (C.) 183, relied on.

Appeal against the decree of the District Judge, Chittagong, dated the 1st August 1921, affirming that of the Officiating Subordinate Judge, First Court of that District, dated the 25th August 1921.

Babu *Chandra Sekhar Sen*, for the Appellant.

Babu *Narendra Kumar Das*, for the Respondents.

JUDGMENT.

Greaves, J.—This is an appeal by the plaintiff against a decision of the District Judge of Chittagong, confirming a decision of the First Subordinate Judge. The facts necessary for the understanding of this appeal are as follows: The present plaintiff in the year 1914 commenced a suit for partition and his brother who was a party in that suit filed a written statement. At this stage friends of the parties intervened and the plaintiff's case is that he was induced by misrepresentations to sign a *solenama* compromising

the matters in this suit. Then the plaintiff commenced the suit out of which this appeal arises and in this suit he asked for a declaration that the decree based on the *solenama* filed in the partition suit might be declared null and void and inoperative as having been obtained by undue influence, coercion and fraud. This was what the plaintiff asked for in this suit and he asked for nothing else. When the matter came before the First Subordinate Judge of Chittagong he said without taking any evidence that such a suit would not lie having regard to the provisions of section 42 of the Specific Relief Act and he also stated that the suit was not properly valued the suit having been filed on a Court-fee of Rs. 10. Against this decision an appeal was preferred to the District Judge and he stated that the appeal was not maintainable having regard to the fact that only a Court-fee of Rs. 10 had been paid and he referred to the provisions of the Court Fees Act. It seems to us that the decisions of both the Courts were wrong. It was not, we think, having regard to the decision in *Gokul Nath Jiu* v. *The New Birbhum Coal Co., Ltd.*, (1), open to the First Court to say that the suit did not lie without going into the facts and considering the relief that was asked and this being so, it was not open to the lower Appellate Court to dismiss the appeal, upon the ground upon which it was dismissed. It may be, as the respondents contend, that it will ultimately be found that the suit does not lie as a mere declaration will not suffice. But this is a matter that has to be decided after the facts have been ascertained and the Judge is in a position to deal with the point upon the facts as ascertained. The appellant before us contends that no consequential relief is necessary. He may be right or he may be wrong but it appears to us that it is impossible for the Court to decide the matter as the First Court purported to decide it without ascertaining the facts.

(1) 80 Ind. Cas. 589; 27 C. W. N. 972; (1924) A. I. R. (C.) 183.

In the circumstances, we allow the appeal and the matter must go back to the First Court in order that the suit may be registered and dealt with on its merits. After that has been done if an appeal results it will then be possible to say whether a second appeal lies or not or whether having regard to the value of the suit there should be a first appeal to this Court, if appeal there be.

The appellant will be entitled to his costs in this Court. Costs of the lower Appellate Court will abide the result.

Chakravarti, J.—I agree.

N. H. *Appeal allowed.*

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 2142 OF 1920.

March 29, 1923.

Present:—Mr. Justice Marten.

JETHABHAI VERSEY & Co.—PLAINTIFFS

versus

AMARCHAND MADHAVJI & Co.—DEFENDANTS.

Civil Procedure Code (Act V of 1908), ss. 25, 151—Inherent jurisdiction, scope of—Suit, when to be stayed—Transfer—Test—Suit, vexatious and oppressive.

Appeals to the inherent jurisdiction of the Court have to be regarded with the greatest caution. But if after exercising such caution the Court is clearly of opinion that the jurisdiction ought to be exercised, it should not be intimidated from so doing because no case on all fours is forthcoming from the reported decisions in the various High Courts. [p. 855, col. 2.]

The Court will interfere to prevent vexatious proceedings which would have the effect of preventing the due administration of justice. [p. 856, col. 1.]

Mulchand Raichand v. *Gill & Co.*, 53 Ind. Cas. 518; 21 Bom. L. R. 263 at p. 966 and *McHenry* v. *Lewis*, (1882) 22 Ch. D. 397; 52 L. J. Ch. 325; 47 L. T. 549; 31 W. R. 305, followed.

Section 25 of the Civil Procedure Code does not apply or at any rate should not be confined to objection to a particular Judge personally. The objection must apply to the High Court as a whole. [p. 860, col. 2.]

The test for a transfer is much the same as for a stay of suit under section 151 of the Civil Procedure Code or alternatively the rather more

lenient test adopted in section 527 of the Criminal Procedure Code. [p. 860, col. 2.]

Plaintiffs who carried on business in Bombay, Rangoon and Calcutta and had their head office at Bombay brought a suit at Bombay against defendants who also carried on business at those places as merchants and commission agents. The suit was for accounts in respect of certain transactions which had taken place at Rangoon under instructions of a partner of the plaintiffs' firm. The books of account as well as all the principal witnesses were at Rangoon and the suit involved a determination of the custom of trade observed at Rangoon with regard to the transactions. After the filing of the suit defendants paid what they regarded as balance due to the plaintiffs and offered to pay taxed costs to date but prayed that the suit should be stayed:

Held, (1) that it would be most inconvenient to the defendants to have the suit tried at Bombay; [p. 858, cols. 1 & 2; p. 859, col. 1.]

(2) that as from the date when the defendants paid the amount to the plaintiffs and offered to pay taxed costs, the suit was vexatious and oppressive to the defendants; [p. 859, col. 2.]

(3) that the plaintiff was at liberty to withdraw the suit under O. XXIII, r. 1, Civil Procedure Code, but in default of his so doing within the time limited for presenting an appeal, all further proceedings in the suit should be stayed. [p. 859, col. 2.]

FACTS.—Plaintiffs who carried on business in rice at Bombay, Rangoon and Calcutta and had their head office at Bombay brought a suit for accounts in respect of certain transactions with defendants who according to the plaintiffs were merchants and commission agents with their head office at Bombay and branch offices at Rangoon, Calcutta and Karachi. It was alleged that plaintiffs employed defendants as their commission agents and agreed to pay their usual commission; that defendants' branch office at Rangoon used to carry out instructions given by the plaintiffs' representative at Rangoon for buying and selling rice, that defendants' branch office having entered into certain speculative transactions on behalf of the plaintiffs which the latter had not authorised, disputes arise between the parties and as the accounts for the *Sambat* years 1975 and 1976 had not been adjusted, defendants had in their hands large sums of money as well as some goods belonging to the plaintiffs, but had withheld the same owing to the dispute. The defendants contended that the firm with which the plaintiffs had dealings at Rangoon was not a branch of the defendants' firm in Bombay but was differently constituted and that, therefore, they, the defendants, were not concerned with the transactions between the plaintiffs and the Rangoon firm; that they were not the commission agents of the plaintiffs; that the agency alleged by the plaintiffs was between the plaintiffs and the Rangoon firm and was entered into at Rangoon, that no part of the cause of action had arisen in Bombay and the High Court had no jurisdiction to try the suit. They further contended that all transactions took place and all moneys were paid at Rangoon, that all books of account, papers, etc., relating to the said transactions were at Rangoon; that the principal witnesses of both parties were at Rangoon and commissions would have to issue for taking their evidence; that if the suit was allowed to proceed at Bombay it would involve a great hardship, expense and inconvenience to the defendants; and that even if the High Court had jurisdiction the suit should be stayed or transferred to the Court at Rangoon. The defendants then traversed the other allegations of the plaintiffs with regard for accounts and alleged that they did not enter into any forward transactions; that no sums were due from them to the plaintiffs and that when the accounts for the *Sambat* year 1376 were made up by the Rangoon firm, the defendants forwarded to the plaintiffs on 28th February 1921 a cheque for the total amount found due by the Rangoon firm, and they offer to pay taxed costs to date. The main issue in the case was:

(4) "Whether the suit should not be stayed in any event on the ground of the balance of inconvenience and the suit being oppressive."

Messrs. *Davar* and *Desai*, for the Plaintiffs.

Messrs. *Jinnah*, *Taraporevalla* and *Engineer*, for the Defendants.

JUDGMENT.—[After stating the facts and discussing the pleadings of the parties His Lordship proceeded :—]

Now the facts which are admitted or proved here are shortly as follows. The parties come from Cutch or Kathiawar, but their businesses are mainly elsewhere,

The disputed transactions between the parties are (*a*) in gunny bags, and (*b*) in rice. The transactions in gunny bags number about 100 to 125 and amount in all to about three to four lacs of rupees. The transactions in rice are about 500 or 600 and amount to nearly rupees fifty lacs. All the transactions took place in Rangoon, and all the instructions for these transactions were given in Rangoon to the defendants by Khimji and Tokersey. Khimji was admittedly a partner in the plaintiffs' firm. It is in dispute whether Tokersey also was a partner in the plaintiffs' firm. Further, the moneys in respect of these transactions were paid in Rangoon and all deliveries were given or taken there. Substantially all the books of account and vouchers relating to the suit transactions are at Rangoon. Further the other parties to the transactions are all merchants in Rangoon and consist of Chinese, Burmese, Europeans and Madrasis. The books of the Chinese and Burmese merchants are written in the Chinese and Burmese languages respectively, while the Madrasi books are in Tamil. It is not practicable to get business men to come from Rangoon to Bombay to give evidence, for the journey takes about eight days if a traveller goes *via* Calcutta. I think it would probably take longer if he went by Colombo unless he was fortunate in meeting connecting boats.

It is in dispute whether the plaintiffs are acting *bona fide* in persisting in having this suit tried in Bombay. They contend that the transactions in question were the private ventures of Khimji and Tokersey, and that they are now hostile to them. The defendants allege that the suit is being continued in Bombay in order to harass the defendants and so force them to some settlement which they would not otherwise agree to; that the plaintiffs are wanted by their creditors both in Bombay and in Rangoon and have decrees out against them in Bombay, and that that is the real reason why they have remained in Cutch and have put forward requests for adjournment, and that under all the circumstances it would amount to a denial of justice if they were forced to have the matter tried in Bombay.

The plaintiffs have called no evidence, but the defendants have called their Rangoon partner Jivandas Sevchand. It appears from his evidence that in the rice transactions a question will arise on the local law of Rangoon with regard to the rice control. It would appear that in these rice transactions the plaintiffs have been debited and credited with certain bonuses. The defendants say that this is in accordance with the practice in Rangoon and that this practice was not an infringement of the local regulations. Whether that be so or not would be eminently a matter for the Rangoon High Court to determine, if possible.

Then the same witness in answer to the Court made a statement which might be liable to misconstruction. He said: "If a commission was sent to Rangoon to take all the evidence, we should have no objection. If all the evidence is taken there, we have no objection." Then on being cross-examined he said: "If all evidence were taken on commission, we should have no objection to being tried in Bombay." Whereupon Counsel for the plaintiffs said: "I say now I shall have no objection to all evidence being taken on commission including this gentleman's." What the witness meant there was, I think, that if all the evidence on both sides was taken on commission and no other evidence was allowed to be called at the trial, then his firm would not object to the Bombay Court determining the rights of the parties. But that was only a layman's reply and as was pointed out by his Counsel shortly afterwards, a commission to Rangoon would not prevent the plaintiffs from afterwards calling oral evidence at the trial in Bombay and thereby springing a surprise on their opponents and a surprise moreover which they might be unable to cope with by calling rebutting evidence.

Further, on March 2nd, 1923, when I asked Counsel for the plaintiffs how he suggested the case should be tried, he said he wanted it to go before the

Commissioner of this High Court in the ordinary way. Then when I said a Special Commissioner might have to be appointed to go to Rangoon and that provision must be made for his costs and that in the first instance those costs should be provided by the plaintiffs without prejudice to their ultimate incidence, Counsel said: "If I am to be asked to deposit costs here for a Special Commissioner I say I am not obliged to do so, and that if I am ordered to do so, I withdraw my application to consent to Special Commissioner to Rangoon." As to this, I will only say that if the Court has to appoint a Special Commissioner to go thousands of miles away to Rangoon and be engaged on a lengthy enquiry, such cash deposit must be made in order to provide for his costs. I am referring of course to his costs and not to the costs of the parties. That being so, as it is the plaintiffs' suit and they have selected this inconvenient forum of Bombay, it would seem only reasonable that in the first instance they should provide the initial Court costs necessary for the determination of this suit, just as if they were additional Court fees, leaving it to the Court hereafter to say how those costs should be ultimately borne. The plaintiffs have, therefore, once more put me in a position of difficulty. Their Counsel has declined to accept the terms which were provisionally arranged on January 9th, 1922, for selecting a limited number of items in the gunny bag transactions as a test to determine the liabilities of the parties, and have insisted on raising the point about the rice bonuses which is not expressly pleaded in their plaint. They have now created obstacles in the way of an alternative solution of the difficulty, *viz.*, to send a Special Commissioner to Rangoon. They prefer to take up the position that if the defendants want a Commission to Rangoon, they must first pay the estimated expenses thereof into Court under O. XXVI, r. 15.

These then being some of the main facts, what is the law on the subject? The jurisdiction under which I am asked to stay all further proceedings in this action is contained in section 151 of the Civil Procedure Code, which runs:

"Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

Appeals to the inherent jurisdiction of the Court have, I need hardly say, to be regarded with the greatest caution. But, if after exercising such caution, the Court is clearly of opinion that the jurisdiction ought to be exercised, I do not think it should be intimidated from so doing, because no case on all fours is forthcoming from the reported decisions in the various High Courts.

The only Indian decision to which I have been referred is that of *Geffert* v. *Ruckchand Mohla* (1) where under the then existing Code there was power for the Court to stay a suit if "it is satisfied that justice is more likely to be done by the suit being instituted in some other Court." That was a suit for a libel published in the *Bombay Gazette*. Accordingly the cause of action arose in Bombay. The learned Judge refused to stay the suit merely on the ground that the libel related to the alleged wrongful dismissal of the plaintiff from his employ, which was the subject of another suit between the same parties in a District Court, where most of the witnesses were living. With great respect I entirely follow that decision, but it is of little assistance to me here. In the present case, substantially the whole of the cause of action arose in Rangoon.

On the other hand, *Mulchand Raichand* v. *Gill & Co.* (2) is an instance where this Court restrained the defendant in a Bombay High Court suit from prosecuting against the plaintiff and others a suit in an up-country Court which had been instituted some twelve days before the High Court suit. There Mr. Justice Macleod, who was the Trial Judge, said at page 966* :—

"I am...prepared to hold that in the

(1) 13 B. 178; 13 Ind. Jur. 306; 7 Ind. Dec. (N. S.) 119.

(2) 53 Ind. Cas. 518; 21 Bom. L. R. 963 at p. 966.

*Page of 21 Bom. L. R.—[*Ed.*]

circumstances of this case justice requires that an order should go against the defendants in this Court *in personam* from proceeding with the suit in the Bijapur Court. All the evidence required for the purpose of deciding the dispute would be in Bombay,...It is quite clear that this case should be tried in Bombay. It would be a most undesirable precedent that commission agents in Bombay who make advances to up-country merchants on their cotton should be dragged to up-country Courts in cases of dispute which may occur between them on these transactions."

That decision was confirmed on appeal for the reasons there given.

Turning next to the English decisions, I find that the broad basis on which the jurisdiction is exercised, may be summarised as follows, *viz.*, that the Court will interfere to prevent vexatious proceedings which would have the effect of preventing the due administration of justice. Thus in *McHenry* v. *Lewes* (3) Lord Justice Bowen at pages 407-408 said :—

"I agree that it would be most unwise ...to lay down any definition of what is vexatious or oppressive...I would much rather rest on the general principle that the Court can and will interfere whenever there is vexation and oppression to prevent the administration of justice being perverted for an unjust end."

Then in the same case Lord Justice Cotton at page 406 said :—

"In the first place, it is a jurisdiction which one ought to exercise with extreme caution. Stopping in the middle of a suit a plaintiff from going on when he has a right of action as against the defendant, is a jurisdiction which has to be exercised with very considerable caution."

Those principles were more particularly considered by the Court of Appeal in *Logan* v. *Bank of Scotland* (4). The headnote runs :—

"The Court will stay an action, brought within the jurisdiction, in respect of a cause of action arising out of the jurisdiction, if satisfied that no injustice will be done thereby to the plaintiff, and that the defendant would be subject to such injustice in defending the action as would amount to vexation and oppression, to which he would not be subjected if an action were brought, in another and accessible Court, where the cause of action arose."

The suit there was for £ 50 damages for misrepresentations in a prospectus. The name of the Bank of Scotland appeared on the prospectus as the bankers of the Company, and accordingly they and their treasurer and certain directors of the Company were sued as defendants. The writ was served on the London branch of the Bank of Scotland and also on one of the directors who was resident there. The Bank applied to stay all further proceedings in the action on the ground that it was vexatious and oppressive and an abuse of the process of the Court. Lord Gorell pointed out that the action was purely a Scottish action and all the transactions which gave rise to the alleged cause of action took place exclusively in Scotland, and that all the parties to the action resided in Scotland, with the exception of the defendant Scott, who appeared to reside in London. At page 147 the learned Judge said :—

"If this action be fought out, it is obvious that it will involve calling a large number of witnesses, all of whom reside in Scotland, and none in England, and the production of numerous books, documents, and papers relating to the matters in question in Scotland,...and it is perfectly clear that a case of this kind ought, if possible, to be tried in Scotland, and that the inconvenience and difficulty placed upon the defendants in conducting the case in England would be so great as to put a great oppression upon them if they were obliged to produce and keep their witnesses and documents, etc., in London during the time such a trial as that which would take place would last."

Then after referring to the cases I have mentioned, the learned Judge stated at page 150 :—

(3) (1882) 22 Ch. D. 397; 52 L. J. Ch. 325; 47 L. T. 549; 31 W. R. 305.

(4) (1906) 1 K. B. 141; 75 L. J. K. B. 218; 94 L. T. 153; 54 W. R. 270; 22 T. L. R. 187.

"The difficulties which arise in the exercise of this power of the Court do not appear to be so much difficulties in stating the law as difficulties in administering or applying it. The Court should, on the one hand, see clearly that in stopping an action it does not do injustice, and, on the other hand, I think the Court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought not to be sued in the Court in which the action is brought, to which injustice he would not be subjected if the action were brought in another accessible and competent Court."

Then at page 151 the learned Judge proceeded:

"It seems to me clear that the inconvenience of trying a case in a particular Tribunal may be such as practically to work a serious injustice upon a defendant and be vexatious. This would probably not be so if the difference of trying in one country rather than in another were merely measured by some extra expense; but where the difficulty for the defendant of trying in the country in which the action is brought is such that it is impracticable to properly try the case by reason of the difficulty of procuring the attendance of busy men as witnesses, and keeping them during a long trial, and of having to deal with masses of books, documents, and papers which are not in the country where the action is brought, and of dealing with law foreign to the Tribunal, it appears to me that a case of vexation in some circumstances may be made out if the plaintiff chooses to sue in that country rather than in that where everybody is and where all the witnesses and material for the trial are."

Then, after referring to the possibility of suing in England a Bank whose head office was in Australia or Brazil in respect of transactions which took place in Australia or Brazil, the learned Judge continued (page 152):—

"This matter is, in this respect, of general importance, because so many Banks and other mercantile houses which are established in our Colonies and in the United States and other foreign countries have branches here. To a business concern to allow actions to proceed in such circumstances when there is a proper and adequate Tribunal in the place where both parties really are, and dealt with each other, and all the evidence is, would be intolerable. In the present case, apart from this question about Scott, it is difficult to conceive anything more harassing to the defendant Bank than to have their officials dragged up to London for a lengthy trial, when the Court of Session is, so to speak, across the way in Edinburgh.....All this to my mind is not measured by mere expense."

Accordingly the Court stayed the suit in that particular case.

In the other two suits to which I will refer, the alleged cause of action arose curiously enough in India. One is *Egbert* v. *Short* (5) a decision of Mr. Justice Warrington. The other is *In re Norton's Settlement, Norton* v. *Norton* (6) a decision of the Court of Appeal. In both cases suits were commenced in England by a wife against her husband or trustee, and the defendant applied for and obtained a stay on the ground that they were vexatious and that the disputes should more properly be tried in India. Substantially the decisions were applications of the principles referred to in the above *Bank of Scotland case* (4) but I may quote what Lord Justice Vaughan Williams said in *In re Norton's Settlement* (6) at page 479, *viz.*

"I wish to say, further, that the undoubted inherent jurisdiction of the Court to stay proceedings on the ground that they are an abuse of the process of the Court should always be exercised with the greatest care and caution....As I have already pointed out, in order to justify a stay it

(5) (1907) 2 Ch. 205; 76 L. J. Ch 520; 97 L. T. 90 23 T. L. R. 558.
(6) (1908) 1 Ch. 471; 77 L. J. Ch. 312; 99 L. T. 257.

is, as a rule, necessary that something more should exist than a mere balance of convenience in favour of proceedings in some other country. In my opinion it must be proved to the satisfaction of the Court that either the expense or the difficulties of trial in this country are so great that injustice will be done-in this sense, that it will be very difficult, or a practically impossible, for the litigant who is applying for the stay to get justice in this country. Speaking generally, one may say that the litigant must show that some injustice will be done to him. There is also another consideration to be borne in mind. If the Court, taking all the facts into consideration, comes to the conclusion that a plaintiff in commencing an action in this country has not done so on account of any legitimate advantage which a trial in this country will give him, but for purposes entirely foreign to that legitimate purpose, then, apart from any question as to expense or inconvenience, in my opinion not only has the Court jurisdiction, but it is its duty, to stay the proceedings".

Applying then the test laid down by Lord Justice Vaughan Williams, are either the expense or the difficulties of trial in the Bombay High Court so great that it would be very difficult or practically impossible for the defendants to get justice in this Court? I quite accept that mere inconvenience is not sufficient. It is clear to my mind that putting the matter in the most favourable way to the plaintiff, it would be most inconvenient to the defendants to have this suit tried out in Bombay. This inconvenience will in the main fall on the defendants, for the plaintiff is in the happy position that he is entitled to call upon the defendants as his commission agents to account for the proceeds of his goods that have been bought or sold on his account. He may accordingly remain safely in Cutch, and merely instruct his Counsel and Solicitors to require the defendants to prove strictly every single item in their accounts, and produce all necessary books, vouchers, etc. If, therefore, this Court had a complete discretion as to where this suit should be tried, I should undoubtedly hold that it ought to be transferred to and tried in the present High Court of Rangoon.

But does this case go further than mere inconvenience? In my opinion it undoubtedly does. What Lord Gorell has stated with reference to the officials of the Bank of Scotland applies in a considerable degree to the defendants' business at Rangoon. But one must remember this that whereas Edinburgh is only some eight hours by rail from London, Rangoon is some eight days journey from Bombay. And in the English suit there was no difficulty about languages. Here the evidence is that the defendants will require Burmese, Chinese and Madrasi merchants to produce their books, all of which are written in their own languages. But Burmese and Chinese witnesses are practically unknown in our Courts and Tamil speaking witnesses from Madras are rare. We have no Court interpreters who know any of these languages. Consequently special arrangements will have to be made for the necessary official translations of all these documents and the oral evidence of the witnesses. It is to my mind clear that in any event a commission would have to go to Rangoon. It would be monstrous to say that the defendants must either do the impossible, that is, require independent business men to travel from Rangoon, or else have their evidence shut out. And even if a commission were issued, I think when it returned, the Trial Judge or our High Court Commissioner might be in the greatest practical difficulty as to how he should proceed. The plaintiffs might call some oral evidence to answer which another commission might be necessary, and there is almost bound to be great practical difficulty about the books. Some of the defendants' books are required for proceedings in Rangoon and in any event the defendants cannot be asked to forward recent books to Bombay, for they might easily be required any day in looking up or en-

forcing transactions with other parties. In this connection the defendants' witnesses no doubt admitted that they would not require the *Samvat* 1973 books for their daily business now and that there would be no hardship in bringing those books down. But the suit transaction are not in respect of the year 1973. They are for the *Samvat* years 1975 and 1976 (1918-1920).

In short, I have to the best of my ability endeavoured to forecast what would be the probable course of events if I allowed this suit to proceed in the ordinary way. But in the result I can find no solution to satisfy my sense of what is required for the due administration of justice in the present suit, except to have the disputes tried at Rangoon where the High Court "is so to speak across the way" as Lord Gorell put it in *The Bank of Scotland case* (4). I have already referred to the matter about the local law of Rangoon with reference to the rice control. That is an additional reason why the matter should be determined at Rangoon. Other reasons are the large aggregate numbers of the various transactions and the large sums involved.

Nor can I accept the plaintiffs' contention that all the matters in dispute can be tried by the Bombay High Court Commissioner on taking the accounts. A reference to the further issues (5—13) that have now been put in will, I think, show that there are many points which ought to be dealt with by the Trial Judge and not left to the Commissioner. For instance, the initial dispute as to the authority of Tokersey and Khimji and as to whether these transactions were on behalf of the plaintiffs or were private ventures of their own, are matters for the Trial Judge and not for the Commissioner on taking the accounts.

But there is one important distinction which must be taken into consideration in this case and that is that this suit was not wholly vexatious and oppressive at the date of its institution in August 1920, because it has at any rate resulted in the defendants paying a sum of Rs. 33, 545 in February 1921 and offering to pay the plaintiffs taxed costs up to that date. But that does not, in my opinion, conclude the question as to whether or not the suit is oppressive as from February 28, 1921, or some later date. A suit may consist of two claims A and B, and be only oppressive as regards A. If, therefore, a defendant satisfies claim B, I do not see why he should be precluded from contending that claim A should be stayed. In the present case I think the suit was oppressive after February 28, 1921, when the defendants paid the above sum and made the above offer.

I have so far dealt with the case irrespective of whether the plaintiff is acting from any indirect motive. The defendants say he is, and have put forward certain reasons which in my opinion afford justification for their contention. The plaintiff has not gone into the witness box, and I understood from his Counsel's statement to me on March 2, 1923, that he is still in Cutch. The inference I draw from all the circumstances is that the plaintiff is acting from an indirect motive, and that he hopes by remaining in Cutch to avoid all inconvenience to himself, and yet at the same time by continuing the proceedings in Bombay to put his opponents to such disadvantage and to such oppression that they will either be forced to some compromise or else may run a serious risk of an adverse judgment in the absence of evidence which would be available for them at Rangoon, though not in Bombay.

My conclusion then is that I ought to make an order to the following effect. The plaintiff is to be at liberty to withdraw this suit under O. XXIII, r. 1, but in default of his so doing within the time limited for presenting an appeal, all further proceedings in this suit will be stayed. But this is to be on terms. The defendants must pay the whole of the costs of the suit up to February 28, 1921, when they paid the cheque for Rs. 33,545 and offered to pay the costs up to date. As regards the subsequent costs of the suit, these will be paid by the plaintiffs, and there will be a set-off as to costs.

In view of the offer of February 28, 1921, I do not think it would be fair to make the defendants pay the costs down to their filing of their supplemental written statement. Then there must be an undertaking by the defendants that they will raise no technical defence to the plaintiffs suing the Rangoon firm in Rangoon, even though the plaintiffs have elected in the present suit to sue Amarchand Madhavji & Co. of Bombay alone, and not all the partners in the Rangoon firm. There must also be an undertaking by the defendants that if the plaintiffs sue them in Rangoon, they will not ask for further security for costs against the plaintiffs as being foreign plaintiffs. These undertakings, defendants' Counsel have already expressed their willingness to give, *viz.*, on January 9 and 20, 1922. Execution of this order is to be stayed for the limited time allowed for the presentation of any appeal by the plaintiffs from this order, and if any such appeal is presented, then pending the hearing of such appeal or until the further order of the Court. In any event the plaintiffs are to be at liberty to take such proceedings in the High Court of Rangoon in respect of the subject-matter of this suit or any part thereof as they may be advised.

Issue No. 4 will accordingly be answered "yes, after February 28, 1921, but any stay is to be upon the terms set out in the judgment of the Court".

In conclusion I should refer to one further point. On March 2, 1923, in answer to a question from the Bench as to the powers of transfer of suits in India, Mr. Davar was good enough to refer me to section 25, of the Civil Procedure Code. This section enacts that:—

"Where any party to a suit...pending in a High Court presided over by a single Judge objects to its being heard by him and the Judge is satisfied that there are reasonable grounds for the objection, he shall make a report to the Governor-General in Council, who may, by notification...transfer such suit ...to any other High Court."

That section was not material at the previous hearings because the Rangoon Court was not then a High Court. But now it is. Accordingly this section affords a possible alternative remedy in cases where the Court considers that its inherent jurisdiction to stay suits is not applicable. Counsel were unable to refer to any decided case on the operation of section 25, but cited the corresponding provision in section 527 of the Criminal Procedure Code, where a transfer may be directed by the Governor General in Council "whenever it appears to him that such transfer will promote the ends of justice, or tend to the general convenience of the parties or witnesses." I do not propose to decide what in general would be reasonable grounds for objection within the meaning of section 25. But I am satisfied that the section does not apply or at any rate should not be confined to objection to a particular Judge personally, *e. g.*, that previously while at the Bar he has advised one of the parties. In such a case all difficulty would be met by the case being tried before another Judge of the same High Court. Consequently the objection in question must, I think, apply to the High Court as a whole. That being so, it would seem probable that the test for a transfer would be much the same as I have already indicated for a stay of a suit under section 151 of the Code, or alternatively, the rather more lenient test adopted in section 527 of the Criminal Procedure Code.

In fact, however, no formal objection has been made to me by the defendants under section 25. I have suggested it to their Counsel but have not pressed it. In the view I take there is a remedy under section 151, and accordingly the more cumbrous procedure of section 25 should not be adopted, despite the fact that some saving in costs might be effected by a transfer as opposed to a stay and a fresh suit.

K. S. D. *Order accordingly.*

RAMZAN *v.* FAKIR MAHOMED.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 46 OF 1920.
April 15, 1924.

Present:—Mr. Kincaid, J. C., and Mr. Rupchand Bilaram, A. J. C.

RAMZAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

FAKIR MAHOMED AND OTHERS—PLAINTIFFS—RESPONDENTS.

Adverse possession—Possession of part, when possession of whole—Onus of proof—Civil Procedure Code (Act V of 1908), O. XXI, r. 103—Possession of tenant, whether possession of landlord.

Possession of a part of land with defined boundaries in exercise of an assertion to claim the whole is evidence of the possession of the whole. [p. 862, col. 2.]

Jones v. *Williams*, (1837) 2 M. & W. 326 at p. 331; 1 M. & H. 51; 6 L. J. (N. S.) Ex. 107; 150 E. R. 781; 46 R. R. 611, *Lord Advocate* v. *Lord Blantyre*, (1879) 4 A. C. 770 at p. 791, *Clark* v. *Elphinstone*, (1881) 6 A. C. 164; 50 L. J. P. C. 22, *Sivasubramanya* v. *Secretary of State*, 9 M. 285; at p. 305, 3 Ind. Dec. (N. S.) 595, *Vithaldas* v. *Secretary of State*, 26 B. 410 at p. 417; 4 Bom. L. R. 28, relied upon.

The onus of proving a subsisting title to a land is on the party who is out of possession and the fact that a party in possession is driven to institute a suit under the provisions of O. XXI, r. 103, Civil Procedure Code, does not shift the burden of proof on him. [p. 862, col. 2.]

Possession of tenants is possession of their landlord. [p. 863, col. 2; p. 864, col. 1.]

Secretary of State v. *Krishnamoni Gupta*, 29 C. 518; 4 Bom. L. R. 537; 6 C. W. N. 617; 29 I. A. 104; 8 Sar. P. C. J. 269 (P. C.), relied on.

Appeal against the decree of the Additional Judicial Commissioner, Sind, dated the 12th May 1920, in Suit No. 727 of 1918.

Mr. *W. Lobo*, for the Appellants.

Mr. *Hiranand Bulchand*, for the Respondents.

JUDGMENT.—This is an appeal against the decision of Kennedy, A. J. C. holding that the plaintiffs are entitled to retain possession as against the defendants of certain portions of plot No. 7 in the Garden Quarter, Karachi.

The plaintiffs are Barans by caste. The first defendant is a Bhambhro and the second defendant the heir of a co-purchaser with the first defendant of plot No. 7 from one Ishak, a Baran. This plot has been the subject of dispute for over twenty years between the Barans and the Bhambhros and it would be convenient to refer at the outset to the history of this protracted litigation between them.

In 1876-77 at the Survey Settlement of the plots in the Garden quarter of Karachi the whole Plot No. 7 which measures 636 square yards was allotted to one Jiandi a Bhambhro. In 1886 one Jiari, the widow of Jiandi's son Shangoor, and the mother of the first defendant, applied for mutation of names. Kadu Bayan admitted the title of Jiandi. But one Nath Baran claimed the plot as his own though he also admitted that it had been allotted to Jiandi at the Survey Settlement. In 1888 the plot was transferred in the Revenue Records, to the name of Jiari. In 1902 Jiari and her three sons including the first defendant instituted Suit No. 124 of 1902 against the three sons of Kadu, one Chibhir and one Walbai, all Barans for possession of this plot. These Baran defendants pleaded that they held the plot as permissive tenants of Natho Baran and his son Ishak and succeeded in non-suiting Jiari and her sons in the Appeal Court on the ground that Jiari and her sons had lost their rights, if any, by adverse possession.

In 1910 Ishak instituted Suit No. 330 of 1910 for ejectment against the sons of Kadu and the sons of Chibhir, and Walbai being then dead. It appears that this suit was inspired by the first defendant who was not prepared to accept his defeat quietly. On 22nd March 1911 Ishak assigned to the present defendants half his right, title and interest in the plot for valuable consideration evidently part of it being money required for litigation. Though in this suit the sons of Kadu and of Chibhir set up a plea of adverse possession, and possession through one Elias, they failed. During the pendency of an appeal filed by them, Ishak conveyed the remaining half share in this plot to the present defendants. On 25th February 1914 the Appellate Court confirmed the decree in favour of Ishak. The present defendants then applied as assignees to execute the decree obtained by Ishak against the sons of Kadu and Chibhir. They were, however, resisted by Ishak who disputed

the validity of the deeds of assignment executed by him. In order to spite the present defendants Ishak further attempted to create a *wakf* of the plot in favour of certain Sayads. This led to the present defendants instituting Suit No. 117 of 1915 against Ishak and the Sayads which resulted in an award decree being passed in their favour on 19th July 1917. On the strength of this decree the present defendants again attempted to eject the sons of Kadu and Chibhir and were obstructed by the present plaintiffs, who are all admittedly related to the sons of Kadu. The plaintiff Manio's mother is married to Chato son of Kadu, the plaintiffs Ibrahim and Arab are nephews of Kadu and the plaintiff Fakir Mahomed is related to Kadu through his mother. The Execution Court passed an order against the plaintiffs under O. XXI, r. 98, Civil Procedure Code, and directed the defendants to be put in possession. The plaintiffs thereupon instituted this suit for a declaration that they were the owners of three of this plot measuring about 280 square yards, nearly half of the whole plot. They *inter alia* contended that the decree in Suit No. 117 of 1915 was a declaratory decree and, therefore, the order passed by the Executing Court for possession was erroneous.

The learned Additional Judicial Commissioner has found that there is no substance in the legal plea, as the defendants were not executing their decree against Ishak in Suit No. 117 of 1915 but Ishak's decree in the Suit of 1910, and that the plaintiffs had failed to prove title by adverse possession. He was however of the opinion that the possession of the plaintiffs though not shown to be adverse was not of a patently wrongful and permissive nature and that as the defendants had also failed to prove title to the specific portions of the plot, the plaintiffs as the persons in possession of their holdings were entitled to retain them until some persons appeared with a better title.

It may be conceded that the onus of proving a subsisting title to the land was on the defendants. They were out of possession of the land and the mere fact that the plaintiffs were driven to institute a suit for declaration of their rights in view of the provisions of O. XXI, r. 103, Civil Procedure Code, cannot, in my opinion, shift the burden on the plaintiffs.

The learned Additional Judicial Commissioner was, however, we think, in error in holding that the defendants had not proved a subsisting title to the portions of the plot in suit. He was of the opinion that the fact that Ishak had succeeded in getting a decree against some of the Barans was of no use to show that he had any title to any portion of Plot No. 7 which was not the subject-matter of the previous litigation. Possession of a part of land with defined boundaries in exercise of an assertion to claim the whole is evidence of possession of the whole. In *Jones* v. *Williams* (1) Parke, B., observed that "Ownership may be proved by proof of possession, and that can be shown only by acts of enjoyment of the land itself: but it is impossible in the nature of things to confine the evidence to the very precise spot on which the alleged trespass may have been committed: evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the Jury, that the place in dispute belonged to the plaintiff if the other parts did". These remarks have been referred to with approval by Blackburn, J., in the *Lord Advocate* v. *Lord Blantyre* (2). His Lordship there observed :—"Every act shown to have been done on any part of that tract by the Barons or their agents which was not lawful unless the Barons were owners of that spot on which it was done is evidence that they were in possession as owners of that spot on which it was done. No one such act is conclusive and the weight of each act as evidence depends on the circumstances; one very important circumstance as to the weight being, whether the act was such and so done that those who were interested in disputing the ownership

(1) (1837) 2 M. & W. 326 at p. 331; 1 M. & H. 51 6 L. J. (N. S.) Ex. 107; 150 E. R. 781; 46 R. R. 611.
(2) (1879) 4 A. C. 770 at p. 791.

would be aware of it. And all that tends to prove possession as owners of parts of the tract tends to prove ownership of the whole tract; provided there is such a common character of locality as would raise a reasonable inference that if the Barons possessed one part as owners they possessed the whole, the weight depending on the nature of the tract, what kind of possession could be had of it, and what the kind of possession proved was". The same rule appears to have been laid down in *Clark* v. *Elphinstone* (3) an appeal from Ceylon. Reference may also be made to *Sivasubramanya* v. *Secretary of State* (4) and *Vithaldas* v. *Secretary of State* (5) The weight to be attached to the evidence of such acts would no doubt depend on the circumstances of each case. So far as the facts of the present case go, it would appear that throughout the history of this litigation, the whole plot was the subject-matter of contest between the Barans and the Bhambhros. In 1886 the father of Ishak laid claim to the whole plot before the Deputy Collector at the time of mutation of names of the plot to the name of Jiari and in the subsequent litigation also Jiari and Ishak laid claim to the whole plot. There is no evidence to show that any portions of the plot which were not in occupation of the defendants in the litigation of 1902 were, as a matter of fact, occupied by the present plaintiffs or by any person through whom they claim. The acts of constructive user proved by the occupation of portions of the plot through the permissive tenants of Ishak for over twelve years prior to 1902 and also subsequent thereto upto 1914 are acts which would show that Ishak had either title to the whole plot or acquired a title to the whole plot by adverse possession prior to 1902. The plot is a small plot forming a separate survey number with defind boundaries. The portions now in suit adjoin those which are said to have been in the possession of the sons of Kadu and Chibhir. It is somewhat difficult to believe that if the present plaintiffs were in occupation of these portions either Jiari or Ishak would not have instituted proceedings against them much earlier for ejecting them. Jiari wanted to eject all the Barans from the plot and not only some of them. Again there is no reason why the Baran defendants in the Suit of 1902 should not have pleaded that portions of this plot were in the occupation of the present plaintiffs specially when they raised the plea of the non joinder of one Elias who was alleged to be in occupation of a portion of the plot. Elias was, however, found to be occupying land outside the boundaries of this plot. If the present plaintiffs came to live on the portions in dispute subsequent to 1902, there is again no reason why Ishak who had at his back Ramzan the son of Jiari should not attempt to eject the plaintiffs in 1910. In this long protracted litigation we do not find any mention being made of any persons besides the sons of Kadu and Chibhir having huts on this plot. The evidence adduced by the plaintiffs of their long possession consisted chiefly of Baran, witnesses closely related to them, and the learned Additional Judicial Commissioner rightly came to the conclusion that this evidence was insufficient to prove their long possession. According to the learned Additional Judicial Commissioner, the Barans possessed cattle, and, therefore, it is very likely that the Baran defendants in the Suit of 1902 occupied the whole plot partly for their residence and partly for tethering their cattle. In their attempt to explain the evidence that some of these huts had been recently constructed, some of the plaintiffs were forced to admit that at one time or the other they were living with the sons of Kadu and to assert that they had reconstructed new huts on the site of their old huts which had gone into disrepair. It appears more probable that the whole plot was in the occupation of the sons of Kadu and Chibhir and used by them either as their residence or for tethering cattle and that the plaintiffs who are their relations have squatted on the plot in recent years. The possession of the sons of Kadu and

(3) (1881) 6 A. C. 164; 50 L. J. P. C. 22.
(4) 9 M. 285 at p. 305; 3 Ind. Dec. (N. S.) 595.
(5) 26 B. 410 at p. 417; 4 Bom. L. R. 28.

Chibhir being the possession of their landlord Ishak; Ishak continued to exercise acts of owners till recent years through them over the whole plot and not only over the portions on which they had huts. Their possession was Ishak's possession: *Secretary of State* v. *Krishnamoni Gupta* (6). The plaintiffs could not, therefore, succeed unless they showed that they had acquired title by adverse possession over the portions in dispute for over twelve years and which they have failed to prove. The defendants as the assignees of Ishak are entitled to eject them. I would set aside the decree of the lower Court and dismiss the suit with costs.

P. B. A. *Suit dismissed.*

(6) 29 C. 518; 4 Bom. L. R. 537; 6 C. W. N. 617; 29 I. A. 104; 8 Sar. P. C. J. 269 (P. C.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 844 OF 1921.
March 20, 1924.

Present :—Mr. Justice Krishnan.

BITRAGUNTA APPAYYA—PLAINTIFF—APPELLANT

versus

ADDANKI VENKATARAMANAYYA AND OTHERS—DEFENDANTS Nos. 1, 3, 5 TO 10 AND 12 TO 31—RESPONDENTS.

Mortgage—Prior and puisne mortgagees—Each suing without other—Puisne mortgagee's rights—Redemption—Limitation—Starting point—Limitation Act (IX of 1908), Sch. I, Art. 132.

When two mortgagees bring suits each suing without making the other mortgagee a party, the rights of either mortgagee are not affected by the suit brought without making the other party. Where one of them purchases the property in such a suit, his purchase does not give him a fresh starting point of limitation to redeem or sell the property.

Nidhiram Bandopadhya v. *Sarbessur Biswas*, 5 Ind. Cas. 877; 14 C. W. N. 439, relied upon.

Second appeal against the decree of the Court of the Subordinate Judge, Bapatla, in Appeal No. 113 of 1920, (A. S. No. 409 of 1920 on the file of the District Court, Guntur), preferred against the decree of the Court of the District Munsif, Ongole, in O. S. No. 422 of 1918.

Mr. *K. Krishnaswami Iyengar*, for the Appellant.

Mr. *A. Ramachandra Iyer*, for the Respondents.

JUDGMENT.—In this case the competition is between the plaintiff who was the puisne mortgagee who brought a suit on his own mortgage without making the prior mortgagee a party and purchased the property in Court auction and the prior mortgagee who brought a suit without making the puisne mortgagee a party and purchased the property himself. Neither mortgagee made the other mortgagee a party to his suit. The puisne mortgagee now claims possession of the property under his purchase and in the alternative relying on his mortgage asks to be permitted to redeem the prior mortgagee or to bring the property to sale subject to that mortgage.

When two mortgagees bring suits like this, each suing without making the other mortgagee a party, it is clear on the authorities that the rights of either mortgagee are not affected by the suit brought without making him a party. The result is the puisne mortgagee would have been entitled to redeem the prior mortgagee in this case if no difficulty of limitation arose. But unfortunately his right to enforce his mortgage has become barred by limitation. His mortgage was in 1893. The suit was brought in the year 1918 and is clearly beyond time under Art. 132 of the Limitation Act. He could not enforce his claim under his mortgage, either to redeem the prior mortgage or sell the property, as he is barred by limitation. An exactly similar case arose in Calcutta and is reported as *Nidhiarm Bandopadhya* v. *Sarbessur Biswas* (1). There their Lordships held that the second mortgagee having allowed the period of limitation to expire, was not entitled to enforce his mortgage by redeeming or selling and that a purchase by him in a suit brought by him against the mortgagor without making the first mortgagee a party did not give him a fresh starting point for limitation; he can only rely upon his original mortgage itself and being unable to do so on

(1) 5 Ind. Cas. 877; 14 C. W. N. 439.

account of limitation, his suit must be dismissed. In this view which I respectfully follow, it is not necessary to consider any other points arising in this case. The suit was rightly dismissed. The second appeal fails and is dismissed with costs.

V. N. V.
S. D. *Appeal dismissed.*

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 323 OF 1924.
March 26, 1924.

Present:—Sir Sydney Robinson, KT., Chief Justice, and Mr. Justice Heald.

T. C. BOSE—APPELLANT

versus

O. R. CHOWDHURY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 95, 97—Auction-purchaser—Delivery of possession—Obstruction—Suit for recovery of possession Limitation—Limitation Act (IX of 1908), Sch. I, Art. 11A.

The resistance or obstruction contemplated in O. XXI, r. 97, Civil Procedure Code, is some overt act of resistance or obstruction to the giving of possession by some person who is present at the time. [p. 865, col 1.]

Where, therefore, an auction-purchaser applies under O. XXI, r. 95, Civil Procedure Code, and gets possession from the tenants of the person in possession without any resistance, a suit against the auction purchaser for recovery of possession is not governed by Art. 11A, Sch. I of the Limitation Act. [*ibid.*]

First appeal from the District Court, Maubin, in C. S. No. 8 of 1922.

Mr. *Das*, for the Appellant.

Mr. *Chari*, for the Respondent.

JUDGMENT.—The owner of the two properties mortgaged them to one Po Kyaw on the 16th of March 1914. On the 12th of September, 1918, he sold these properties to Mr. Bose, the present appellant. U Po Kyaw filed a mortgage suit and obtained a decree, but he did not make Mr. Bose a party to that suit. A mortgage decree having been passed, the property was brought to sale and purchased by the respondent Chowdhury. On the 1st of November, 1920, Chowdhury applied under O. XXI, r. 95, of the Code of Civil Procedure, to be put into possession. On this, the Court ordered notice to issue to Mr. Bose's tenants. The Court examined them, and also Mr. Bose himself, but without any investigation of the title Mr. Bose set up, passed an order that, as the men were only coolies they had no right to be in possession, and that they should vacate the land within one month. This order was passed on the 31st of January 1921. On the 3rd February, 1921, Mr. Bose applied alleging that he was in possession as owner, and prayed that his possession should not be disturbed without investigation. Notice was ordered to issue to Chowdhury. On the 3rd of March, 1921, the Court dismissed Mr. Bose's application. The application was dismissed on the ground that Mr. Bose's possession has not yet been disturbed. On the 24th of July, 1921, Chowdhury was given possession in accordance with the order originally passed. Mr. Bose again applied on the 17th of August, 1921, pleading that he was the owner and that his possession should be restored after investigation, but on the 1st September 1921 the Court rejected his application. Mr. Bose then filed a suit on the 3rd of May, 1922, praying for a declaration that the decree in the mortgage suit brought by U Po Kyaw was not binding on him, for a declaration that he, Chowdhury, had acquired no title to the lands, for possession of the lands and for mesne profits. The suit has been dismissed as barred by limitation, the Court holding that Art. 11A of the Limitation Act applied, and that the suit must have been brought within one year from the date of the order of the 31st January, 1921. Against that decision an appeal has been filed.

It is clear that none of the proceedings taken before the Court were under O. XXI,r. 97, of the Code of Civil Procedure. The "resistance or obstruction" there contemplated is some overt act of "resistance" or "obstruction" to the giving of possession by some person who is present at the time.

There was no allegation of any such "resistance" or "obstruction" and it is clear that the suit that is provided for in cases of such "resistance" or "obstruction"

is not a suit which could have been filed in the present case.

Article 11A of the Limitation Act is perfectly clear, and provides a period of limitation only for that class of suit. The present suit is an entirely different case. It seeks reliefs other than those contemplated and it is clearly within time under the general period of limitation.

The appeal will be accepted and the suit remanded to the District Court for disposal on the merits.

The respondent will pay the costs of the appellant in this appeal and we direct that a certificate may issue for the refund of the full Court fees paid in connection with this appeal.

We fix the Advocate's fee at two gold *mohurs*.

N. H. *Appeal allowed.*

LAHORE HIGH COURT.

SECOND CIVIL APPEAL No. 1318 OF 1920.
April 5, 1923.
Present:—Mr. Justice Abdul Raoof and Mr. Justice Fforde.

SUKHBIR SINGH—PLAINTIFF—APPELLANT
versus
PIARE LAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VII, r. 6—Plaint originally presented within time—Return for presentation to proper Court—Suit time-barred—Rule, if applicable—Amendment of plaint, if necessary—Limitation Act (IX of 1908), s. 14.

The provisions of O. VII, r. 6, Civil Procedure Code, have no bearing on a case which at the time of its institution is within time, though the plaint having been returned, it is time barred at the time of its presentation to proper Court. [p. 867, col. 1.]

Where, therefore, in a suit instituted within time the plaint is returned for presentation to proper Court and the circumstances enabling the plaintiff to claim benefit of section 14, Limitation Act, appear on the face of the record and there is an order of the Court that the suit is not cognizable by it, along with an endorsement showing the date of the return of the plaint, it is not necessary for the plaintiff to amend the plaint by adding a statement showing the ground upon which exemption from limitation is claimed, if at the time of presentation of plaint to proper Court the suit is time barred. [p. 867, col. 1.]

Appeal from a decree of the District Judge, Delhi, dated the 6th March, 1920.

Bakhshi *Tek Chand*, Messrs. *Jagan Nath* and *Gopichand*, for the Appellant.

Messrs. *Mool Chand* and *Nanwan Mal*, for the Respondent.

JUDGMENT.—This second appeal has arisen out of the following facts:—

The plaintiff is a resident of Muzaffarnagar and the defendant is a merchant of Delhi who carries on the business of repairing motor cars, etc. In June 1915 the plaintiff handed over his motor car for repairs to the defendant. The motor was never repaired, and it is alleged that it had been damaged and made useless. The present suit was instituted by the plaintiff in the Court of the Subordinate Judge at Meerut on the 10th of April, 1910, for the recovery of its price and for damages. One of the pleas raised in defence was that the Court at Meerut had no jurisdiction to entertain the suit. On the 14th of December, 1918, the Trial Court gave effect to this objection and held that the suit was not cognizable by the Court at Meerut. The plaint upon this finding ought to have been returned to the plaintiff for presentation to the proper Court; but the Trial Court decided the suit on the merits also and found against the plaintiff. The suit was accordingly dismissed.

The plaintiff preferred an appeal to the District Judge and it came on for hearing before the Additional District Judge, who, on the 2nd of April, 1919, held that the plaint ought to have been returned to the plaintiff and the Trial Court ought not to have gone into the merits of the case. The plaint was actually returned on the 14th April, 1919. It was then presented on the 22nd of April, 1919, to the Court of the Subordinate Judge at Delhi. Objection was taken by the defendant to the effect that the suit was barred by time. The plaintiff, however, claimed the benefit of the provisions of section 14 of the Limitation Act. The Trial Court on the facts found that the plaintiff had not succeeded in proving that he had been prosecuting the suit in the Court at

Meerut in good faith and with due diligence and made an order dismissing the suit.

An appeal was preferred to the lower Appellate Court which refused to go into the merits of the questions arising under section 14 of the Limitation Act and dismissed the appeal on the simple ground that the plaintiff had not complied with the provisions of O. VII, r. 6, Civil Procedure Code, according to which "where the suit is instituted after the expiration of the period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed."

It is clear that the suit as originally instituted in the Court at Meerut was within time, and, therefore, the provisions of the above rule had no bearing on the case on the date of the institution of the suit. When the plaint was presented to the Court at Delhi the suit was no doubt barred by time but the circumstances entitling the plaintiff to claim the benefit of section 14 of the Limitation Act appeared on the face of the record. There was the order of the Appellate Court holding that the suit was not cognizable by the Court at Meerut and there was further an endorsement on the record showing that the plaint was returned on the 14th April, 1919, to be presented to a proper Court. In addition to this the statement of the plaintiff's Pleader, dated the 22nd of May, 1919, was recorded in which it was made clear that the plaintiff claimed the benefit of the provisions of section 14 of the Limitation Act. In our opinion, under these circumstances, it was not necessary for the plaintiff to amend the plaint by adding a statement showing the ground upon which exemption from limitation was claimed. The lower Appellate Court has taken too strict a view of the provisions of O. VII, r. 6, Civil Procedure Code.

We accordingly set aside the decision of the lower Appellate Court upon this preliminary point and remand the case to that Court under O. XLI, r. 23, Civil Procedure Code. The Court will allow the parties to produce such additional evidence as they may wish to tender for the decision of the questions arising under section 14 of the Limitation Act. Costs will abide the result.

N. H. *Appeal allowed.*

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL NO. 181 OF 1916.
October 11, 1922.
Present:—Mr. Justice Marten and Mr. Justice Pratt.

SIR DOLATSINGJI JASWANTSINGJI—PLAINTIFF—APPELLANT

versus

OGHAD VIRA KHACHAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Gujarat Taluqdars' Act (VI of 1888), as amended by Act II of 1905, s. 2 (1) (a)—Gameti, rights of—Mulgameti, definition of—Sovereign rights, whether essential—Cession of territory—Rights against sovereign how exercised—Burden of proving enforceable right—Talukdari estate.

Although the Kathis of village Salangpur in the Dhanduka *Taluka* of District Ahmedabad are Mulgametis by reason of their retention of the *jivai* lands and *chauth*, they do not hold lands directly from Government and consequently are not *talukdars* within the meaning of the Gujrat Taluqdars' Act, 1888, as amended by the Act of 1905. [p. 875, col. 2.]

Per *Marten, J.*—Generally speaking a Gameti would have sovereign or *quasi*-sovereign rights but a retention of such sovereign or *quasi*-sovereign rights is not essential to constitute a Mulgameti. It is sufficient if the Gameti retains or is re-granted some of his former lands or an interest therein although all his former governing rights pass to others. [p. 872, cols. 1 & 2.]

A Mulgameti of Salangpur is one who is or is descended from, a former ruler and owner of the village and still retains by re-grant or otherwise some portion of the lands or interests therein of such former ruler and owner, but not necessarily any of his governing rights. [p. 872, col. 2.]

After a cession of territory to British Rule the only enforceable rights against the Sovereign are those conferred by him after the cession either by agreement, express or implied or by legislation. An implied agreement conferring rights may be established by evidence of recognition of rights existing before cession, and of an election express or implied to be bound by them: but the burden of establishing the existence of an enforceable right is upon the subject. [p. 874, col. 1]

Per *Pratt, J.*—A talukdari estate is an estate which connoted rulership in pre-British times but which is now a landlord estate to which some seignorial or subordinate rights may or may not be still attached. [p. 877, col. 1.]

DOLATSINGJI JASWANTSINGJI *v.* OGHAD VIRA.

First appeal from the decision of the District Judge, Ahmedabad, in Civil Suit No. 3 of 1914.

Mr. *B. J. Desai* (with him Mr. *R. W. Desai*), for the Appellant.

Mr. *H. C. Coyajee* (with him Messrs. *H. V. Divatia* and *N. K. Mehta*), for the Respondents.

JUDGMENT.

Marten, J.—The question in this appeal is whether defendants Nos. 1 to 30 are "Mulgametis who hold land directly from Government" within the meaning of section 2 (1) (*a*) of the Gujarat Taluqdars' Act, 1888 (Bom. Act VI of 1888) as amended by section 2 (1) of Bombay Act II of 1905, and hence are "Taluqdars" within the operation of the amended Act. The plaintiff contends that this question should be answered in the negative, and sues for a declaration to that effect. The defendants contend for an answer in the affirmative. Mr. Kennedy, the then District Judge at Ahmedabad, decided this point in the defendants' favour, and dismissed the plaintiff's suit with costs on March 23, 1916. Hence the present appeal by the plaintiff. The intervening delay is, I understand, accounted for by the necessity of adding the representatives of certain deceased defendants as parties to the suit.

The question as above stated is hardly indicative of its interesting character. But in fact its investigation has led us to explore the somewhat misty history of the border-lands of Kathiawar in those pre-British days when might was right, and no man's life or property was secure. *Jama* or tribute used then to be collected by the annual excursions of armed bands led by one who apparently had a financial interest in the amount recoverd for the Peshwas. But a receipt or free pass (*parvana*) was given for the amount collected, and this apparently protected the local inhabitants from further exactions for the year in question. Failure to pay however led to extensive ravaging. Apart from the Peshwas—the then Paramout Power—one also had to reckon with the hostility of one's neighbours. And in the present case each of the contending parties alleges that it was by the force or fraud of his opponent's ancesters that his own ancestors were obliged to give up those lands or rights which his opponent now enjoys.

The suit arises in this way. The village in respect of which the defendants Nos. 1 to 30 claim to be Mulgametis is the village of Salangpur situate in the Dhandhuka Taluka of the District of Ahmedabad in Gujarat. Though now within British India, it is geographically part of the eastern border of Kathiawar and is situate some twenty miles to the south-east of Limbdi or Limri as it is sometimes written. Limbdi is the principal town of the Native State of that name, and over that State the plaintiff rules. As is stated in Peile at page 4:—

"The estates of the Ahmedabad *Talukdars* may be defined geographically as the border land between Guzerat proper and the Peninsula of Kathiawar, and historically as the coast where the *debris* of the old Rajpoot principalities of that peninsula was worn and beaten by the successive waves of Mogul and Mahratta invasion. But they are part of Kathiawar rather than of Guzerat. Their proprietors are Kathiawar Chiefs. Their communities have the same elements."

The plaintiff, as the Thakore Sahib of Limbdi, is admittedly the registered Talukdar under the 1888 Act to the extent of two-thirds share in this village of Salangpur. As regards the remaining one-third share, the registered Talukdar is Sher Miya, defendant No. 39 (see Exhibit 439). On the evidence before us, it is also clear that up to the passing of the amending Act of 1905, none of the defendants Nos. 1 to 30 were entered as Mulgametis or *Talukdars*. But in the Settlement Register as altered after this amending Act was passed, the defendants Nos. 1 to 30 are entered as Mulgametis, if not as *Talukdars*, and this has led to the present suit. Exhibit 439 is a typical entry from this Register, and it describes some of the defendants as "Mul (*i. e.* orignal) Gameti." The plaintiff regarded this as the thin edge of the wedge, and accordingly brought this suit. Defendants Nos. 1 to 30 who are Kathis took up the

challenge, and are strongly supported by defendant No. 39 who was added as a party at his own request. Defendants Nos 31 to 38 one need not trouble about, as they are only assignees of defendants Nos. 1 to 30 and admittedly are not Mulgametis. But the dispute though originally over the Register does not necessarily depend on the accuracy of the precise entry there made. The point argued before us is whether the defendants Nos. 1 to 30 are Talukdars within the meaning of the amended Act, and that is the point on which both parties want our decision.

This point primarily depends on the definition of "*Talukdar*" in the amended Act, section 2 (1) (*a*) of which now runs as follows :—

"2. (1) In this Act, unless there be something repugnant in the subject or context,—

(*a*) 'Talukdar' includes a Thakur, Mehwasi, Kasbati, and Naik, and a Mulgameti who holds lands directly from Government."

These last words, *viz.*, "and a Mulgameti who holds land directly from Government" were added by the amending Act of 1905. They were not in the original Act, *viz.*, the Ahmedabad Taluqdars' Act, 1862 (Bom. Act VI of 1862) nor in the Gujarat Taluqdars' Act, 1888, which was an extension of the 1862 Act. The amending Bill originally proposed to add merely the words "and a Mulgameti", but as a result of a protest by the plaintiff to Government that the word "Mulgameti" was an ambiguous one and would cause confusion, the additional words "who holds land directly from Government" were eventually included in the amending Act.

There is no definition of "Mulgameti" in the amended Act, and not much light can be obtained from the provisions of the Act itself. But as regards its general nature I may quote from *Waghela Rajsanji* v. *Shiekh Masludin* (1) where Lord Hobhouse in delivering the judgment of the Privy Council on certain matters arising under the 1862 Act said at page 562 as follows :

"The object of the Taluqdari Act was to maintain the *status* and order of Talukdars, which the Government, as a matter of policy, thought it important to maintain. They were a class of gentlemen who had been living beyond their means ; they had got very much embarrassed, and they did not perform those political objects which the Government thought of great importance to have performed in various parts of the country. Many Acts of the kind have been passed relating to different parts of the country, and all with the same object. The method adopted was, where a Talukdari estate had reached a certain pitch of embarrassment, to make a declaration placing it under the management of an officer who was to manage for a term of years, which might extend to twenty years."

In the present case the estate of Sher Miya (defendant No. 39) is under management, and hence he appears by the Taluqdari Settlement Officer.

As regards the details of the Act, I need only for the present mention the following. Section 2 (1) (*c*) defines "*jama*" to mean "land revenue payable by a Taluqdar to Government." Sections 4 to 9 deal with the preparation of a Settlement Register in which *(inter alia)* the name of every registered Talukdar and of every incumbrancer is to be entered. It is not for the Court to correct this Register, but its entries have to be in conformity with any decision of the Court as to the respective rights of any particular parties (sections 6 and 8). In the present case the Collector and on further appeal the Governor in Council have upheld the entries made by the Settlement Officer with reference to the village of Salangpur. Sections 10 to 21 provide for partition : and sections 22 to 29 F for revenue administration. Section 23 preserves all existing settlements as to the amount of *jama*. This is of importance to the plaintiff, for, as I shall presently show, he settled with Government as long ago as 1807 for the payment in one lump annual sum of the *jama* in respect of this and other villages. Section 24 provides that the registered Talukdar shall be primarily responsible to Government for the *jama* of his village. Sections 26 to 29F pro-

(1) 11 B. 551; 14 I. A. 89; 11 Ind. Jur. 315; 5 Sar. P. C. J. 16; 6 Ind. Dec. (N. S.) 364 (P. C.)

vide for the management of Talukdari estates and the liquidation of their liabilities. Section 31 puts restrictions on the power to incumber or alienate a Talukdar's estate, but the amending Act of 1905 provides that section 31 is not to apply to any incumbrance or alienation made before that Act by a Mulgameti who holds lands directly from Government, except where his estate has been taken under management. Section 33 (2) limits the application of the Bombay Land Revenue Code, and section 34 prevents any new declarations under the 1862 Act.

Stopping there for a moment, one may ask why are the defendants so anxious to come within the Act, and the plaintiff so anxious to exclude them? No very clear answer was given by Counsel, but it was pointed out that a dignity or honorary status went with the terms "Talukdar" and "Mulgameti." It was also suggested that the inclusion of the defendants might lead to increased interference by Government in the affairs of the village, and that friction might thereby be caused. But whatever may be the real motives of the contending parties, I think one may fairly assume that, as a matter of common sense, the respective parties would not have fought out this heavy litigation with its voluminous record and lengthy arguments, unless in their opinion there was some material advantage to be gained by obtaining a decision of the Court in their favour on the ostensible point in dispute.

The next difficulty is to define a Mulgameti, and it seems to me a very real one. Literally it signifies a former lord or proprietor of a village, and is derived from three words, *viz.*, Mul (former), gam (village) and pati (lord). But in my opinion it is clear that the literal meaning is too wide and in some respects too narrow. For instance this literal meaning (*a*) would not include any descendants of a former lord, (*b*) nor necessitate such former lord having held any sovereign or *quasi*-sovereign rights, (*c*) nor necessitate his descendants retaining any portion of the lands or rights formerly enjoyed. Some clue to its real meaning may, I think, be obtained from the word "mul" which is probably the same word as the Sanskrit "mul" signifying a root, and hence figuratively the root of a tree or origin of a family. If that derivation is correct, it would account for the secondary use of the word as "original" or "former." In this connection I may refer to the learned judgment of Sir Michael Westropp in *Vyakunta Bapuji* v. *Government of Bombay* (2), where the expression "Mulavargdar" as used in Kanara was held to mean the properitor of an ancestral hereditary estate, and was contrasted with "Gainivarg" where the land is held directly from the State (page 20).

The dictionary definitions give us little assistance. Robertson at page 16 defines "Gameti" as a Rajput Grashiya in the Ahmedabad Collectorate. "Grash" he says is a grant to a younger son of a Chief for his maintenance. Wilson at page 577 states that "Gameti" is the designation of properietary villages held by Rajputs paying revenue. But defendants Nos. 1 to 30 are not Rajput cadets. They are Kathis. The plaintiff does not, however, contend that the definition should be confined to Rajputs.

The learned Trial Judge defined Gameti as a person holding in full proprietorship a village or group of villages and paying tribute or taxation (however you may call it) to the paramount power, and exercising certain sovereign rights in the village. If such a Gameti alienated his proprietorship, but reserved to himself some rights of a class associated with the retention by him of some sort of sovereignty, then he became an old proprietor known as a Mulgameti.

Defendants' Counsel does not accept this meaning of Mulgameti. He admits that the old proprietor must retain certain lands or rights, but contends that those rights need not be sovereign rights. He would define "Mulgameti" as follows, *viz.*, "a person who or whose ancestor was once a proprietor of the village but who has lost the proprietorship retaining for himself a share of the village lands and land revenue such as *jiwai* and *chouth*, even though he may not

(2) 12 B. H. C. R. (O. C. J.) 1 at pp. 19, 46, 53, 56, 77, 212.

have retained a share in the Government of the village, or any sovereign rights."

Plaintiff's Counsel on the other hand accepts the learned Judge's definition of Mulgameti, but contends that the defendants Nos. 1 to 30 were wrongly held to have retained any sovereign or seignorial rights, and that in fact all those rights passed to plaintiff about 1777 or 1781, and have ever since been enjoyed by him. Plaintiff's contention in short was that you cannot have an ex-Gameti unless he retains part of the sovereign rights.

Both Counsel, however, agree that to constitute a Mulgameti at the present day, he must hold some lands or rights which have descended to him from a Gameti. For instance, a Bombay Bania would not become a Mulgameti by purchasing some of the lands of the defendants. It is also agreed that the Kathi defendants Nos. 1 to 30 have established their descent from the persons they say were at one time Gametis. But there was no agreement, I think, as to the date up to which the Gameti must have remained a Gameti. If, for instance, the Act only refers to those who were Gametis at the date of the cession of the district by the Peshwas to the East India Company, but who then lost their rights and became Mulgametis, that would effect a substantial restriction on possible claimants for that name.

In *Secretary of State* v. *Bai Rajbai* (3) the Privy Council distinguished the status and rights of Kasbatis from those of Gerasias and other true Taluqdars. At page 751* Lord Atkinson said:—

"They (Garasias) were ancient Rajpoot proprietors, and before the cession of the Ahmedabad Zilla, stood to their Native Sovereigns in that relation, their lands being cultivated by *raiyat* tenants. ...They and the Mewassies were clearly. distinguishable from the Kasbatis. The last-named held their lands by contract, neither by *sanad* nor by defiance, and Colonel Walker, the first official appointed to deal with this district, was well aware that there was no analogy between the holdings of the Garasias and those of the Kasbatis. The word taluk was first applied to these Rajpoot proprietors by the British themselves."

Then at page 752* he continues:—

"They (Kasbatis) never were Taluqdars of Ahmedabad in the true sense. They did not lose their ancient right of ownership of their land by taking leases, as did the Garasias, and, therefore, did not suffer the injustice which the Statute (*i. e.*, the 1862 Act) was designed to remedy."

I shall refer to this case again in another connection; and also to *Maharana Shri Jasvatsingji Fatesingji* v. *Secretary of State* (4) where Mr. Justice Candy used the expression "Mulgameti" as meaning the original owner of the village; and quoted from Peile (page 21) where it is said: "The relief which it is possible to give to original holders (Mulgametis) is, therefore, small." Peile at pages 72 to 81 gives particulars of the Dhundooka Taluqa in 1863, and after setting out at page 76 that the plaintiff is the proprietor of various villages, including two-thirds of the village Salangpur, and pays a fixed *jama* of Rs. 15,448-0-11 sanctioned by Government on May 28, 1821, he states in a foot-note to page 80 as follows:—

"*N. B.* The Limree estate is only a late acquisition by Limree and was originally the property of Chorasumas or Kathees who are still found in the villages as Mool Gametees."

Colonel Jacob in his Report of October 1842 thus describes the origin of Mulgerassias:—

"The establishment of various tribes in the peninsula was founded on the sword, but much of the territory was subsequently gained by the weaker land-holders writing over their *geerass* to whomsoever they thought best able to protect them, reserving a fixed portion for themselves. These when they retained only a minor share of the village lands and taxes without one in its

(3) 30 Ind. Cas. 303; 17 Bom. L. R. 730; 19 C. W. N. 1087; 13 A. L. J. 953; (1915) M. W. N. 563; 29 M. L. J. 242; 18 M. L. T. 179; 2 L. W. 731; 39 B. 625; 23 C. L. J. 1; 42 I. A. 229 (P. C.).

(4) 14 B. 299 at pp. 306, 310; 7 Ind. Dec. (N. S.) 659.

*Pages of 17 Bom. L. R.—[*Ed.*]

Government, are termed Mool Geerassias, and from the natural result of power and cupidity united have in most cases been deprived by degrees of much or all of what they had reserved for themselves. With those exceptions, the tenure on which the Chiefs hold their possessions is that of absolute sovereignty over, and property in, the soil." (See Selections, Volume 37, p. 23).

In Peile at page 67 is set out a despatch from the Government of Bombay in 1862 pointing out that the Taluqdars of Gujarat are quite different in status and powers from the Taluqdars in the North-West Provinces:

"The Taluqdars of Gujerat all call themselves Gametees, Grassias, and more frequently still Bhomeas, all of which names indicate very ancient family possessions. These proprietors are the direct issue of one cadet of some Rajpoot Gadee or Sovereign Chief to whom two or three villages were given for support... The gadees or chiefships (such as... Limree.....) from which they have sprung.....still exist, and are recognised by the Gametees or Grassias as their natural head. The proprietary right of these Gametees, Grassias or Bhomeas is, therefore, as towards the public or States as complete as possible."

The present case is, therefore, somewhat unusual as we have to deal with Kathis and not with the cadets of a chieftain family. A long account of the Kathis is given by Colonel Walker in Selections pages 246 to 254, and though he does not give them a good character (see page 252), it was hardly an age for good characters in those parts of India. Strength was then a more important qualification for existence.

[His Lordship then referred to several passages of Colonel Walker's report and to the Girasia Court Rules in the Kathiawar Agency for determining disputes between the various kinds of land owners and after discussing the judgment of the Trial Court proceeded :—]

The conclusion then which I have arrived at is that the learned Judge was correct in his view that generally speaking a Gameti would have sovereign or *quasi*-sovereign rights, but that I disagree with his finding that to constitute a Mulgameti some retention of such sovereign or *quasi*-sovereign rights is essential. In my opinion it is sufficient if the Gameti retains or is re-granted some of his former lands or an interest therein although all his former governing rights pass to others.

I will not attempt an exhaustive definition for all Gujarat, but as far as the village of Salangpur is concerned and for the purpose of the present case only, I will describe a Mulgameti as follows, *viz.*, one who is or is descended from a former ruler and owner of the village and still retains by re-grant or otherwise some portion of the lands or interests therein of such former ruler and owner, but not necessarily any of his governing rights.

I will next consider what are the existing interests of the parties in the village. Barring certain claims which the learned Trial Judge has disallowed, the existing interests of the parties are substantially what they have enjoyed for over one hundred years past.

[His Lordship then discussed the figures showing the area held by different parties and their interest therein and proceeded:—]

A good deal turns in this case on the significance to be attached to the *chauth* which the defendants thus get. Literally *chauth* means a quarter of the income of the village. But sometimes it has been used to designate a form of blackmail which was levied in the old days as the price paid for forbearance to ravage. Before us, however, the plaintiff's Counsel has been content to treat the *chauth* as meaning merely the fraction of the income I have indicated.

These then being the interests of the parties, are defendants Nos. 1 to 30 Mulgametis, and do they hold their land directly from Government? To answer this question, one must investigate the history of the village. Now at the trial two conflicting theories were advanced as to how the village lands came thus to be held in the present manner. The plaintiff alleged that originally he was

the proprietor of the whole village, and that these *jiwai* lands and also the *chauth* were extorted from him by robber bands as the price of forbearance to ravage his estate. Consequently as this he said was the origin of the Kathis, they were never Gametis, and could not properly be regarded as Mulgametis. The case of the Kathi defendants was that they were the original proprietors of the village, and that for their own purposes they had leased or mortgaged the village from time to time to the plaintiff, and that he had wrongfully set up a title as an absolute owner.

The learned Judge found the facts midway between these two contentions. He found that the Kathis were the original proprietors of the village, and that in 1763 or thereabouts they granted one-third of it to the ancestor of defendant No. 39, and that in 1777 or 1781 they granted the remaining two-thirds to the plaintiff's ancestor, but that on the occasion of the latter grant they reserved to themselves the *jiwai* lands, namely, the 1668 acres and also the *chauth* in the remaining lands, namely, the 1962 acres. He rejected entirely the alleged leases or mortgages set up by the defendants.

[His Lordship after discussing the evidence on the point proceeded:—]

My conclusion then is that the learned Judge rightly rejected all these alleged leases or mortgages, and that the present rights of the parties should be decided on that footing.

What then are the conclusions which one ought to draw from the voluminous evidence in this case? The Kathi defendants Nos. 1 to 30 are admittedly descendants of former Gametis, and admittedly hold *jiwai* lands formerly belonging to those Gametis, and also *chauth* in respect of the produce of other land. But I draw a distinction between the mere holding of land or an interest therein such as *chauth*, and the exercise of sovereign or *quasi*-sovereign rights. In my judgment the true inference to be drawn from the facts is that in 1777 or 1781 or thereabouts the Kathis surrendered their lordship of the village to the Thakore Sahib in perpetuity in exchange for his protection, but at the same time retained or were re-granted the *jiwai* lands and the *chauth*. As the new Gameti, it was thenceforward for the Thakore Sahib to pay the *jama*, and settle all differences with the Peshwas and afterwards with Government; and this in fact he appears to have done ever since. In my judgment, therefore, the Kathis have not had any *quasi*-sovereign or seignorial rights in respect of this village since 1781.

If then I were to accept the definition of Mulgameti adopted by the learned Judge, it would follow that I should not consider the Kathis to be Mulgametis. But taking as I do the view that the retention of sovereign rights is not essential to constitute a Mulgameti, I have arrived at the conclusion that in fact the Kathi defendants are Mulgametis by reason of their retention of the *jiwai* lands and *chauth*. And I am considerably fortified in this conclusion by the fact that in that formal document, Exhibit 428, and also in Exhibit 406 the Limbdi State has itself described and treated the Kathis as the Mulgametis of the village. And to this I may add the corroboration afforded by the definition of "Mulgirassia" in the Girassia Court Rules of the Kathiawar Agency which I have already alluded to.

But can it be truly said that defendants Nos. 1 to 30 are Mulgametis "who hold land directly from Government" within the meaning of the amended Act? Unfortunately the learned Judge has almost taken this point for granted, for the following is the only direct passage in the judgment which deals with it, *viz.*: "No real Mulgameti would fail to hold land direct from Government, for he must hold it from some one and *ex hypothesi* does not hold it from the actual proprietor."

Defendants' Counsel endeavoured to support this proposition by contending that in theory all lands in British India belong to Government, and that if any one is found in possession of rent free lands, presumably he holds from Gov-

ernment. I do not desire to be thus drawn into the controversial questions which were considered at great length in *Vyakunta Bapuji* v. *Government of Bombay* (2) and by the Privy Council in *Gunga Gobind Mundul* v. *The Collector of the Twenty-four Pergunnahs* (5) but I think I have stated enough of the history of the village of Salangpur to show that the Peshwas at any rate did not have the property in the soil of this village, and that the British officers felt the greatest difficulty in claiming more than a mere right of *jama* or tribute. No doubt after conquest, it is the right of the conqueror to say what he will take and what he will concede. Thus in *Secretary of State* v. *Bai Rajbai* (3) it was held by the Privy Council, following other authorities, that after a cession of territory to British Rule the only enforceable rights against the sovereign are those conferred by him after the cession either by agreement, express or implied or by legislation. An implied agreement conferring rights may be established by evidence of recognition of rights existing before cession, and of an election express or implied to be bound by them: but the burden of establishing the existence of an enforceable right is upon the subject.

In the present case we have the express agreement between the Thakore Sahib and Government which is contained in Walker's Settlement, and which has been acted on ever since 1807-8. But I can find no agreement express or implied between the Kathi defendants or their ancestors and the British Government. On the contrary it is the Thakore Sahib who has dealt directly with Government. Even, therefore, if it can be said that the Kathis hold their *jiwai* lands from Government—which, in my opinion, is open to extreme doubt—they do not, in my opinion, hold these lands "directly" from Government. An intermediary in the shape of the Thakore Sahib has, in my opinion, been interposed between them and Government. The very use of the word "directly" would seem to negative the mere application of any general theory that all land is held of the Crown. The definition in section 2 (1) (*a*) would indeed fit those Girassia proprietors spoken of in the same case (pages 751-752) who had taken leases from the British Government. They undoubtedly would hold directly from Government, but no such lease or *sanad* from Government has ever been taken by any of the Salangpur Kathis, so far as the evidence before us goes.

[His Lordship at this stage referred to the Bombay Land Revenue Code, 1879, and discussed the effect thereof on the question. After discussing various sections of the Code he proceeded :—]

The conclusions then which I draw from the 1888 Act and the Code is that defendants Nos 1 to 30 would be liable for land revenue, if it were not for the 1807 Settlement which the Thakore Sahib effected with Colonel Walker; and further that it is the Thakore Sahib as the registered Taluqdar who is regarded by Government as the person primarily responsible to them for such land revenue. The Code also uses the expression "lessee holding directly under Government" in excluding such a lessee from the definition of "tenant" in section 3 (14). Why say "directly" unless it was to negative any mere theoretical holding under the Crown?

Further the Code in defining in section 3 (13) a superior and an inferior holder and in fixing in section 83 their respective rights, would seem to consider the actual payer to Government of the land revenue to be the superior holder, provided he is entitled to receive it from another, *viz.*, the inferior holder. In the present case, the plaintiff is not, I think, entitled to recover *jama* from the defendants Nos. 1 to 30. He pays the whole, and has no right of recoupment or contribution. Apart from that—which I agree is an important difference—he and they would seem to occupy the position of superior and inferior holders respectively as defined by the Code.

Nor I think is any different conclusion to be arrived at by studying the earliest Land Revenue Regulations which

(5) 11 M. I. A. 345 at pp. 359, 363; 7 W. R. P. C. 21; 1 Suth. P. C. J. 676; 2 Sar. P. C. J. 284; 20 E. R. 131.

Counsel referred us to, *viz.*, Regulation XVII of 1827. There rule 2 (1) provides that—

"All land...shall be liable to the payment of land revenue to Government according to the established principles which govern the assessment of that description of land to which it belongs, except such as may be proved to be either wholly or partially exempt from the payment of Land Revenue under any of the provisions of this Regulation."

It will be seen that this substantially corresponds with section 45 of the present Code.

Then section 3 is important. It runs:—

"The settlement of the assessment shall be made with the occupant. The cultivator when the land is held direct from Government is to be considered the occupant; and when it is not so held the person having the highest right or holding recognised by the custom of the country or resting on specific grant which intervenes between the Government and the cultivator is to be so considered."

Once more then we get the reference to holding "direct" from Government. And if the cultivator does not so hold direct, then Government makes liable the highest right intervening between the cultivator and Government. In the present case, surely the Thakore Sahib as Gameti would be the person having such highest right. At any rate nobody else has hitherto been recognised as having it except the Thakore Sahib. I exclude of course defendant No. 39. He is not a Kathi.

Then Regulation V provides that the occupant shall be liable in his person and property for the revenue of the land, but on non-payment by the superior holder it may be recovered from the inferior holder. And Regulation XXX provides that superior holders are responsible to the Collector for the public revenue assessed on their lands and, if payment is not made, the Collector may realise from the crop the amount due, or remit direct to the inferior holder as provided in section 5.

It is true that Regulation IV (2) provides that when there is a right on the part of the occupant in limitation of the right of Government in consequence of a specific limit having been established and preserved, the assessment shall not exceed such specific limit. That provision may protect the Thakore Sahib having regard to Walker's Settlement, but I fail to see what limitation on the right of Government could be proved by the Kathi defendants if once Walker's Settlement was out of the way. They were no direct parties to that settlement. Whether if Government forced them to pay, they would have any right of indemnity against the Thakore Sahib under the provisions of a presumed lost grant in 1777 or 1781 I need not discuss. No such point has been taken before us. In the result, therefore, I think these Regulations and the subsequent Code and the 1888 Act rather assist the Thakore Sahib's contentions than otherwise.

I have now dealt with the more important of the able and lucid arguments that were urged on us by Counsel for the respective parties. My final conclusion on the whole case is that the Kathi defendants Nos. 1 to 30, though they are Mulgametis, do not hold land directly from Government, and consequently are not Taluqdars within the meaning of the 1888 Act as amended by the 1905 Act. Defendants Nos. 31 to 38 are neither Mulgametis nor *Taluqdars*.

I would, therefore, allow the appeal, and set aside the decree of the Court below, and instead make a declaration to the following effect, *viz.*, that within the meaning of the Gujarat Taluqdars' Act (Bombay Act VI of 1888) as amended by Bombay Act II of 1905, the Kathi defendants Nos. 1 to 30 are Mulgametis but that they do not hold land directly from Government and that they are not Taluqdars and that defendants Nos. 31 to 38 are not Mulgametis or Taluqdars.

As regards the Settlement Register (Exhibit 439), it is not for us to make any actual amendment therein. Our duty is to determine the rights of the parties, and it is then for the Survey Officer or the Collector to make any necessary

amendments under sections 6 (2) and 8 (2) of the 1888 Act. We have now determined those rights and, in the view we take, the 1905 Act has effected no change in the respective rights of the present parties under the Gujarat Taluqdars' Act with reference to this particular village. But we may point out that as regards the only extract from the Register shown to us, *viz.*, Exhibit 439, the Kathi defendants would not appear to be entered as Taluqdars but only as Mulgametis.

As regards costs, the plaintiff has failed in his contention that his ancestors were the original grantors to the defendants, and that the defendants Nos. 1 to 30 are not Mulgametis. On the other hand, these defendants have failed in their contention that the plaintiff was only a lessee or mortgagee from them, and that they are Taluqdars within the meaning of the Act. Under all the circumstances of the case, I think the fair order as to costs will be that each party should bear his own costs throughout in both Courts. This order also applies to defendant No. 39. He has espoused the cause of the Kathis, and must stand or fall with them.

I have not overlooked the fact that in his plaint the plaintiff claimed that the village of Salangpur was a village in Limbdi State belonging to him, but this surprising claim was dropped before the trial. The written statement of defendant No. 39 goes far beyond any mere defence to this abandoned claim, and it would appear that he took an active part at the trial, and put in a large amount of documentary evidence. He cannot, therefore, be regarded as a nominal party, more especially as he was added at his own request.

Pratt, J.—The plaintiff in this suit is the Chief of Limbdi who has been registered as Taluqdar of the British village of Salangpur in the Settlement Register prepared under section 5 of Bombay Act VI of 1888.

He complains that although he is the sole proprietor and Taluqdar of the village defendants Nos. 1 to 38 have been registered as Mulgametis. This, he says, is prejudicial to his rights and status as Talukdar and he seeks a declaration that defendants Nos. 1 to 39 are not Mulgametis or Talukdars.

Defendants Nos. 1 to 30 are Kathis holding *jiwai* or rent free lands in the village and claimed that they held the land independently of the plaintiff, and are, therefore, Mulgametis or Talukdars.

Defendants Nos. 31 to 38 are their assignees who are not interested.

Defendant No. 39 Sher Miya was added as a party at his own request as he is a registered one-third sharer in the Talukdari of the village and desired to resist the plaintiff's claim to be sole Talukdar.

The lower Court dismissed the plaintiff's suit holding that defendants Nos. 1 to 38 were Mulgametis holding directly under Government.

The plaintiff has, therefore, appealed.

The talukdari estates in Gujarat are the remnants of old Rajput kingdoms. These disintegrated being either disrupted by internecine feuds or crushed by foreign invaders. The subordinate states thus formed were known by names generally indicative of their origin. The smallest of these subordinate rulers was the Gameti or ruler of a single village. In Mahratha times these estates were independent and Colonel Walker writing of them in 1804 says:

"With the reservation of their acknowledged tributary payments, the Kattywar States are independent, and at liberty to form connections with other powers. They are under no obligations of service, and neither the Peshwa nor the Gaekwar pretended to exercise an authority in Kattyawar, beyond the demand of their respective contributions."

Under the British Rule the old rulership slowly degraded into a mere landlord estate. This process is foreshadowed in Colonel Walker's Report of July 25th 1806—(Selections from Government Records No. 39, page 52)—In paragraph 69 occurs the following passage:

"Hence it would appear that the Purgunas of Dundooka, Ranpoor, and Gogo and even Dholka, comprehend, exclusively of the Honourable Company's Sirkar a variety of lordships."

Then in paragraph 81 he makes the following significant recommendation:—

"It would, however, be extremely desirable to dissolve these discordant authorities and to consolidate all the inferior jurisdictions under the Company's power."

Bombay Act XIX of 1844 abolishing various local taxes and cesses was one stage in the process by which some of these lordships or seignorial rights were dissolved. But it may be that some still survive such as the right to waste or the right of escheat.

A Talukdari estate is, therefore, an estate which connoted rulership in pre-British times but which is now a landlord estate to which some seignorial or subordinate rights may or may not be still attached.

When the estate connoted rulership of a single village the holder is a Mulgameti, *i. e.*, a Gameti who has lost all or most of his lordships. These estates being very small the holder was not included in the definition of Talukdar until the amending Act (Bombay Act II of 1905) recognized as a Talukdar a Mulgameti who holds lands directly from Government.

The plaintiff's contention in the lower Court was—

(1) that the Kathi defendants were not Mulgametis as their ancestors were not the rulers of Salangpur.

(2) that even if they were Mulgametis they were not entitled to be registered as they do not hold land directly from Government.

On the first point it is now conceded that prior to 1777 at any rate, the Kathis were the rulers or Gametis of the village: and this in spite of the fact that they are Kathis and not Rajputs—for the Kathis had invaded and seized many parts of Kathiawar and indeed Jasdan is a Kathi State. The Revenue Records make it clear that in the time of the Peshawas the village was a Kathi village. It is so entered in the Revenue Settlement of 1759 attached to Collector Byron Rowles' report Exhibit 380. It is also certain that the Kathis paid tribute to the Peshwa in 1772—Bond Exhibit 443 and Taleband Exhibit 374. Then the admissions made by Limbdi in a suit in 1816 show that the Kathis granted one-third of the village to Sher Miya's ancestor in 1763 (Exhibit 353 and Exhibit 372) and then granted two-thirds of the village to Limbdi in 1777 after reserving rent free *jiwai* land for their maintenance and a *chauth* or quarter share of the produce (Exhibit 354).

It is, however, contended that when the Kathis granted the two-thirds of the village to Limbdi in 1777 they surrendered all their rights of rulership and were, therefore, no longer Gametis at the time of the British acquisition under the treaty of Bassein in 1802. But the probabilities are all the other way. Grants were at that time made in return for protection and they were generally for a limited period: see DeSouza's report in 1805, Exhibit 378. The Limbdi pleading in the suit of 1816 already referred to did not describe the grant as being in "*aghat*" or in perpetuity and Colonel Jacob in his report on Kathiawar in 1842 at paragraph 20 refers to the reluctance of Chiefs to make perpetual grants—Selections from Bombay Government Records, Volume 39, page 27. The Kathis allege that the transaction of 1777 was a lease for a term of years renewed by another lease in 1801. This latter lease (Exhibit 377) is not signed but the fact that it was produced by the Kathis before the Collector as far back as 1829 and that they then claimed that the term of the grant had expired is significant. The grant not being in perpetuity it is not likely that a grant of rights of rulership was included. Indeed Limbdi in 1826 in a petition to the Collector described the Kathis as Mulgametis: (Exhibit 406). It is true that this term was sometimes used in a complimentary sense. But the petition of 1826 was one complaining of the conduct of the Kathis and the phrase would not have been used if the Kathis had not been Gametis in 1802. The Kathis were also described as Gametis in the suit of 1816. Proof of the actual exercise of subordinate sovereign rights prior to 1802 either by the Kathis or by Limbdi there is none; but on the evidence available I think it proved that

the Kathis were the Gametis up to the time of the British acquisition in 1802.

On the second point the District Judge appears to have held that as the Kathis paid no rent to Limbdi and did not derive title from Limbdi they could not be said to hold under Limbdi—and as they did not hold under Limbdi they must hold under Government. But this line of reasoning overlooks the fact that the revenue of the village was paid by the plaintiff first to the Peshwa and then to Government. Indeed the Kathis' written statement admits that the revenue is paid by the plaintiff and by Sher Miya. Colonel Walker settled the Limbdi tribute in 1807 and in the remark column of his statement he made a reference to the revenue of the Dhandhuka Parganna. Whether this implies that Colonel Walker made a Permanent Settlement of the revenue of all the villages in the Parganna including Salangpur for the sum named may well be doubted. But Government have accepted that construction of the settlement. See G. R. 591 of 1821, Exhibit 393. The revenue, therefore, of the village is paid by the plaintiff; and the Kathis who hold part of the village do not hold directly from Government. Moreover, they have not given evidence of any direct dealings wtih Government ever since 1802. Government compounded the local taxes with Limbdi in 1844 (Exhibit 106) and the Local Fund also with Limbdi in 1865 and 1883 (Exhibit 108). The defendant Kathis are, therefore, not Talukdars.

It must be observed, however, that the plaint is wrong in assuming that the entry of the defendant Kathis in the Talukdari Settlement Register as Mulgametis involves their recognition as Talukdars. The defendants are entered not in column 1 as Talukdars but in columns 6 and 7 as holding rent free land under the Talukdar. If they were entered in the Register as Talukdars they would under section 24 be primarily responsible for the *jama* which would be absurd for it is admitted the Limbdi is and always has been primarily responsible. Section 5 makes it clear that holders of other rights appear also on the Register.

Plaintiff exaggerated his case in every possible way. He claimed that the village was in his State whereas it is a British village. He said he was sole Talukdar whereas it is admitted that Sher Miya is a one-third sharer in the Talukdari. He pleaded that the Kathi defendants' estate was derived from him whereas it is his estate that is derived from the Kathi. Lastly he pleaded the Talukdari Settlement Register as giving a cause of action for a declaration that the Kathi defendants were not Talukdars whereas they are not entered as Talukdars in the Register. The suit illustrates the warning in *Sree Narain Mitter* v. *Sreemutty Kishen Soondery Dassee* (6) where it was said :—

"There is so much more danger in India than here of harassing and vexatious litigation, that the Courts in India ought to be most careful that mere declaratory suits be not converted into a new and mischievous source of litigation."

However, as the Kathi defendants were so ill-advised as to adopt the plaintiff's construction of the Register and to claim in their written statement to be Talukdars I think it would be advisable to make a declaration.

I agree, therefore, that the appeal should be allowed and a declaration made on the terms suggested by my learned colleague.

The declaration will be that the plaintiff is a two-third sharer in the Talukdari estate of Salangpur, that the other one-third sharer in the Talukdari is defendant No. 39 Sher Miya Bapumiya, that the Kathi defendants are not Talukdars but Mulgametis not holding directly from Government. I agree with my learned brother's order that parties bear their own costs in both Courts.

K. S. D. *Appeal allowed.*

(6) I. A. Sup. Vol. 149 at p. 162; 11 B. L. R. 171; 19 W. R. 133; 3 Sar. P. C. J. 203 (P. C.).

PRIVY COUNCIL.

APPEAL FROM THE PATNA HIGH COURT.

July, 25, 1923.

Present:—Lord Sumner, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

Raja SRINATH RAY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Maharaja PRATAP UDAI NATH SAHAI DEO—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 103 (b) *—Record of Rights—Presumption—Burden of proving contrary*—Talukdar *paying revenue to* Zemindar—Jama *not separate—Bengal Decennial Settlement Regulation (VIII of 1793), s. 5*—Kabuliyat, *definition of—Service tenure—Resumption, meaning of*—Zemindar, *rights of.*

The burden of proving that an entry in the Record of Rights is erroneous is on the party alleging it. [p. 881, col. 1.]

A *talukdar* who has been paying revenue to the *zemindar* but has taken no steps to obtain separation of his *jama* from the *zemindary jama* is not an independent *talukdar* within the meaning of section 5 of the Bengal Decennial Settlement Regulation, 1793. [p. 882, cols. 1 & 2.]

A *kabuliyat* predicates a *patta*. A *patta* is granted by the *zemindar* as a title-deed to the tenant. The *kabuliyat*, as its name implies, is a mere acknowledgment, an engagement by the tenant to carry out the terms of the *patta*. [p. 882, col. 2.]

The "resumption" of a "service tenure" does not mean that on failure of the direct male line it "escheats" to the *zemindar* and becomes what is called his *sir* or *khas* property; the *jagir* retains its character, but the *zemindar* becomes entitled to make a new settlement with the knowledge and sanction of the authorities. [p. 886, col. 1.]

Appeal against the judgment and decree of the Patna High Court (Sir Dawson Miller, C. J., and Jwala Prasad, J.), dated the 29th March 1920, reported as 70 Ind. Cas. 232.

Messrs. *G. R. Lowndes, K. C.*, and *G. D. Mac Nair*, for the Appellants.

Messrs. *Dunne, K. C.*, and *Y. B. D. Ramsay*, for the Respondent.

JUDGMENT.

Mr. Ameer Ali.—The suit which has given rise to this appeal was brought by the plaintiffs on the 28th July, 1908, in the Court of the Subordinate Judge of Ranchi under the following circumstances. The plaintiff Srinath Roy purchased on the 15th September, 1899, in execution of a mortgage decree, *Pargana* Bundu, a property lying within the estate of Chota Nagpur. The second and third plaintiffs are Srinath Roy's brothers and interested in the purchase, whilst the fourth is an assignee of a share in the property in question. It appears that in 1895 the first three plaintiffs advanced a large sum of money to one Tikait Jagannath Roy, since deceased, who was then in possession of the property, on a mortgage of the same. The document of mortgage bears date the 2nd of August, 1895. In default of payment a suit was brought, and a decree obtained upon it in October 1898.

The sale proclamation was issued on the 20th of July, 1899, and the sale held, as already stated, on the 15th of September, 1899. The plaintiff Srinath Roy obtained the sale certificate on the 20th of January, 1900. He claims that *Pargana* Bundu was the absolute estate of his mortgagor and that he is entitled to it by virtue of his purchase.

The defendant is the *Zemindar* of the Chota Nagpur estate, and his contention is that the property in question was a *jagir* tenure held by Jagannath defeasible on failure of the lineal male line of the grantee, and the plaintiffs' mortgagor having died without leaving any male issue, he has resumed the same, as he was lawfully entitled to do.

In 1903 the Bengal Government directed, under Chapter X of the Bengal Tenancy Act, the preparation of a Record of Rights in respect of the Chota Nagpur estate. The Settlement Officer, Mr. Lister, in pursuance of the instructions of the Government, and in accordance with the provisions of the Tenancy Act, instituted a careful and minute enquiry relating to the tenures and other subordinate tenancies within the Chota Nagpur estate. Section 102, clause X, requires the Settlement Officer to include among other particulars "the special conditions and incidents, if any of the tenancy" regarding which the enquiry is being held. Mr. Lister, accordingly made in the register of tenancies, technically called the Khewat,

the following entry against *Pargana* Bundu:—

"Col. 4—Nature of rights—*Jagir khidmat* (that is, service tenure resumable).

"Col. 5.—Resumable or not—*Kabilzabit.*

"Col. 11.—Remarks—'*Yeh Jagir Tekait Basdeo Rai, hasil kiya is shart par ke Putra Putradik bhog kare*'

"The entry in the column of remarks is intended to mean that the tenure is *Putra Putradik* and derived from Basdeo Rai."

Basdeo was the grandfather of the mortgagor. It is to be noted that the words *Putra Putradik* denote descent in the direct male line. The entry rendered into English runs thus:—"This *jagir* was obtained by Tekait Basdeo Rai on condition of enjoyment in the direct male line."

Section 103 (B) of the Tenancy Act provided that:—

"A certificate, signed by the Revenue Officer, stating that a Record of Rights has been finally published under this Chapter, shall be conclusive evidence of such publication; and every entry in a Record of Rights so published shall be presumed to be correct until the contrary is proved."

The plaintiff accordingly brought this suit in the Court of the Subordinate Judge of Ranchi to set aside the order of the Settlement Officer referred to above, and to obtain a declaration that *Pargana* Bundu was held as an independent estate by the ancestors of his mortgagor from a time previous to the Permanent Settlement made by the Government with the Maharaja of Chota Nagpur, that it was incorporated as a *Shikmi* or dependent *taluk* in such settlement with the Maharaja merely for the payment of the revenue through him, that, the subsequent grant made by the Maharaja to Basdeo Roy referred to in the Settlement Officer's entry was not consequent upon a resumption or fresh settlement, but was a mere continuance of the old status. The defendant, the Maharaja, pleaded that *Pargana* Bandu was never an independent estate; that it was a mere *jagir* or tenure resumable on failure of the direct male line, and that the last holder in the direct line having died in 1847 without leaving any male issue, he (the Maharaja) made a new grant to Basdeo Roy, by which Basdeo clearly acknowledged that the tenure was resumable on failure of the lineal male line of the grantee.

A number of issues were framed by the Subordinate Judge, all of which relate to the nature of the property in suit, *viz.*, whether it was a resumable *jagir*, or was an independent estate held by the ancestors of the plaintiffs' mortgagor and was incorporated in the *zemindari* of the Maharaja of Chota Nagpur as a *Shikmi* or dependent *taluk*, with its revenue payable through the Maharaja. The fourth issue related to the character of the grant made to Basdeo Roy. The judgment of the Subordinate Judge who first tried the case was reversed on appeal by the High Court and the case was remanded for a fresh trial. The Subordinate Judge before whom the case came for hearing the second time rests his judgment almost entirely on the non-production by the defendant of the *kabuliyat*, which it was alleged was executed in 1794 by the holder of the *jagir* at the time. The Subordinate Judge held that *Pargana* Bundu was the absolute estate of the *jagirdar* when it was incorporated in the Maharaja's estate, and that since its incorporation its revenue only is payable to Government through the *zemindar*. Had it been otherwise, says the learned Judge, the Maharaja would have produced the *kabuliyat* given to him by the *jagirdar*. He also accepted the contention of the plaintiffs that the grant made by the Maharaja to Basdeo in 1849 was not a new settlement but only a continuance of the old *jagir*. He accordingly decreed the plaintiffs' claim.

The following passage in the Subordinate Judge's judgment shows the trend of his mind in dealing with the case. He says:—

"Taking the broad facts of this case, it appears that the Bundu Raj Estate existed from time before the accession of the British Government. This estate was gained by conquest and the Raja was made to execute *kabuliyat* in favour

of the Maharaja of Chota Nagpur agreeing to pay Government revenue through him. This estate is heritable as well as transferable. The plaintiffs obtained this property by mortgage and afterwards at a sale purchased it in execution of the decree obtained on this bond. The origin of the Bundu Estate is unknown. The defendant has not produced the *kabuliyat* executed by these Rajas in favour of his ancestors. Under these circumstances, it is not unreasonable to hold that the Bundu Raj Estate is a permanent tenure and is not resumable. The Maharaja has failed to prove that he ever had any right or title to this *Pargana*. I, therefore, find Issues Nos. 2, 3 and 4 in plaintiffs' favour. I find that Bundu Raj Estate is not a resumable tenure."

And in the decree he declared as follows:—

"Pargana Bundu was held as an independent estate by the ancestors of Raja Haridas Roy prior to the Permanent Settlement, and that Raja Basudeo Roy succeeded Raja Haridas Roy as his nearest heir and agnate and that the status of Bundu Raj Estate was not affected by the Permanent Settlement."

The defendant appealed to the High Court of Patna, which, on the 29th March 1920, reversing the decree of the Subordinate Judge, dismissed the plaintiffs' suit. The learned Judges of the Appellate Court remarked, not without reason, that the Trial Judge in his treatment of the case had placed on the defendant the burden of showing that the entry in the Record of Rights was correct, whereas it lay on the plaintiffs to show that it was erroneous. And after a close and detailed examination of the respective contentions and of the evidence they came to the conclusion that the plaintiffs had failed to establish that the entry made by the Settlement Officer in the Record of Rights was wrong. They further held that the grant by the *Zemindar* in 1849 was not a continuation of the old tenure, which came to an end on the death of Haridas Roy in 1847 without leaving any male issue, and that the subsequent grant to Basdeo Roy was a new settlement and that the tenure was a resumable tenure. They accordingly, as already stated, allowed the appeal and dismissed the suit.

The present appeal to His Majesty in Council is by the plaintiffs. The contentions on their behalf have proceeded on the same lines as those which found acceptance with the Subordinate Judge. It is contended in the first place that the *jagirdar* or Raja of Bundu was an independent chief; and that although on its conquest by the British, Bundu was incorporated with the *zemindary* of Chota Nagpur and its revenue was made payable through the *Zemindar*, it never lost its character of an independent estate, and that it has always retained that character. Consequently, it is urged, the Maharaja of Chota Nagpur has no right to resume it and that the plaintiffs are entitled to a decree by setting aside the revenue entry.

It is impossible to ascertain at this distance of time with any approach to precision the status of the Chiefs of Bundu in relation to the Maharajas of Chota Nagpur before the establishment of British Rule. The Chota Nagpur estate appears from the evidence on the record to extend over an area of several thousand square miles, situated in a tract of country more or less covered with *jungle*. It further appears from the evidence of Mr. Peppe, the Manager of the Chota Nagpur Estate, that within the ambit of this vast estate there lie some 1,000 *jagirs*. Beyond the statements contained in the Report of Mr. Webster, who was at one time in charge, on behalf of Government, of the Chota Nagpur Estate, and in other reports made by other officers in the course of their official duties, there is no record of the earlier history of these *jagirs*, when or how they came into existence and in what relation they stood to the Maharajas. In 1765 with the grant of the Dewani by the Emperor of Delhi to the East India Company, Chota Nagpur, as a part of Behar, came into British hands. It appears that in 1771 or 1772 a temporary settlement of revenue was made by the East India Company with the *Zemindar* of Chota Nagpur.

The last settlement with him was contemporaneous with the well-known Decennial Settlement in 1789, and this Settlement, under the provisions of Bengal Regulation VIII of 1793, was made permanent. The Maharaja's *zemindary* is now accordingly, a permanently settled estate. About this time Chota Nagpur appears to have been in a very disturbed condition; whether the *jagirdars* were refractory subordinates of the Maharaja or rebellious independent Chiefs, it is beyond dispute that the holder of *Pargana* Bundu, along with other *Pargana* Chiefs. was reduced to subjection by British forces and his *jagir* was incorporated with the *zemindary* of Chota Nagpur, and he was made liable to pay his rent to the Chota Nagpur *Zemindar*. This is said to to have happened in 1794, and this rent, which appears to have been slightly increased in later times, has been regularly paid to the *Zemindar*.

It is urged on behalf of the plaintiffs that as the *jagirdar* of *Pargana* Bundu never paid revenue to the Maharaja before its incorporation in his *zemindary*, his contribution towards the revenue cannot be treated as rent. And it has been strenuously contended before the Board that his status was that of an independent *talukdar* under section 5 of the Bengal Regulation VIII of 1793. This contention seems to be based upon a clear misapprehension of the provisions of the Regulation. Section 5 describes the classes of *talukdars* who were entitled, under its provisions, to obtain separation of their *jama* from the *zemindary jama*. The Regulation defined the procedure for the purpose of obtaining the separation. All independent *talukdars* occupying the position described in clauses 1 to 5, section 5, who had been heretofore paying their quota of the Government dues through the *Zemindar*, became entitled to obtain a separation of their *jama* by adopting the procedure laid down in the Regulation. There is not an iota of evidence to show that the *jagirdar* of *Pargana* Bundu ever took any step for the separation of his *jama*. Had he been paying revenue, making use only of the *zemindar's serishta* for its transmission to the Government Treasury, or had he occupied the status which is claimed for him, there would have been an undoubted record of the fact in the Government Revenue Register.

The plaintiffs in their plaint had claimed to be only "dependent *talukdars*." The Regulation draws a wide distinction between "independent *talukdars*" and "dependent *talukdars*." The former come within the category of "actual proprietors of land," whereas the latter do not; "they are considered as lease-holders only" (section 7). It was evidently owing to the difficulty presented by section 7 that the contention advanced in the First Court has been abandoned before the Board, and the plaintiffs have taken their stand on section 5.

It is contended that when Major Farmer brought the *jagirdar* of Bundu into subjection he made him execute a *kabuliyat* in favour of the *Zemindar* of Chota Nagpur, and it has been vehemently urged, both by the Subordinate Judge and learned Counsel on behalf of the plaintiffs, that that *kabuliyat* if produced, would disprove the defendant's case, and that it has been deliberately withheld by the Maharaja because it would have supported the plaintiffs' contention. There are two clear answers to this argument. In the first place, a *kabuliyat* predicates a *patta*. A *patta* is granted by the *Zemindar* as a title-deed to the tenant. The *kabuliyat*, as its name implies, is a mere acknowledgment, an engagement by the tenant to carry out the terms of the *patta*. If the *jagirdar* of Bundu entered into a *kabuliyat* it may be inferred with certainty that there was also a *patta*; and that *patta*, as the title-deed of the grantee, would be in the hands of the grantee's heirs and successors, and would, it may safely be presumed, come into the hands of the mortgagee, who derives his title from the mortgagor. On behalf of the plaintiffs it has been urged that he was on bad terms with the mortgagor and could not consequently obtain the necessary documents from him. Considering the nature of the jungle-*mahal* and the uncertainty of title in those districts, it is somewhat remarkable that the mortgagee should not have endeavoured to

obtain from the mortgagor, who at the time of the mortgage was in possession of Bundu, documents of title relating thereto. Much criticism has been passed by the Subordinate Judge, which has to a certain extent been adopted by plaintiffs' Counsel before the Board, on the non-production by the *Zemindar* of the *kabuliyat*. The explanation given by the defendant for its non-production has been accepted by the High Court, and their Lordships do not find sufficient reason to take a different view. The defendant's manager, Mr. Peppe, who has been in that office from 1900 to the date he gave his evidence in August, 1916, states :—

"I searched for copy of Bundu *Pottah*. I could not find out any copy of Bundu *Pottah*. All the ancient records of the Maharaja are not in existence. These documents were kept in the custody of Gunpat Ray, who was Maharaja's Record-keeper. He was called upon to make over all these records to the Maharaja. He did not choose to do so. Thereupon he was convicted."

[It is in evidence that this Gunpat Ray was subsequently hanged for Mutiny.] In cross-examination Mr. Peppe states as follows :—

"There is practically no paper in the record room prior to the time when the Court of Wards took over charge."

The Court of Wards were in charge of the *Zemindary* of Chota Nagpur from 1868 or 1869 to 1887. Apparently, it was then that an effort was made to overhaul the record room of the Maharaja and obtain copies of the *pattas* that had been given to the various *jagirdars*. The numerous documents that were forthcoming in the earlier proceedings lend support to the story that important papers were purloined or abstracted from the *Zemindar's* record room about the time of the Mutiny.

In 1826 Mr. Cuthbert, who was appointed by the Government to make a report on the Chota Nagpur District, submitted a report on the 21st of April and 14th of June, 1827, in which occurs the following passage on which considerable reliance has been placed on behalf of the plaintiffs :—

In paragraph 20 he states :—

"Six subordinate *parganas* are incorporated with Chota Nagpur, *viz.*, Tamar, Buroda, Raie, Boondoo, Silee and Burwa. How or when these *parganas* became dependent on the Raja of Chota Nagpur I cannot ascertain but it would appear that for a long time the dependence was little more than nominal. It was not until the country came into our possession that these Rajas were permanently and actually incorporated with Chota Nagpur."

And continuing, he adds in the same paragraph :—

"These Rajas may be considered in the light of *Talukdars*. The Rajas, however, still acknowledge the Rajas of Chota Nagpur as their feudal Chief, and on the death of a Raja his successor waits on the Raja of Nagpur, pays homage and presents a considerable *nazar*—generally 1,000 rupees— and receives the Tilluc from him."

What follows, however, is important :—

24. "Although from the nature of these feudal tenures *jageers* were originally granted solely in consideration of military services, yet services of a civil and religious nature were afterwards similarly rewarded at the pleasure of the superior."

25. "The number of larger *jageers* is 26, consisting of about 25·31/2 villages. *These jageers have invariably descended from father to son, and both the custom of the* pargana *and the parctice of the Courts hold them as hereditary in the direct male line. On a jageerdar dying without male issue his jageer generally reverts to the Raja, as females in this country do not succeed to real property.*"

The italics are their Lordships.

Mr. Cethbert's statement in this paragraph clearly goes to support the defendant's contention that the Bundu *Jagir* was, like others descendable in the direct male line resumable on failure of such line.

To this report Mr. Cuthbert attached a list of *parganas* prepared in 1827. It is headed thus :—

"List of Parganas of Nagpur, being the *Zemindari* of Maharaja Jagarnath

Sahai Deo *on condition of rendering serivce.*"

And then comes :—

" Ghatwals *Jagirdars* on condition of rendering service."

One of the *Jagirdars* there mentioned is " Bundu—Raja Balamdar Rai."

Pargana Bundu thus remained in the hands of the lineal descendants of Kanukdand Rai, who was found to be in possession in 1794, until it devolved on Haridas Rai. He is stated to have died on the 10th January, 1847. On his death his widows applied for possession of the *jagir*; at the same time two of his collaterals (Kanchan Lal and Basdeo Rai) advanced a claim in respect to the succession. At this time Jagannath Sahi Deo was the Maharaja and *Zemindar* of Chota Nagpur. Arrears of rent had fallen due in respect of Bundu, and he appears to have instituted proceedings in the Collectorate for recovery of his rent. In the course of these proceedings a *Sazawal* or curator was appointed to take charge of the property. The order relating to the attachment of *Pargana* Bundu and the appointment of the *Tahsildar* as curator bears date of the 23rd of August, 1847.

On the 26th July, 1848, Kanchan Lal applied to the Civil Court presided over by the Agent of the Governor-General, complaining that the *Sazawal* had ousted the petitioner from some lands granted by a former *Jagirdar* of Bundu for maintenance. The order of the Civil Court on this petition is important. It shows the exact nature of *Pargana* Bundu in relation to the *Zemindar* :—

" The Rajah of *Pargana* Bundu died without issue ; and now a *Sazawal* is appointed by Government in the said *pargana* and it is not known what settlement the Maharaja of Palkot [Chota Nagpur] has made with respect to *Pargana* Bundu ; because in accordance with the *sanad* and *pottah* of the said Maharaja, the Maharaja, can make over the *pargana* to any body who may be found entitled after the death of Rajah Haridas Ray, *Zemindar* of Bundu, and with respect thereto the Maharaja has power to resume the said *pargana* if he finds nobody entitled to *Pargana* Bandu, upon giving notice, and with the sanction of the Assistant Agent at Lohardaga. Thereafter any person who may think himself entitled is at liberty to institute a civil suit. Therefore, it is ordered that a *parwana* be issued to Maharaja Jagannath Sahi Deo, *Zemindar* of the Pargannas of Chota Nagpur, containing the matters above mentioned, with a request to forward a receipt of the *parwana* to His Honour and a copy of this proceeding be forwarded for information to the Personal Assistant of District Lohardaga."

Three years earlier, in a proceeding of the 26th of December, 1845, the Agent to the Governor-General, acting as the Civil Court, had, in connection with *Pargana* Rahi, pointed out that the Maharaja "could resume the *jagir* by giving information to and receiving permission from the authorities in the event of the lessee dying without issue."

The adoption of this procedure was re-affirmed on the 26th July, 1848. The *zemindar* was debarred from acting capriciously or arbitrarily; he could only exercise his right with the knowledge and sanction of the authorities. And Jagannath Sahi appears to have adhered to the procedure prescribed by the Government Officers.

Out of the two claimants, who had come forward for the possession of *Pargana* Bundu, he selected Basdeo, and installed him as Raja or *jagirdar*. To mark Basdeo's installation the Maharaja affixed the *tilak* on his forehead. This was the undisputed right of the overlord.

On the 28th of February, 1849, Basdeo reported to the District Officers the fact of his installation and of receiving the *tilak*.

On the 29th of May, 1849, the Maharaja filed by his *mukhtars* (agents) an application in the Court of the Extra Assistant Commissioner for the discharge of the *Sazawal* and the issue of the usual *parwana* (warrant) to Basdeo to take possession of the *jagir*.

This document, Exhibit I, is headed thus:—Application for issue of *parwana* to Raja Basdeo Ray.

After stating that Raja Haridas Ray,

SRINATH RAY *v.* PRATAP UDAI NATH SAHAI DEO.

"*Elaqadar* of the villages of Bundu," had died.

"without leaving any male issue and leaving him surviving his widows,"

it proceeds thus:—

"Your petitioner's client (meaning the Maharaja) wanted, in accordance with the custom and practice in his *zemindari* to resume direct possession of the villages of the deceased Raja. Then unexpectedly the Ranis of the deceased Raja reported to the Agent to the Governor-General and to the Commissioner and the former Assistant Agent of District Lohardaga and to your petitioner's client that the senior Rani was pregnant, and prayed that in expectation of a child being born the property might be left in their possession. In accordance with their prayer, the Settlement of the *pargana*, possessed by the deceased Raja, was kept in abeyance in expectation of the birth of a child of the said Rani."

It then mentions the fact of attachment and the appointment of the *Sazawal* and gives the substance of the *parwana* to the Maharaja issued by the Agent to the Governor-General enquiring as to what settlement he had made "in respect of the said *pargana* because in accordance with your *sanad* and *patta* if after the death of Raja Haridas Ray, *Zemindar* of Bundu, the title devolves on no one, you can resume direct possession thereof."

It then goes on to state that although Basdeo had no title "in accordance with *patta* and the usage of the *zemindari*, still your petitioner's client being pleased with the service of the said Lal, with a view to promote cultivation and happiness of the people on approving the application of the said Lal for the grant of *tilak* of Raj of the entire *Pargana* Bundu, excluding four *Mauzas viz.*, Kanchi, etc., retained by him for Khalsa Bhandar, granted the rest of the *Mauzas* of the said *pargana* fixing an annual rent of cash Rs. 1,000 exclusive of Abwabs, *subject to service*, and then gave him the *Rajgi Tilak* of the said Pargana, and after taking *kabuliyat* (*ekrarnama*) for the maintenance of the Ranis which the said Raja has undertaken, and then a *patta of jagir conditional upon service*, was granted to him by your petitioner's client."

The Maharaja's application then continues:—

"As it is not now necessary for the *Sazawal* to remain in *Pargana* Bundu because the said Raja will from 1906 *Sambat*, under the terms of the *kabuliyat* and *ekrarnama*, render services, pay the fixed rent and maintain the Ranis, it is prayed that in accordance with the proceedings of the Agent to the Governor-General and of the Commissioner, dated the 26th July, 1848, an order may be passed for the removal of the *Sazawal* in view of the order of release, a *parwana* may be issued to Basdeo Rai, directing him to proceed to the villages."

As already stated, the petition on behalf of the Maharaja was presented on the 29th of May, 1849. On the 6th of June, 1849, Basdeo's agent filed a similar petition stating that he (Basdeo) had obtained a settlement from the Maharaja and received from him the *tilak* of installation. It then goes on to state that the Maharaja "upon fixing a rent of Company's Rs. 1,000 per annum, granted to him a *nagbast patta* conferring upon him the title of Raja, on the 11th *Phagan* 1905 *Sambat* and granted to him *patta* and *amalnama*, which are forthcoming. At present *Pargana* Bundu, being attached on account of arrears of rent due to the Maharaja Saheb, collections are made therefrom through the Government *Sazawal*. Whereas the Maharaja Sahib's rent has been wholly and fully paid, and so a petition on the part of the Maharaja has been submitted to Your Honour praying for the discharge of the *Sazawal* and for the release of *Pargana* Bundu, attached on account of rent, and stating that he had invested (my client) with the *Rajgi Tilak*."

He also prayed for the lease of the *gargana* from attachment.

The settlement with Basdeo shows that the rent was increased from Rs. 735 to Rs. 1,000, four villages were taken out of the *pargana* and set apart for the maintenance of Haridas' widows and a

new *patta* was granted to him by the Maharaja and a new *parwana* was issued to him at the *Zemindar's* instance for possession of the *jagir*. In face of these facts it is idle to contend that the settlement with Basdeo was a continuance of the old tenure. Had Basdeo succeeded to the *jagir* by right of inheritance the maintenance of the Ranis, the widows, would have devolved exclusively on him and the superior landlord would have had no concern with it or the right to take away any part of the property to provide for their maintenance. The Maharaja's interference on behalf of the widows is explainable only on one hypothesis, *viz.*, that he was making a new arrangement by virtue of a right recognised by the authorities. And the grant of the *parwana* to Basdeo together with the withdrawal of the attachment signified their approval; nor was any exception taken to the increase of the *jama*.

One more remark on this part of the case seems necessary. In the grant to Basdeo to the *jagir* is specifically mentioned as a "service tenure," involving the performance of Police and other duties. They could hardly have been newly imposed, as they would at once have attracted the notice of the Governor-General's Agent when the *pottah* was produced before him and would have led to investigation and comment. It is abundantly clear, therefore, that the *jagir*, minus four villages, was settled with Basdeo in 1849 on an increased rental.

There seems to be some confusion as to the meaning of the word "resumption" in connection with these tenures. It does not mean that on failure of the direct male line it "escheats" to the *zemindar* and becomes what is called his *sir* or *khas* property; the *jagir* retains its character, but the *zemindar* becomes entitled to make a new settlement with the knowledge and sanction of the authorities.

In the Record of Rights proceedings the Settlement Officer scrupulously and carefully analysed the evidence in the presence of the plaintiffs, and came to the conclusion embodied in the entry impugned in this suit as erroneous. Under section 104 of the Bengal Tenancy Act the plaintiffs appealed to the Board of Revenue against Mr. Lister's decision. The Board of Revenue, after a remand for the purpose of taking further evidence, in a remarkably well-balanced judgment, held that the plaintiffs had utterly failed to establish their contentions. In the present suit the High Court, on appeal from the Subordinate Judge, examined the evidence with great care and came to a conclusion adverse to them.

Their Lordships have given every attention to the arguments of Counsel for the appellants; they find absolutely no ground for interfering with the decree of the High Court. They consider that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

The respondent will be entitled to the costs of this appeal.

K. S. D. *Appeal dismissed.*

Solicitors for the Appellants.—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents.—Messrs. *Indermaur & Brown.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 270 OF 1922.

June 20, 1924.

Present:—Justice Sir N. R. Chatterjea, Kt., and Mr. Justice Chotzner.

Sri PROTAP CHANDRA DEO DHABAL DEB—DEFENDANT—APPELLANT

versus

Sri Raja JAGADISH CHANDRA DEO DHABAL DEB—PLAINTIFF—RESPONDENT.

Hindu Law—Mitakshara—Impartible estates—Principle of survivorship, how far applicable—Alienability of impartible estates, evidence of—Settlement khewats, *relevancy of—Bengal Tenancy Act (VIII of 1885), ss. 102, 103—Evidence Act (I of 1872), s. 35—Chota Nagpur Encumbered Estates (Amendment) Act (III of 1909), ss. 3, 12A—'Alienation', meaning of—Scope of Act*

PROTAP CHANDRA *v.* JAGADISH CHANDRA.

—Co-parcenary in impartible properties—Right to maintenance—Evidence as to usage of family, nature of—Independent opinion—Will, execution of, if amounts to alienation—Interpretation of Statutes—Act imposing restrictions.

The principle of survivorship which governs succession in ordinary joint family under the Mitakshara has to be followed in the case of impartible estates only for a particular purpose, *viz.*, to find out a successor and it is only for the purpose of determining who is entitled to succeed, that the estate is to be treated as the property of the joint family. [p. 893, col. 2.]

In the absence of any custom an impartible estate is alienable by way of transfer *inter vivos*, as well as by testamentary dispositions. [*ibid*]

If according to Hindu Law an impartible Raj is not inalienable the burden of proving that by custom the estate is inalienable is on the person who alleges it to be inalienable. [p. 895, col. 2.]

In considering evidence of inalienability it should be seen that if there was any occasion, when having regard to human nature, there was likelihood of alienation and alienation was not effected, it would be evidence of inalienability. [p. 896, col. 2; p. 897, col. 1.]

Entries in Settlement *khewats* are presumed to be correct under section 103, Bengal Tenancy Act. Even if they do not come under section 102 of the Act, they are relevant under section 35 of the Evidence Act, being made by a public officer in the discharge of official duties. [p. 912, col. 1.]

Lekraj Kuar v. *Mahpal Singh*, 5 C. 741; 6 C. L. R. 593; 7 I. A. 63; 4 Sar. P. C. J. 93; 3 Suth. P. C. J. 704; Rafique and Jackson's P. C. No. 61; 4 Ind. Jur. 423; 2 Ind. Dec. (N. S.) 1081 (P. C.), relied upon.

A Will operates only from the death of the testator and there can be no question of Commissioners' sanction after the death of the testator under section 12A of the Chota Nagpur Encumbered Estates (Amendment) Act of 1909. The alienation mentioned in that section and in section 3 refers to alienation *inter vivos* and not to Wills. [p. 924, col. 1.]

The Encumbered Estates (Amendment) Act creates a sort of administration of the immoveable estate of the debtor in some respects resembling that pursued in an administration suit but with the material difference that whereas in an administration suit the satisfaction of the claims of the creditors is primarily in view, in proceedings under the Act the protection of the debtor and the protection of his estate so far as practicable in spite of its encumbered condition is the main solicitude of the authorities concerned. [p. 924, col. 2.]

Kameshar Prasad v. *Bhikan Narain Singh*, 20 C. 609 at p. 625; 10 Ind. Dec. (N. S.) 112, *Bischa Ram Sahu* v. *Bishambhar Nath Sahi*, 17 Ind. Cas. 957; 16 C. L. J. 527; 17 C. W. N. 754, relied upon.

The Chota Nagpur Encumbered Estates (Amendment) Act restricts the power of the holder in disposing of the property in so far as it would interfere with the management of the estate. But the right to succession to the estate of the holder is not affected by the Act and is saved by the provisions of section 23. [p. 925, col. 1.]

Obiter.—In impartible properties there is no co-parcenary. [p. 894, col. 1.]

Sartaj Kuari v. *Deoraj Kuari*, 15 I. A. 51; 10 A. 272; 5 Sar. P. C. J. 139; 12 Ind. Jur. 213; 6 Ind. Dec. (N. S.) 182 (P. C.), *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards (The Pittapur case)*, 22 M. 383; 1 Bom. L. R. 277; 3 C. W. N. 415; 26 I. A. 83; 7 Sar. P. C. J. 481; 9 M. L. J. Sup. 1; 8 Ind. Dec. (N. S.) 276 (P. C.), relied upon.

The right to maintenance, so far as founded on or inseparable from the right of co-parcenary, begins where co-parcenary begins and ceases where co-parcenary ceases. [p. 894, col. 2.]

It is admissible for a living witness to state his opinion on the existence of a family custom and to state as the ground of that opinion information derived from deceased persons. The weight of such evidence would depend on the position and the character of the witness and of the persons on whose statements he formed his opinion. It must be the expression of independent opinion based on hearsay and not mere repetition of hearsay. [p. 906, col. 1.]

The mere execution of a Will does not amount to alienation as it passes no property at the time. [p. 924, col. 1.]

An Act imposing disabilities should be strictly construed. [p. 926, col. 1.]

Appeal against the decree of the Subordinate Judge, First Court, Midnapur, dated the 21st August 1922.

Babu *Dwarka Nath Chakravarti*, (with him Dr. *Dwarka Nath Mitter*, Babus *Pyari Mohan Chatterji* and *Krishna Lal Banerji*), for the Appellant.

Sir *B. C. Mitter*, Counsel, (with him Babus *Gunada Charan Sen*, *Suresh Chandra Das* and *Narendra Krishna Bose*), for the Respondent.

JUDGMENT.—This appeal arises out of a suit for declaration of title to and recovery of possession of the Dhalbhum Raj Estate, for mesne profits and other reliefs. The plaintiff Jagadish Chandra Deo Dhabal claimed the estate under the Will of Raja Satrughna Deo Dhabal dated the 11th May 1905. The properties belonging to the estate are situated partly in Singhbhum, and partly in the District of Midnapur.

The parties are governed by the Mitakshara School of Hindu Law, and their ancestors are said to have migrated from Rajputna centuries ago. The history of the family is stated in

PROTAP CHANDRA v. JAGADISH CHANDRA.

Mohesh Chunder Dhal v. *Satrughan Dhal* (1) and a genealogical table is given at page 311. The defendant Protap Chandra is descended from one Jugal Kishore who belonged to the main family, and the plaintiff is descended from one Raja Kamala Kant the brother of Jugal Kishore who founded the Jamboni branch of the family.

The Dhalbhum Raj is an impartible estate the succession to which has devolved by family and local custom according to the rule of lineal primogeniture from ancient times. The estate was settled by the British Government with Raja Jagannath the ancestor of the parties at a revenue of Rs. 4,000 in 1777. Raja Satrughna got the Dhalbhum Estate according to the ancient family and local custom. On his death dispute arose as to succession to the estate between the defendant who is his nearest heir, and the plaintiff who claimed the estate under his Will.

Satrughna as stated above executed his Will on the 11th May 1905, and died on the 1st March 1916. The plaintiff on the 6th April 1916 applied for Probate of the Will. The defendant contested the Will, but it was found to be genuine and Probate was ordered to be granted on the 30th May 1917. In the meantime the defendant obtained possession of the estate, and his name was registered under the Land Registration Act by the Deputy Commissioner, Singhbhum, overruling the plaintiff's objections. The order was up-held by the Commissioner, and finally by the Board of Revenue on the 13th July 1917 who held that in the jungle *mahals* "There was no custom of devisability by Will."

It appears that before the death of Raja Satrughna, the estate came under the Encumbered Estate Act (Bengal Act VI of 1876) upon the complaint of the defendant's father Madhu Sudan on the 2nd August 1905. After Satrughna's death, the defendant as his heir got the estate released in October 1920 from management under the Encumbered Estates Act, but upon his application as a disqualified proprietor the Court of Wards took over the management of the estate. The present suit was instituted on the 17th March 1921, and after it was decreed by the Trial Court, a Receiver of the estate was appointed by this Court.

The defence, *inter alia*, was that the Dhalbhum Estate had been held and enjoyed by the predecessors of the defendant as an "ancestral joint undivided and impartible Raj" and is still held and enjoyed as such, that the estate is the joint property of a joint undivided family governed by the Mitakshara Law as modified by the customs prevailing in the family and in the locality known as the jungle *mahals* from time immemorial that the estate was in its origin in the nature of a "feudal tenure in Chief" and was and is by its nature inalienable, that the defendant and his father Madhu Sudan were all along joint with the deceased Raja Satrughna and used to be maintained by the latter, though according to family custom they had a separate house to live in. The defendant denied that the proprietor for the time being of the Dhalbhum Estate had or has any right to dispose of any of the properties of the estate by Will or otherwise or to nominate any person as his heir or successor.

The Court below by its judgment and decree dated the 21st August 1922 held that the estate being an impartible one was alienable, that the defendant had failed to prove that either by custom or by its nature it was inalienable, that the alienation was not bad by reason of the provisions of the Encumbered Estates Act, and in the result decreed the suit in a "modified form." The defendant has appealed to this Court.

At the hearing of the appeal an application was made on behalf of the appellant for the admission of certain documents in evidence. These documents were produced in the Court below, but it is said they were not tendered in evidence owing to inadvertance. The respondent objected to their being admitted in evidence. The

(1) 29 C. 343; 29 I. A. 62; 6 C. W. N. 459; 4 Bom. L. R. 372; 8 Sar. P. C. J. 238 (P. C.).

documents were referred to and discussed by learned Counsel on both sides at the hearing of the appeal, the question of their admissibility being reserved for decision after the arguments were over.

We have considered the question and for reasons recorded in the order-sheet dated to-day we have admitted them (except one) in evidence and directed them to be marked as Exhibits.

The first question for consideration is whether Raja Satrughna had power to dispose of the Dhalbhum Estate by his Will.

It is admitted that parties are governed by the Mitakshara School of Hindu Law, that the Dhalbhum Raj is impartible and that the succession to it, takes place according to the rule of lineal primogeniture. It is found that the defendant was joint in estate with Raja Satrughna; the learned Counsel for the plaintiff-respondent does not press his objections to that finding, and there is ample evidence in support of it. So that if there was no power of alienation, the defendant is entitled to succeed by right of survivorship. The Court below has held that it is "settled law now that in case of impartible *zemidaries* governed by the Mitakshara Law, the holder of the *zemindari* can alienate the estate by Will, gift, mortgage, sale, adoption or nomination of next-of-kin when there is succession to the *zemindari* by lineral primogeniture." It has further held that, "It is settled law now that the holder of an impartible *zemindari* governed by the rule of succession by the custom of lineal primogeniture can alienate the *zemindari* unless there be any family local custom restricting such alienation, and that the onus of proving such custom lies upon the person who alleges it," and reference is made to the case of *Sartaj Kuari* v. *Deoraj Kuari* (2) and some other cases. On behalf of the appellant it is contended that having regard to the principles enunciated in *Baijnath Prasad Singh* v. *Tej Bali Singh* (3) (and some other cases) the holder of an impartible Raj has no power to alienate it, at any rate by any testamentary disposition.

In the case of *Baijnath Prasad Singh* v. *Tej Bali Singh* (3) Lord Dunedin in delivering the judgment of the Judicial Committee reviewed the decisions on the point and held that the succession to an impartible estate which is ancestral property of a joint Hindu family governed by the Mitakshara is "designated by survivorship." His Lordship after reviewing the cases on the point decided before *Sartaj Kuari's case* (2) observed:—

"Up to this point, with the single exception of the Tippera case, which, as stated, was not under Mitakshara Law, the law is all one way and seems to affirm these propositions:—

(1) The fact that a Raj is impartible does not make it separate or self-acquired property.

(2) A Raj, though impartible, may in fact be self-acquired or it may be family property of a joint undivided family.

(3) If it is the latter, succession will be regulated according to the rule which obtains in an undivided joint family, so far as the selection of the person entitled to succeed is concerned, *i. e.*, the person will be designated by survivorship, although then according to the custom of impartibility, he will hold the Raj without the others sharing it."

So far, therefore, as the question of succession is concerned, the authorities show that the principle of survivorship regulates the succession in a Mitakshara joint family, though the estate is an impartible one governed by the rule of lineal primogeniture, except that the estate is held by a single member. In the present case, however, the question is not one of succession, but the power of testamentary disposition over an impartible estate. So far as

(2) 15 I. A. 51; 10 A 272; 5 Sar. P. C. J. 139; 12 Ind. Jur. 213; 6 Ind. Dec. (N. S.) 182 (P. C.).

(3) 60 Ind. Cas. 534; 43 A. 228; 19 A. L. J. 317; 33 C. L. J. 388; 40 M. L. J. 387; (1921) M. W. N. 300; 25 C. W. N. 564; 2 P. L. T. 257; 23 Bom. L. R. 654; 3 U. P. L. R. (P. C.) 35; 29 M. L. T. 358; 48 I. A. 195 (P. C.).

the question of the power of alienation is concerned the leading case is that of *Sartaj Kuari* v. *Deoraj Kuari* (2). In that case the owner of an impartible Raj made a gift of 17 villages forming part of the estate in favour of his younger wife. Thereupon a suit was brought by his son (by his first wife) for declaration that the gift was invalid on the ground that the Raja had no power to alienate any part of the Raj Estate. The Trial Court decided that the deed of gift was invalid. On appeal the High Court of Allahabad held that "they were not prepared to admit at any rate so far as the law governing these (the North-West) Provinces is concerned, except where it is clearly overriden by well-recognised family custom, an absolute disposing power in one member of a joint family over an estate which has some of the incidents at least of joint family property." Sir Richard Couch in delivering the judgment of the Judicial Committee observed: "It is admitted that the Raj is impartible, and that there is a custom of succession by primogeniture. The question how far the general law of the Mitakshara is superseded and whether the right of the son to control the father is beyond the custom is one of some difficulty. The Judges of the High Court have quoted in support of their view passages from several judgments of this Committee. In all of them the question was as to the succession to the property on the death of the Raja or *zemindar* and it was held that, for the purpose of determining who was entitled to succeed, the estate must be considered as the joint property of the family." Then after referring to some decisions of the Judicial Committee his Lordship observed "that though an impartible estate may be for some purposes spoken of as joint family property, the co-parcenary in it which under the Mitakshara Law is created by birth does not exist." "The reason for the restraint upon alienation under the law of the Mitakshara is inconsistent with the custom of impartibility and succession according to primogeniture. The inability of the father to make an alienation arises from the proprietary right of the sons.....The argument in support of the view of the High Court appears to be that although the sons do not take an interest by birth, so as to enable them to hold the estate or to have a partition, they have as members of a joint family some interest which is sufficient to enable them to prevent an alienation. The learned Judges of the High Court say: 'It must be conceded that the complete rights of ordinary co-parcenership in the other members of the family to the extent of joint enjoyment and the capacity to demand partition are merged in, or perhaps to use a more correct term, subordinated to the title of the individual member to the incumbency of the estate, but the contingency of survivorship remains along with the right to maintenance in a sufficiently substantial form to preserve for them a kind of dormant co-ownership.'" "The property in the paternal or ancestral estate acquired by birth under the Mitakshara Law, is in their Lordships' opinion so connected with the right to a partition that it does not exist where there is no right to it." "It is difficult to reconcile this mode of succession with the rights of a joint family and to hold that there is a joint ownership which is a restraint upon alienation."

The case, therefore, establishes the following propositions:—

(*i*) In an impartible estate governed by the rule of lineal primogeniture the co-parcenary which under the Mitakshara Law is created by birth does not exist, and the son is not a co-sharer with the father.

(*ii*) Property in ancestral estate acquired by birth under the Mitakshara Law is so connected with the right to a partition that it does not exist when there is no right to it.

(*iii*) For the purposes of determining who are entitled to succeed the estate must be considered as the joint property of the family.

The next case is *The Fisrt Pittapore case* [*Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court*

of Wards] (4) in which it was distinctly laid down that an impartible estate is not inalienable by Will or otherwise by virtue only of its impartibility, and in the absence of proof of some special family custom or tenure attaching to the *zemindari* and having that effect. That is a case directly in point, and unless it can be distinguished is binding upon us. It is contended on behalf of the appellant that there was no jointness in estate in that case. It is necessary, therefore, to examine the facts of the case. It appears that the Raja of Pittapur adopted the plaintiff who was the natural born son of the Raja of Venkatagiri. Under the adoption deed, he was to reside with his adoptive father, but after so residing for some time he quarrelled with the latter and ceased to reside with him. The adoptive father gave some moveables to the plaintiff and money for the expenses of his marriage and it was arranged that he would get Rs. 2,000 per month for his maintenance. The defendant who claimed to be the son of the Raja set up a Will under which the estate was bequeathed to him. It was alleged that the defendant was a supposititious child but the Court held that the bequest was to him as a *persona designata* and that the Will was genuine. It is true that the plaintiff left the residence of the Raja, but the facts show that he was joint in estate with the Raja.

In the statement of facts at page 84 of the report it is stated that the High Court took up the question "whether it was within the power of the holder to alienate it by his Will so as to deprive his son, who, but for the impartible character of the estate would have been a joint owner thereof with him of all interest in the said estate." Mr. Mayne's argument proceeded upon the footing that the adopted son had a vested right in the estate, and Sir Richard Couch in delivering the judgment said (page 90): "The Courts below held that the estates of the Raj though impartible were in the nature of joint family property and were, therefore, according to the law of the Mitakshara inalienable except for necessary objects," and observed (at page 91) "that where the Mitakshara Law prevails and there is the custom of primogeniture the eldest son does not become a co-sharer with his father in the estate, the inalienability of the estate depends upon custom which must be proved, or, it may be in some cases, upon the nature of the tenure."

Reliance, however, is placed on a passage in the judgment (at page 95) which runs as follows: "It was argued that the decision in *Sartaj Kuari* v. *Deoraj Kuari* (2) did not extend to a Will, and a case in *Vitla Butten* v. *Yamenamma* (5) was referred to. That was a case of an admitted co-parcenary between the maker of the Will and his adopted son, and the latter would take as the surviving co-parcener a title which was held to be a prior title to that by devise. It is not applicable here, where co-parcenary between the Raja and the adopted son is not admitted, but the contrary is held. In the present case, according to the decision in *Sartaj Kuari* v. *Deoraj Kuari* (2) the appellant did not become a co-parcener with the Raja. If the Raja had power to alienate he might do it by Will, and the title by the Will would have priority to the title by succession."

It is contended that the Madras case was distinguished on the ground that there was co-parcenary in that case where as in *The First Pittapur case* [*Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards*] (4) *co-parcenary between the Raja and the adopted son was "not admitted but the contrary is held,"* which shows that there was no co-parcenary. But the adoption was admitted, and although the adopted son quarrelled with the Raja and was living separate from him, he was receiving maintenance (Rs. 2,000 per month) from the Raja. That being so, there can be no doubt that there was jointness *in fact*. It seems to us

(4) 26 I. A. 83; 22 M. 383; 1 Bom. L. R. 277; 3 C. W. N. 415; 7 Sar. P. C. J. 481; 9 M. L. J. Sup. 1; 8 Ind. Dec. (N. S.) 276 (P. C.).

(5) 8 M. H. C. R. 6.

that what was meant was that *in law* there was no co-parcenary between the adopted son and the Raja, as their Lordships say "In the present case, according to the decision of *Sartaj Kuari* v. *Deoraj Kuari* (2) the appellant did not become a co-parcener with the Raja." If there was no jointness *in fact* there was no necessity for reference to the case of *Sartaj Kuari* v. *Deoraj Kuari* (2). The Madras case related to an ordinary Mitakshara family and, therefore, his Lordship observed that it was the case of an admitted co-parcener, but in *Sartaj Kuari* v. *Deoraj Kuari* (2) which also was a case of admitted joint estate it was held that in an impartible Raj governed by the rule of primogeniture the co-parcenary which under the Mitakshara Law is created by birth does not exist, and the son is not a co-sharer with his father. By reason of the decision in that case, therefore, there was no co-parcenary (as a matter of law) between the Raja and the adopted son in *The First Pittapur case* [*Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards*] (4) although the latter was joint with the Raja, and that is what was meant in the passage that the co-parcenary "is not admitted but the contrary is held." It is also contended that in the case of *Sartaj Kuari* v. *Deoraj Kuari* (2) jointness was not found, whereas in the present case jointness was asserted not only by Satrughna but by all the members of the family, and is conclusively proved, and that, therefore, the decision in *Sartaj Kuari's case* (2) does not apply to the present. But if there was no jointness in *Satraj Kuri's case* (2) it would have been wholly unnecessary to go into the questions dealt with by the Judicial Committee whose judgment proceeded upon the footing that there was jointness in fact, though there was no co-parcenary in law.

It is contended that impartibility is inconsistent with the power of alienation, that if the holder of an impartible estate has the power of alienation, he can, if he chooses, put an end to the impartibility by alienating the estate to different persons who may be absolute strangers to the family, and who can at once partition the estate, and that in fact impartibility, lineal primogeniture and inalienability all converge to preserve the entity of the estate, and we were referred to Golap Chandra Sarkar's Hindu Law, 4th Edition, pp. 511-512.

The reason, however, why an impartible Raj has been held to be alienable in the cases cited above, as already stated, is that in such an estate, the co-parcenary which under the Mitakshara Law is created by birth does not exist and the reason for restraint upon alienation, therefore, ceases to exist in the case of an impartible estate.

There are repeated admissions of Satrughna and other members of the family that the estate has been held from the time of remote ancestors, as a joint ancestral impartible Raj. Satrughna died joint in estate with the defendant (Protap), and if it were ordinary ancestral property there is no doubt that Protap would have taken the estate by survivorship.

It is accordingly contended on behalf of the appellant that if, as held in a series of cases the succession to an impartible Raj also goes by survivorship, the right by survivorship being prior to a right under a Will operates only from the death of the testator, there was no property of Satrughna upon which the Will could operate. Reference is made to the case of *Lakshman Dada Naik* v. *Ramchandra Dada Naik* (6) and *Vitla Butten* v. *Yamenamma* (5). Both the cases related to an ordinary Mitakshara family. In the first case it was held by the Judicial Committee that under the Mitakshara Law as received in Bombay, a father cannot by Will make an unequal distribution of ancestral property whether moveable or immoveable, that although one of several co-parceners under the same law has the power of alienating his undivided share in ancestral estate without the consent of his co-sharers by

(6) 7 I. A. 181; 5 B. 48; 4 Sar. P. C. J. 173; 3 Suth. P. C. J. 778; 3 Shome L. R. 217; 4 Ind. Jur. 472; 7 C. L. R. 320; 3 Ind Dec (N. s.) 34 (P. C.).

deed executed for valuable consideration and although such share may be seized and sold in execution for the separate debt of the co-sharer, at least in the lifetime of the judgment-debtor, yet such alienation cannot be made by Will. Their Lordships referred to the case in *Vitla Butten* v. *Yamenamma* (5) and observed: "Again, the High Court of Madras though admitting that a co-parcener can effectually alienate his share by gift has ruled that he cannot dispose of it by Will [see the case reported as *Vitla Butten* v. *Yamenamma* (5)]. Its reasons for making the distinction between a gift and a devise are, that the co-parcener's power of alienation is founded on a right to a partition: that that right dies with him, and that the title of his co-sharers by survivorship vesting in them at the moment of his death there remains nothing upon which the Will can operate. This principle was invoked in the case of *Suraj Bunsi Koer* v. *Sheo Prasad Singh* (7) and was fully recognised by their Lordships".....and further on observed: "they are of opinion that the principles upon which the Madras High Court has decided against the power of alienation by Will are sound and sufficient to support that decision."

It is contended that with regard to the rule of succession by survivorship there is no distinction between partible property and impartible property under the Mitakshara Law, except that in the latter case the estate is held by a single person, and that that being so, the principle that in a case of succession by survivorship, the title of survivorship being the prior title takes precedence to the exclusion of that by devise, applies to an impartible estate also.

It is further contended that the principle of survivorship pre-supposes jointness of interest during the lifetime of two persons, and though in an impartible estate the right to call for partition does not exist in the other members of the family the right to partition is only one of the incidents of joint ownership, and that in an impartible estate, the members of the joint family (other than the holder of the estate) receive maintenance according to custom and before *Satraj Kuari's case* (2) it was held that impartibility does not destroy jointness. Reference was made to the case of *Tekait Doorga Persad Singh* v. *Tekaitni Doorga Koonwari* (8) where it was observed that impartibility does not destroy its nature as joint family property or render it the separate estate of the last male holder so as to destroy the right of another member of the joint family to succeed upon his death in preference to those who would be his heirs if the property were separate, and also to the observations in the case of *Naraganti Achammagaru* v. *Venkatachalapati Nayanivaru* (9) that such an estate though possessed by one of the members of the family is the joint property of the family and in the event of death passed by survivorship.

The principle of survivorship, however, which governs succession in ordinary joint family under the Mitakshara, has to be followed, according to the decisions since *Sartaj Kuari's case* (2), in the case of impartible estate only for a particular purpose *viz.*, to find out a sucessor, and it is only for the purpose of determining who is entitled to succeed, that the estate is to be treated as the property of the joint family.

The question, therefore, is no longer *res integra*, and we are bound to hold having regard to the decisions of the Judicial Committee in *Sartaj Kuari's case* (2) and *The First Pittapur case* (4) that in the absence of any custom, an impartible estate is alienable by way of transfer *inter vivos*, as well as by a testamentary disposition. The principle of the said decisions has been followed or recognised in subsequent cases also. In *Tara*

(7) 6 I. A. 88; 5 C. 148; 4 Sar. P. C. J. 1; 3 Suth. P. C. J. 589; 4 C. L. R. 226; 2 Shome L. R. 242; 2 Ind. Dec. (N. S.) 705 (P. C.).

(8) 5 I. A. 149 at pp. 159, 160; 4 C. 190; 3 C. L. R. 31; 3 Suth. P. C. J. 540; 3 Sar. P. C. J. 827; 2 Ind. Jur. 650; 2 Shome L. R. 21; 2 Ind. Dec. (N. S.) 121 (P. C.).

(9) 4 M. 250; 1 Ind. Dec. (N. S.) 1010.

Kumari v. *Chaturbhuj Narayan Singh* (10) it was held that there was complete separation of the joint family between Thakur Ranjit Narain Singh (the holder of the impartible estate) and his brother Bhupat Narain and consequently the impartible estate became the separate property in which the appellant the widow of the last holder, was entitled to a widow's estate. But their Lordships, referring to the judgment of the High Court observed: "Those learned Judges overlooked the fact that Bhupat Narain Singh and his son had no co-parcenary rights in the impartible estate, and no rights in that estate which entitled them or either of them to a partition of the impartible estate. They could not have prevented Thakur Ranjit Narain Singh from alienating that impartible estate in such a way as to determine any contingent interest they had in it under the custom. Their contingent interest under the custom was liable to be defeated by an alienation of the estate by Thakur Ranjit Narain even if the family had remained joint." In *Bachoo* v. *Mankorbhai* (11) Sir Lawrence Jenkins, C. J., observed: "But whatever may have been the opinion that prevailed at that time it has now been definitely decided by the Privy Council in *Sartaj Kuari* v. *Deoraj Kuari* (2) and in *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards* (4) that in impartible properties there is no co-parcenary."

In *Venkata Mahipathi Gangadhara Rama Rao* v. *Rajah of Pittapur* [*The Second Pittapur case*] (12), the plaintiff, the adopted son of the late Raja of Pittapur, sued the defendant (to whom the estate had been devised by the late Raja after the adoption of the plaintiff) for maintenance. He rested his case not on any relationship with the defendant which he denied but on what he alleged was the general law *viz.*, that by birth, he had a right to maintenance out of the property constituting the Raj which right followed the property into the hands of a third party, Lord Dunedin in delivering the judgment referred to the view taken by the High Court in *Sartaj Kuari's case* (2), and observed (at page 783*):—"But the decision of the Board which binds their Lordships made that view no longer tenable. It settled that in an impartible *zemindari* there is no co-parcenary, and consequently no person existed who as co-parcener could object to alienation of the whole subject by the *de facto* and *de jure* holder. That judgment was followed and applied to this very Raj in *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards* [*The First Pittapur case*] (4). The import of these decisions was in their Lordships' view correctly stated by Sir Lawrence Jenkins, in the case of *Bachoo* v. *Mankorbhai* (11): 'It has now been definitely decided that in impartible properties there is no co-parcenary'." Then after referring to the right of maintenance as an inherent quality of the right of co-parcenary that is, of common property observed (at page 784*) that "the right to maintenance, so far as founded on or inseparable from the right of co-parcenary begins where co-parcenary begins, and ceases where co-parcenary ceases".

It is contended on behalf of the appellant that in the present case there was not merely a notional but actual jointness. According to custom the members of the joint family not only got maintenance, but education and marriage expenses also, so that there was actual enjoyment by the members of the family so far as was consistent with the impartibility of the estate. That is so, but if as held in the above cases, there is no co-parcenary in law, and the estate is to be treated as joint only for a particular purpose, the dis-

(10) 30 Ind. Cas. 833; 42 I. A. 192; 42 C. 1179; 19 C. W. N. 1119; 29 M. L. J. 371; 18 M. L. T. 228; 2 L. W. 843; 13 A. L. J. 1031; 17 Bom. L. R. 1012; 22 C. L. J. 498; (1915) M. W. N. 717 (P. C.).

(11) 29 B. 51 at p. 58; 6 Bom. L. R. 268.

(12) 47 Ind. Cas. 354; 45 I. A. 148; 41 M. 778 at p. 782; 35 M. L. J. 392; 24 M. L. T. 276; 16 A. L. J. 833; 28 C. L. J. 428; 5 P. L. W. 267; 20 Bom. L. R. 1056; 23 C. W. N. 173; (1918) M. W. N. 922 (P. C.).

*Pages of 41 M.—[*Ed.*]

tinction relied upon by the appellant does not help him.

In the case of *Baij Nath Prasad Singh* v. *Tej Bali Singh* (3), there was no question of alienability and the only question related to succession. But their Lordships in discussing the last question had to refer to *Sartaj Kuari's case* (2), because of the contention that the succession to an impartible estate was not governed by survivorship having regard to the principle laid down in the case of *Sartaj Kuari's case* (2), that there is no co-parcenary in an impartible Raj, and also to the decision in *The Second Bettiah case* [*Bishun Prakash Narayan Singh* v. *Janki Koer*] (13), based upon the admission of Counsel. With reference to *Sartaj Kuari's case* (2), it was pointed out that the question of succession was outside the scope of enquiry in that case, and it was observed (at page 244*):—"No doubt it would have been possible to decide the case of *Sartaj Kuari* v. *Deoraj Kuari* (2), differently if the theory had been accepted that impartibility being a creature of custom though incompatible with the right of partition, yet left the general law of the alienability by the head of the family for other than necessary causes without the consent of the other members as it was." Nevertheless the decision in *Sartaj Kuari's case* (2) was not declared to be incorrect. Their Lordships observed: "Even if, however, their Lordships thought the decision in *Sartaj Kuari* v. *Deoraj Kuari* (2) wrong—an opinion which they do not pronounce—the case has stood too long to be touched." *Baij Nath's case* (3), therefore, did not touch the law regarding alienability of an impartible estate, but left the law where it was.

Our attention has been drawn to Mayne's Hindu Law, 9th Edition, page 796, where it is stated "whether a co-parcenary is to be assumed solely for purpose of ascertaining the next heir or whether it is a living principle by which the succession is to be regulated is an extremely difficult question, and when it comes before the Privy Council, that Tribunal will have to resolve the difficulty created by the fact that the doctrine of survivorship and the right of testamentary disposition cannot co-exist". That question, however, must be taken as settled, and having regard to the state of the authorities, we are bound to hold that the holder of an impartible estate has the power of alienating it by Will, and that, therefore, Raja Satrughna had the power to dispose of the Dhalbhum Estate by his Will.

Custom of Inalienability.

If according to law, an impartible Raj is not inalienable. it is for the defendants to prove that, by custom the estate is inalienable. Before dealing with the evidence on the point, we may point out the nature of the evidence required to prove custom in such cases.

In the case of *Sartaj Kuari* v *Deoraj Kuari* (2) their Lordships in considering the custom of inalienability observed: "The fact that there is no evidence of a sale of any portion of the estate is in the plaintiffs' favour but this is not sufficient. The absence of evidence of an alienation without any evidence of any facts which would make it probable that an alienation would have been made cannot be accepted as proof of a custom of inalienability."

In the case of *Durgadut Singh* v. *Rameshwar Singh* (14), the latter portion of the above passage was quoted and followed, and their Lordships observed: "But in this case numerous instances were proved in which alienation of small portions of the property took place and in not a single instance was it proved that any objection based upon the alleged custom was raised by any one to an actual or threatened alienation. It was raised in the present suits for the first time".

In *Rama Nand* v. *Surgiani* (15)

(13) 62 Ind. Cas. 289; 24 C. W. N. 857; 28 M. L. T. 105; 12 L. W. 349 (P. C.).

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(14) 4 Ind. Cas. 2; 36 C. 943; 13 C. W. N. 1013; 11 Bom. L. R. 901; 6 M. L. T. 68; 10 C. L. J. 233; 6 A. L. J. 847; 19 M. L. J. 567; 36 I. A. 176 (P. C.).

(15) 16 A. 221 at p. 223; A. W. N. (1894) 47; 8 Ind. Dec. (N. S.) 143.

Sir John Edge, C. J., and Burkitt, J., observed:—"In such a case the kind of evidence that ought to be regarded is evidence showing that the right claimed by custom was more or less contested and the contest abandoned by some one who, if the custom had not existed, would have been entitled, or evidence showing that generally in the District the custom was followed to the exclusion of persons who, if it had not been for the custom, would presumably have enforced their right under the general law. Evidence which is as consistent with there being a custom as with there being no custom at all is not evidence of a custom modifying or varying the general law. In this case, so far as we can see, there was no evidence of custom in the strict sense to be considered."

It is contended that the estate has remained intact for several centuries, and the fact of its existence for such a length of time is an indication that there was no power of alienation, as otherwise the estate would in all probability have been broken up and dissipated.

Reference is made to paragraph 105 of the judgment in Suit No. 17 of 1890 brought by Nityanand Dhal against Satrughna Dhal and others, where the statement of Raja Man Govinda (the son of Raja Kamala Kant of the Jamboni branch) dated the 26th June 1859 with reference to the "date from which the successor of the original title holder has been holding title" is set out. It was stated that Raja Jagannath Dhabal Deo the founder of the family came from Dharanagar in the Western Provinces in the year 638 *B. S.*, and established himself in the Dhalbhum Raj. Reference is also made to the statement of Satrughna contained in his petition dated 29th March 1887 where he stated that 24 generations back his ancestors migrated to this part of the country from Dharanagar and the family was governed by the Mitakshara. As for Man Govinda's statement it was not accepted by the Court and even if it be accepted, it merely shows that the family migrated to this part of the country centuries ago. It does not show since what time the family came to possess property, nor how long the estate is impartible and governed by lineal primogeniture. Whether the family migrated about seven centuries ago (638 *B. S.*) or not, as to which, of course, there is no evidence beyond the statement of Raja Man Govinda made in 1859 or that of Satrughna made in 1887, it appears as stated in the judgment of this Court dated the 5th August 1893 in the appeal of *Rani Siromoni* against *Satrughna* that the members of the family looked upon themselves as Khatrias who came many generations ago from some place in the North-West Provinces. There is no doubt also that the bulk of the estate has remained intact for many generations. We were referred to a passage in the judgment of the Judicial Committee in the case of *Sheonath Singh* v. *Badan Singh* (16), where Lordships observed (with reference to the judgment of the Appellate Court) "The judgment omits from consideration in the appraisement of the case the existence of the family as an entity through so many centuries which entity could only survive destruction and disintegration with the help of such a family custom." (The family custom there referred to was the custom of lineal primogeniture). The fact referred to by their Lordships is no doubt to be borne in mind, but it also must be remembered that according to the law understood prior to the decision in the case of *Sartaj Kuari* v. *Deoraj Kuari* (2) in 1889, an impartible Raj had always been considered as inalienable. And if the Rajas were following what they believed to be the law, it was not custom, because custom is something in derogation of the law. It may also be pointed out that the estate in *Sartaj Kuari's case* (2) had its origin three years before the suit, and evidently that fact by itself was not held to be sufficient proof (in the absence of custom) of inalienability.

The question we have to consider is whether the evidence proves the custom of inalienability. In considering that question we have to bear in mind that if

(16) 64 Ind. Cas. 194; 48 I. A. 446 at pp. 464, 465; 17 N. L. R. 128; 26 C. W. N. 226; 48 C. 997; 20 A. L. J. 443; (1922) A. I. R. (P. C.) 146 (P. C.).

there was any occasion when having regard to human nature, there was likelihood of alienation, and alienation was not effected, it would be evidence of inalienability.

We will now deal with the instances in which it is said that alienations would have been made, were it not for the custom of inalienability.

(1) Raja Ram Chandra I died leaving a widow (who was *enceinte*), a widowed daughter-in-law (the widow of Kartikeswar who had pre-deceased Raja Ram Chandra) and a brother Hakim Nursingh. Hakim Nursingh became the Raja, and that was a fact relied upon by Satrughna in Rani Siromani's Suit No. 1 of 1889 as an instance (among others) of exclusion of the widow as bearing upon the question whether the family was governed by the Mitakshara or Dayabhaga (see judgment of District Judge dated the 19th August 1891 in that suit), and the judgment of the High Court dated the 15th August 1893 on appeal). But no inference can be drawn in favour of any custom of inalienability from the fact that Raja Ram Chandra I, did not execute any Will and that Nursingh succeeded to the Raj. It does not appear that the Raja was aware of the Rani being *enceinte* when he died. If he was aware of it, there was the possibility of her giving birth to a son, in which case there could be no question of bequeathing the estate to the widow. But, of course, there was no knowing that she would give birth to a son, even if the Raja was aware she was *enceinte*, and we must consider the question from the point of view that the Raja was not aware that she was with child or that she would give birth to a son. It does not appear when the succession of Hakim Nursingh took place. But Jagannath I, who was in the womb when Raja Ram Chandra I, died was installed as Raja in 1767, as appears from the *District Gazetteer* Singhbhum (page 27). Raja Ram Chandra must have, therefore, died sometime before 1750. Wills were unknown at that time, at any rate in that part of the country. But apart from that the contention that the Raja did not execute any Will in favour of his wife because of the consciousness that he could not alienate the estate, proceeds upon the assumption that a man dying without issue would naturally leave his estate to his widow. That may be a natural feeling with persons of other nationalities or even with some of the present day Hindus specially in towns. But was that the feeling among Hindus, at any rate, in those days? Apart from the sentiment of preserving the prestige and dignity of the family, and the integrity of the estate, there was generally speaking a feeling among Hindus until recent times, against the estate passing into the hands of the wife's relations. Even Hindus governed by Dayabhaga Law (as to whose power of alienation there is no doubt) in those days very rarely made dispositions of their estates in favour of their wives. The effect of such disposition would be to pass the ancestral estate from the family of the owner to the family of his father-in-law. It is well known that Hindus specially in those days were anxious to provide for the offering of *pindas* and libations of water to them after their death, and the members of the widow's family are not competent to offer *jal pinda*. The feeling against the estate passing into the family of the wife would be much stronger in the case of an owner of an impartible Raj which had descended by lineal primogeniture from generation to generation. We ought not to judge of the feelings and sentiments of these Rajas imbued with ideas of customs of hoary antiquity in the light of the feelings and sentiments of other nationalities or of Hindus of the present generation. Even assuming that a Will had been made, how could rights under a Will be enforced at that time, when the British power had not been established and there were no British Courts to enforce rights? Apart from the fact that the instinct of jointness was very much stronger then, than at present, could Raja Ram Chandra I, expect that his widow would be able to enforce her rights under a Will if he executed any, as against his younger brother who would succeed under the Mitakshara Law as well as under family custom? The question of succession of

Hakim Nursingh would be settled in no time by an appeal to arms, and a female would not venture to set up rights as against a male who had law and custom on his side and followers to support his claim. The argument that no Will was executed in favour of his widow has, therefore, no force. It is contested, however, that some provision would certainly have been made by Raja Ram Chandra for his widow and widowed daughter-in-law, but this contention assumes that no provision was made. It is for the party setting up the custom to show that no provision was made and there is no such evidence. There is no suggestion in the pleadings nor in the evidence of witnesses that no provisions were made for members of the family. The widow and the widowed daughter-in-law would under the family custom be entitled to maintenance. The amount of maintenance is not left to the caprice of the next Raja, but is regulated by well-known custom in these ancient impartible estates, and though there is no evidence as to what maintenance they got, the evidence with regard to some widows in other cases to be presently noticed, shows that widows of the family were amply provided for under the family custom.

After Raja Ram Chandra I died, his widow gave birth to a son. But Hakim Nursingh had already taken the *gadi*. After the birth of the son, the latter was entitled to the Raj, but he was a mere child and Nursingh's possession of the estate must be taken to be that of an usurper.

II. Raja Nursingh died leaving two widows, and a brother Nimai *alias* Baikuntha I, who became the Raja. It is contended that this was another occasion when a Will or other provision could have been made in favour of his widows by Nursingh. The learned Subordinate Judge says that Hakim Nursingh did not become Raja. It appears that he did succeed as Raja as Ram Chandra's son Jagannath I was then in his mother's womb. He was, however, subsequently deposed in 1767 and Jagannath was installed as Raja by the British. So that at the time of his death Nursingh was not the Raja, and it was therefore not an instance in which the Raja could have and did not make a Will in favour of his widows. Then again there is nothing to show that no provision was made for them either by Nursingh or that they were not maintained according to family custom. Lastly some of the observations we have made with reference to Raja Ram Chandra's not making a Will apply to this case also.

III. Baikuntha I, *alias* Nimai, died leaving two sons Beer Chandra and Radha Govind. The former set up an agreement by Jagannath I appointing him successor, but the Courts held that it was invalid and gave the Raj to Ram Chandra II, the eldest son of Jagannath I, under the rule of primogeniture. But Baiknntha I was not the Raja at the time of his death. It appears that after Nursingh was deposed and Raja Jagannath installed as Raja by the British, he rebelled, and was deposed and Nimai, *alias* Baikuntha I, was installed as Raja by the British. But he was Raja only for a short period; he had no followers and Jagannath I was installed as Raja and he got the first settlement of the Raj Estate from the British Government in 1777. In the *tasilnama* granted to Raja Jagannath I, in 1777 by the East India Company there was a provision that he was to give "Baikuntha Dhal lands valued at Rs. 1,000 for his subsistence and raiment." It is clear, therefore, that Baikuntha I was not the Raja at the time of his death, and we do not see how any argument can be founded upon the fact (assuming it to be a fact) that Baikuntha did not provide for his two sons.

With regard to the agreement set up by Beer Chandra by which it was alleged that Jagannath I appointed him his successor, it appears that after the death of Raja Jagannath I, which took place some time between 1800 and 1805, a dispute arose as to who should succeed him, *viz.*, Beer Chandra who set up the agreement, or Ram Chandra the eldest son of Raja Rajagnath. The correspondence between the Collector and the Judge of Midnapur and the Board of Revenue

in the year 1805, and the recitals in the *dowl bandobusht* made with Ram Chandra on the 27th August 1805, show that Beer Chandra's *mokhtar* opposed the registration of the name of Ram Chandra and applied to get his (Beer Chandra's) name registered in the place of Raja Raganath I. The Collector on the 12th August 1805 directed both parties to file their respective documents. Beer Chandr's *mokhtar* filed 11 copies of *parwanas* showing that the *parwanas* were in the name of his father, and also an *ikrarnama* bearing the seal and signature of his father (Baikunth I). Ram Chandra started proceedings before the Judge as would appear from his order dated the 14th August. Under the Regulations the Judge had power to take summary proceedings and also to hold regular trial in cases of disputed successions. The Collector seems to have thought that the Judge had no power to make a summary order, and he referred the matter to the Board of Revenue. The latter by its order dated the 20th August 1805 directed the Collector to act according to the precept of the Judge and to "refer Beer Chandra to prosecute any claim he may have to the estate lately held by the father of Ram Chandra. Accordingly a *dowl bundobast* was made with Ram Chandra on the 27th August 1805, and he as the son and the rightful heir of his father Jagannath was registered in his place. Thus ended the claim of Beer Chandra based upon the agreement alleged to have been executed by Jagannath. Reliance, however, is placed upon the fact that Jagannath sought by an agreement to alienate the property, but the attempt was unsuccessful, and this is referred to as evidence of inalienability. But it is to be observed in the first place that although the *mokhtar* of Beer Chandra stated before the Collector that an agreement was executed by Raja Jagannath to the effect that after his death Beer Chandra should hold possession of the *zemindari*, no such agreement was as a matter of fact produced. What was produced was an *ekrar* executed by Baikuntha I (the father of Beer Chundra). Had any agreement executed by Jagannath been produced it would certainly have been mentioned in the *dowl* or in some other papers but there was none. In the next place the agreement was alleged to have been executed at the time of *jawari* at the *dashara* festival when Baikuntha came into possession of the estate. The year of the *dashara* was not stated. It could not have been after 1777 when Baikuntha I was deposed and Jagannath was agin restored to the estate by the British Government. Baikuntha was in possession for a short time before 1777 when Jagannath was deposed owing to his rebellion, and the "eleven copies of *parwanas*" probably referrred to that period when he was placed on the *gadi* by the British Government. But as already stated Baikuntha was shortly afterwards deposed and Jagannath was again installed in 1777 when the estate was settled with him. Lastly, Jagannath was on the *gadi* from 1777 up to some time in 1800-1805 (the Permanent Settlement was made with him in 1800). He was in possession with the help of the British Government. He had agreed to give lands valued at Rs. 1,000 for the subsistence and raiment of Baikuntha by the *tasilnama* in 1777 and had thus settled matters with Baikuntha. Had there been any agreement before the *tasilnama* of 1777 that after his death Beer Chandra would succeed, it would have been mentioned in the *tasilnama* of 1777. He had six sons, and it is exceedingly improbable that in these circumstances he should have entered into any agreement with Beer Chandra that the latter should succeed him on his death to the exclusion of his own sons. As we have said, no such agreement was produced and we think that the argument of the learned Counsel on behalf of the respondent that the statement of the *mokhtar* of Beer Chunder about the existence of such an agreement was purely illusory, has considerable force. We are accordingly of opinion that an agreement by Jagannath to divert the course of succession is not proved, and the argument on behalf

of the appellant that it was an instance where an attempted alienation was unsuccessful has no force. On the other hand the fact that such an agreement which would have the effect of alienating the estate, was set up (though falsely) by a member of the family, was inconsistent with the consciousness in the family that the estate could not be alienated if the agreement was genuine.

IV. Raja Jagannath I died leaving six sons and four widows. We have seen that his eldest son Ram Chandra II succeeded him. It is said that Raja Jagannath did not make any provision for his younger sons and widows. But the evidence shows that large grants were made for the maintenance of the younger sons. Hakim Nursingh was the second son. The judgment dated the 27th July 1905 in a Suit (No. 20 of 1904) brought by Raja Satrughna against two persons Jonardan Pal and Nanda Lal Giri for resumption of *Mouza* Purulia on the allegation that it was *hikimali khorposh* and, therefore, resumable, shows that Hakim Nursingh obtained *Mouza* Purulia and nine other *Mouzas* as an absolute and irrevocable *Lakhraj* grant made in full satisfaction of all claims of future maintenance. The third son was Jugal Kishore. It appears from the *khorposh patta* dated the 8th April 1850 (Exhibit 12) that Jugal Kishore was in possession of 64 *mouzas* for his maintenance, that a suit was brought by Raja Chitreswar II (whose guardian he had been under the Will left by Baikuntha) for resumption of the *mouzas*. The suit was brought in the lifetime of Jugal Kishore, and was continued after his death against his son Kinu. The lands were resumed and after resumption 18 *mouzas* were settled upon Kinu (son of Jugal Kishore) by way of permanent alienation. They are still in the possession of the defendant (appellant) the grandson of Kinu, and the area of 13 out of the 18 *mouzas* appears from the Settlement Records to be over 40,000 *bighas*. The defendant in paragraph 11 of his written statement in the present suit stated that his father Madhu Sudan used to be maintained by Raja Satrughna and used to support himself and his family from the income of some *khorposh* village, and a list of the 18 *mouzas* in the possession of the defendant is given in Schedule (*ga*) of the plaint. One of the 18 *mouzas* is Dakhinsol, and the defendant's father Madhu Sudan in his deposition in certain Land Acquisition cases in 1896 stated that Dakhinsol *mouza* (about 500 *bighas*) was his *mokrari khorposh mouza* held at a quit rent of annas twelve by right of succession.

The fourth son was Kamala Kant (Rajah in the Jamboni branch). It appears from the judgment dated the 28th December 1891 in the suit (No. 17 of 1890) by Nityananda against Satrughna, that Nityananda stated that "other members of the family receive maintenance" and, that "accordingly the plaintiff and his ancestors (his father was Kamala Kant) received *mouzas* from the Raja of Dhalbhum for their maintenance and the plaintiff is in possession of *mouza* for his *khorposh*." The Court found that "there can be no doubt on the evidence that Kamala Kant before succeeding to the Jamboni Estate had got four *mouzas* from his brother Raja Ram Chandra II on account of maintenance." All these facts go to show that the sons were in fact well provided for, and there was no necessity for making any Will. The lines of the fifth and sixth sons (Nimai and Raghu) are extinct, and no evidence is available with regard to them.

The case of Chitreswar I was also referred to. He left four sons, the eldest being Raja Ram Chandra I. But he must have died before 1750 long before the British Government was established. We have no materials for that period, and for reasons already stated, instances of succession before the British Government was established in the country, afford no help in deciding the question before us.

V. Raja Baikuntha II died leaving two widows Rani Joy Kumari and Rani Amrit Kumari and a minor brother Sukumar *alias* Raja Chitreswar II. He executed a Will (*wasyatnama*) by which

he appointed his uncle Hakim Nursingh as the guardian of his minor brother to manage the estate during his minority. It is said that the Raja was conscious of the power of making a Will and had he the power of alienating property he would have bequeathed the estate to his widows, at any rate would have made provision for them by his Will. We have shown that a Raja would not necessarily execute a Will in favour of his wife, even if he had the power to do so. As for making provisions for his widows, there is nothing to show that no provisions were made for them; and even if none was made the widows must have got sufficient maintenance according to the family custom. In an ordinary Mitakshara family the estate in such a case would go to the brother and not to the widows who get maintenance. Raja Baikuntha II died in 1825, and it cannot be said that it would have been the natural thing in 1825 to give the estate to the widows which would ultimately be enjoyed by the wife's relations. He had his minor brother who would on attaining majority preserve the estate for the family and maintain his widows, and he accordingly executed a *wasyatnama* providing for management of the estate during his minority and appointed his uncle as guardian and manager so that the ancient custom of impartibility and lineal primogeniture might be kept up.

VI. Jagannath II died leaving two sons. Reference is made to the *District Gazeteer* Singhbhum (page 213) to show that he left 12 widows, and it is contended that had he the power of alienation he would have made provision for these Ranis. On behalf of the respondent it is contended that the *District Gazetteer* should not be referred to for showing that the Raja left 12 Ranis, and it is pointed out that no ground of appeal was taken against the finding of the Court below that Raja Jagannath left a widow. However that may be, we do not think that any inference can be drawn in favour of the appellant even if the Raja left 12 Ranis. His eldest Rani, Rani Dhajamani (the Patrani) got considerable properties from him. The judgment in the case of *Prince Mahomed Buktyar Shah* v. *Rani Dhojamani* (17) refers to some such properties.

The Raja left two sons, both of them were very young, the elder being only five years old. It is contended on behalf of the appellant that ordinary human nature would prompt a disposition of property in favour of the other Ranis, at any rate proper provision would have been made for them, if the Raja had power of alienation. We do not think, however, that the Raja would be prompted to make any disposition of the estate among his twelve Ranis, when he had sons, and the elder son would in ordinary case succeed him according to family custom. It is true he was a minor, but it was well-known that the Court of Wards would take charge of the estate during his minority, and ordinarily a better arrangement cannot be made by entrusting the management to private individuals. As a matter of fact the estate was taken charge of by the Court of Wards. Assuming that Raja Jagannath left 12 Ranis we do not see that it would be natural for him to bequeath property separately to each of them with the effect of diminishing the estate to the detriment of his sons. As for their maintenance there is no dobut that there was the custom of making suitable provision for all members of the family male or female [see *Prince Mahomed Buktyar Shah* v. *Rani Dhojamani* (17)] and it does not appear that the Raja or his successor did not make suitable provision for these Ranis.

VII. Raja Purna Chandra (of the Jamboni branch) died in 1886 leaving two widows Rani Radha Kumari and Rani Parbati Kumari, and his brother Iswar the father of the plaintiff. It is said that he made no provision for the widows. But we have no evidence as to the age at which he died, and that no provision was made for the widows. It was Raja Purna's own brother Raja Iswar the father of the plaintiff, who got the Raj, and not any distant agnate, and in those circum-

(17) 2 C. L. J. 20 at pp. 28, 29

stances ordinarily the widows would get maintenance from the brother, even if no separate provision was made by the deceased Raja for them. It appears, however, from the judgment in the certificate case dated the 4th January 1887 that Iswar Chand (plaintiff's father) applied for a succession certificate to the estate of his brother Purna Chandra. He was opposed by the two widows Rani Radha Kumari and Rani Parbati Kumari. The former claimed the estate by virtue of a *tika* alleged to have been given to her by Raja Purna Chandra in his lifetime, and the latter based her title to the estate on a letter alleged to have been addressed by the Raja to the Collector. The Court in that case held that the family was a joint family governed by the Mitakshara, that the estate was ancestral there being no separate property in the family, the various members of it including Iswar, his wife and mother got maintenance from the estate and that the brother (Iswar) was entitled to succeed and observed "With regard to the alleged installation by the deceased of the senior widow as his heir, and that of his daughter as alleged by the junior widow, though a considerable amount of evidence was offered which is to a great extent destructive of the conflicting claims of the two widows I need not say much. Whether the family is governed by the Dayabhaga or Mitakshara deceased could not except (in the former case) by a regular Will settle the devolution of his estate, and it is not pretended that the document which it is said he signed and sent to the Collector Exhibit E is a Will. There is no evidence of any *kulachar* to that effect either, one of opposite party's witness, in fact, the Dewan Ram Kumar Patnaik expressly says that the deceased had no power to will away the estate".

Reliance is placed upon the above passage on behalf of the appellant and it is contended that Raja Purna Chandra could have alienated the Jamboni Estate in favour of the widows by proper instruments as the widows were so anxious to get the estate, and when some attempt was made to give them the estate by giving a *tika* and by letter addressed to the Collector. But in the first place the evidence as to the alleged installation was described by the District Judge as "mutually destructive of the conflicting claims of the two widows", and it is not clear whether the story set up by the widows was true. In the next place though the Dewan Ram Kumar stated that "Raja cannot appoint any one he chooses as his successor" in re-examination he stated that the "Raja if he had no son might make his widow successor". But even if he could not appoint a successor, it does not show that he had no power of alienation. A person may have the power of alienation and yet may not have the power to change the course of succession. As to the statement in the judgment that there is no evidence of any *kulachar* of making Wills, it is objected by the respondent that statement of facts in a judgment not *inter parties* is not admissible in evidence. But even if it is admissible, it only shows that there was no evidence of any family custom of making Wills, which is not the same thing as a custom of inalienability.

It appears from the copy of deposition of Ram Kumar that the Raja was addicted to drinking and that he was ill for a long time before his death from a disorder of the liver so induced. He lived separately from the Ranis, with a concubine for 1½ years, and it was at the house where he was living with the concubine that he is said to have given the *tika* to the senior Rani. There is no evidence that any letter was actually written to the Collector though it was so asserted. But if any letter was written, it goes against the appellant as showing consciousness on the part of the Raja that he had the power of disposition though he may not have been aware of the proper method of effecting it.

IX. The last case relied upon is that of Ram Chandra III.

He died on the 5th January 1887 leaving three widows Rani Siromani, Rani Churamani and Rani Muktmoni, and a brother Hakim Nursingh who, however, died childless. It is said that

he could have made a Will. But he died at the age of 24 by a fall from the roof of his house in a drunken state. Apart from the considerations which have already been stated in the case of other Rajas, it could not be expected of so young man that he would make a Will and the circumstances under which he died would also negative the suggestion.

There were a series of litigations on his death. Satrughna was entitled to succeed according to lineal primogeniture. He was, however, assailed on three sides by Rani Siromani, by Nityanand, and by Iswar (the plaintiff's father).

Rani Siromani as the senior Rani applied on the 10th February 1887 for registration of her name under the Land Registration Act, setting up Dayabhaga as the law of succession. No mention of any Will was made in her application for registration. The Deputy Commissioner decided in her favour on the 4th June 1887. (The judgment is not on the record). In his grounds of appeal to the Commissioner Satrughna relied upon family custom, upon the fact the estate was impartible and ancestral and that the family was joint, and governed by the Mitakshara, the very fact of *khorposh* grants proving jointness. All these allegations were directed against Siromani's case that the family was governed by Dayabhaga. The order was set aside by the Commissioner of Chota Nagpur on the 6th September 1887 whose order was upheld by the Board of Revenue on the 24th April 1888. The Commissioner held that the family was governed by Mitakshara Law, that there was jointness in estate, that primogeniture governed the succession, that no family custom inconsistent with it was proved, and that Satrughna was entitled to succeed. He observed that "in a petition to the Deputy Commissioner the Rani speaks of a Will executed by the late Raja in her favour but she has not pressed this probably under good advice, since the fact of the late production of such a document would have to be accounted for. But besides the question of the authenticity of the Will there is a further doubt whether the late Raja would have had any power to disturb by a Will the legal rights of heirs." So the Will was not produced even in September 1887. There is merely the "doubt" expressed by the Commissioner whether the Raja could distrub by a Will the legal rights of heirs, but this was before *Sartaj Kuari's case* (2) was decided by the Judicial Committee in 1889.

Having failed in the Land Registration proceedings Rani Siromani applied for Probate of the alleged Will of Raja Ram Chandra on the 6th December 1888. In his written statement filed on the 26th July 1890 Exhibit B (a) Satrughna pleaded that the Will was fabricated, that the family was governed by Mitakshara, that the estate was a joint and undivided ancestral estate and governed by the rule of lineal primogeniture. "Accordingly the said deceased Raja Ram Chandra being the eldest member of the seniormost branch of the family came into possession of the estate according to the family custom. He had no right to dispose of all those properties by way of Will or gift or to give permission to adopt a son or to settle or appoint any future heir." The appellant strongly relies upon this passage as containing a distinct admission of Satrughna, under whose Will the present plaintiff claims, that there was no right of alienation. It is also contended upon the authority of *Rani Chandra Kunwar* v. *Chaudhuri Narpat Singh* (18) that the admission of Satrughna shifts the onus of proof on the question of custom upon the plaintiff. In that case the question was whether the plaintiff who claimed the estate had been adopted by another person, and the Judicial Committee held that although the burden of proving that adoption had taken place was on the defendant, it was shifted upon the plaintiff, by the defendants proving statements solemnly made in deeds by the plaintiff himself that he had been so adopted, and that the admission raised the presumption that the adoption had taken place. In the present case had the statement of Satrughna (through whom the plaintiff

(18) 29 A. 184; 11 C. W. N. 321; 4 A. L. J. 102; 5 C. L. J. 115; 17 M. L. J. 103; 2 M. L. T. 109; 9 Bom. L. R. 267 (P. C.).

claims) stood alone, it would have been very cogent evidence and the burden would have shifted on to the plaintiff. But as will be presently seen there were other statements made by Satrughna and those when taken together with his subsequent acts and conduct belie the above statement. In deciding the question we should take into consideration all his statements though weight must be given to each of his statements (including that referred to above) according to the circumstances under which it was made.

It appears, as pointed out on behalf of the respondent (*i*) that in the written statement of Satrughna referred to above, in the original (in vernacular) there is a full stop before the words "He had no right etc.," so that the statement about Raja Ram Chandra's having no power of alienation is not part of the family custom (about succession), (*ii*) that in any case there is no clear statement as regards custom, (*iii*) that the statement as to Raja's having no power of alienation may be in accordance with Satrughna's view of the family being joint and the estate being an impartible one, (*iv*) that although *Sartaj Kuari's case* (2) had been decided, *The First Pittapur case* (4) which dealt with the power of testamentary disposition had not then been decided, and, lastly, (*v*) that the statement was made by Satrughna in self-defence.

It is contended on behalf of the appellant, that when Satrughna filed his objection in the Probate case his claim had been upheld by the Commissioner and the Board of Revenue in the Land Registration proceedings where Rani Siromani had not mentioned the Will. Every one knew that Raja Ram Chandra led a drunken riotous life and died by a fall from the roof of his house, and it would have been sufficient to challenge the Will as false and even if the Will was proved, it could not have the effect of driving him from the *gadi* (as observed by the Court below), as he was the recorded proprietor, and it was, therefore, unnecessary to attack the validity of the Will. It is true that the Probate Court could not determine the question whether the Raja had the power to make the Will, and as a matter of fact it declined to go into it. But in the first place we have to consider not what the Court could have done, but what the parties thought. In the next place not only was the Probate case pending, but the title suit by Rani Siromani had already been instituted (on the 30th November or 6th December 1888). If the validity of the Will was established Satrughna would lose the whole estate worth about a lac of rupees a year. He was in destitute condition then. He had before him the prospect of getting the whole Raj if it was shown that the Will was a forgery, and that, there was no power of making a Will. The matter was of the utmost importance to him, and in these circumstances he would naturally take objections on all grounds and put forward every possible defence to the claim of Siromani. The Court found that the Will was not proved, but it is contended that the fact of setting up the Will which was an assertion of complete testamentary power shows that the Rani was eager to have the estate diverted, and she would have exerted her influence with the Raja to make a Will had he the power of alienation. But we have seen that the Raja met with an accidental death at the early age of 24. And apart from that, the fact that the Rani might have been anxious to get the whole estate under a testamentary disposition does not show that the Raja was also anxious to divert the Raj from his own family to that of his wife's family. The subsequent conduct of Satrughna goes to show that he did not believe in the statement that the Raja had no power of making alienation. In 1905 when he executed his Will he showed the consciousness of his power of making a Will. In his petition of objection dated the 8th May 1905 to the application of Madhu Sudan for taking the estate under the Encumbered Estates Act, Satrughna stated (in paragraph 1) that Raja Jagadish Chandra the minor

Raja of Jamboni is "my sole heir constituted as such under my duly executed Will" and in paragraph 28, it was stated that "your petitioner is advised and most humbly submits by way of pure argument that he could legally sell his estate completely and outright, or having leased the whole of it in *patni* clear of all the debts, and no one could question his right."

It is true that in his petition he defended his acts on the ground of necessity. But he was charged with extravagance and waste, and he would in repelling those charges, and in order to avoid the estate being taken under the management under the Act, naturally attempt to justify alienations made by him on the ground of necessity. It would not under the circumstances show consciousness of inalienability specially having regard to the fact that in the very petition he expressly asserted "by way of pure agreement" a complete power of alienation.

In the *ijara patta* executed by him in favour of Mr. Mathewson dated the 8th March 1905, Satrughna stated that he had borrowed three lacs of rupees from Jogendra Nath Roy and others of *hatkhola* by mortgaging his *zemindari* to them, and borrowed one lac of rupees from the *ijaradar* by making *ijara* settlement for 25 years, and further that by a registered *patta* dated the 10th January 1900 he had settled permanently the minerals in the entire Pargana Dhalbhum with Prince Mahommed Bukhtyar Shah. The *ijara* lease for 25 years may, as contended by the appellant, be considered as an arrangement beneficial to the estate, but the mortgage of the estate for three lacs of rupees and the permanent lease of the mineral rights in the entire estate were clearly alienations. Having regard to all these circumstances it appears that no weight can be attached to the statements contained in Exhibit B (*a*) in the Probate case, and that Satrughna made the statement as to the non-existence of the power of alienation in his objection in the Probate case, in order to serve his own purposes and defeat the claim of Rani Siromani ?

Mohesh Chandra (the grandson of Nityanand) in his petition of objection filed on the 24th May 1891 in the Probate case also took the same pleas as those raised by Satrughna and among others that the Raja "had no right to make a Will regarding those properties or to make a gift of the same to any person, or to give permission to take an adopted son or to appoint a future heir," and this is relied upon as being a statement made by a member of the family as to the family custom Mohesh Chandra was minor at the time, and was represented by his mother and guardian Chura Kumari. However that may be, Nityanand himself had claimed the estate, that suit was pending. Mohesh (the grandson of Nityanand and substituted in his place) was highly interested in denying the power of alienation. If the genuineness of the Will and the power to make a Will were proved, the suit would be defeated. Aprat from that the statement was made at a time when the controversy as to family custom had arisen, and the question is whether the statement is admissible in evidence. Under section 32 clause (4) the statement in order to be admissible must have been made "before any controversy as to such right, custom or matter had arisen". In the present case Siromani had set up a Will. The controversy, therefore, as to the custom of making a Will had already arisen when Mohesh filed his objections. The statement, therefore, does not come under clause (4) of section 32 of the Evidence Act. It is contended, however, on behalf of the appellant that it comes under section 49 or else under section 13 of the Act. Section 49 (so far as is material for the present case) runs as follows :—"When the Court has to form an opinion as to the usages and tenets of any body of men or family....., the opinion of persons having special means of knowledge thereon are relevant facts." There is no difficulty when a living witness states his opinion, the question, however, arises whether the opinion of such a person who is dead can be

proved even though it does not come under section 32 of the Evidence Act.

In the case of *Garuradhwaja Prasad* v. *Superundhwaja Prasad* (19) the Judicial Committee observed:—"By section 49 when the Court has to form an opinion or (*inter alia*) the usages of any family, the opinions of persons having special means of knowledge thereon are also relevant. But by section 60 if oral evidence refers to an opinion or the grounds on which that opinion is held it must be the evidence of the person who holds that opinion on those grounds. Their Lordships think it is admissible evidence for a living witness to state his opinion on the existence of a family custom and to state as the ground of that opinion information derived from deceased persons, and the weight of the evidence would depend on the position and character of the witness and of the persons on whose statements he has formed his opinion. But it must be the expression of independent opinion based on hearsay, and not mere repetition of hearsay." If the contention of the appellant were correct, statements of deceased persons as to matters coming under sections 45, 47 and 49 would be admissible even though they do not fall under section 32. But section 32 is a special section providing in what cases statements of deceased persons would be admissible. Such statements have not the sanction of oath, and the persons making them cannot be subjected to cross-examination. It is necessary, therefore, that the statements should not be made under *bias i. e.*, after a controversy had arisen. Clause 4 of that section accordingly provides that statements of a deceased person on such matters are admissible if made before the controversy had arisen, and it would not be reasonable to hold that those very statements though made after the controversy had arisen are admissible under section 49 of the Act. Reliance is placed on behalf of the appellant upon a passage in the judgment of the Judicial Committee in the case of *Fanindra Deb Raikat* v. *Rajeswar Das* (20). Their Lordships referring to the judgment of the High Court on the question of adoption in the Raikat family observed:—"They also, if their Lordships rightly understand their judgment, put out of their consideration, on the ground that it was hearsay evidence, all the statements as to the custom made by deceased members of the family to which the witnesses deposed. They refer to section 32 of the Evidence Act, but not to section 49. The latter section is applicable, and where an ancient family usage is to be proved the statement of deceased members of the family are relevant facts." But their Lordships were dealing with statements made by living persons examined in Court who deposed to statements made by deceased persons. The statements of the deceased persons on the question of family usage are no doubt relevant facts, but in first place it does not appear that the statements of deceased persons deposed to by the witnesses were made after any controversy as to the usage had arisen. In the next place as pointed out by Lord Davey in the case of *Garuridhwaja Prasad* v. *Superundhwaja Prasad* (19) the opinion of a living witness though grounded upon the statements of deceased persons would be admissible, it would be so as independent opinion and repetition of hearsay. We do not think that their Lordships laid down that statements made by deceased persons after the controversy had arisen and, therefore, inadmissible under section 32 are admissible under section 49 of the Act. In the case of *Ekradeshwar Singh* v. *Janeshwari Babausin* (21), the Judicial Committee referring to certain evidence as to custom observed:—"Some statements deposed to by witnesses who were called, and some of the documents which were put in, were not admissible as evidence in this suit. It seems to have been overlooked at one

(19) 23 A. 37 at pp. 51, 52; 10 M. L. J. 267; 5 C. W. N. 33; 27 I. A. 238; 2 Bom. L. R. 831; 7 Sar. P. C. J. 724 (P. C.).

(20) 12 I. A. 72; 11 C. 463; 4 Sar. P. C. J. 610; 9 Ind. Jur. 277; 5 Ind. Dec. (N. S.) 1068 (P. C.).

(21) 25 Ind. Cas. 417; 41 I. A. 275 at p. 284; 21 C. L. J. 9 at p. 18; 18 C. W. N. 1249; 27 M. L. J. 373; 16 M. L. T. 382; 1 L. W. 863; (1914) M. W. N. 807; 12 A. L. J. 1217; 17 Bom. L. R. 18; 42 C. 582 (P. C.).

period of the suit that evidence oral or documentary as to statement of a deceased person as to the custom in a family is not admissible if it appears that such statements were made after a controversy.....had arisen."

Reference was made to clause (7) of section 32, but that clause refers to statements "contained in any deed, Will or other document which relates to any such transaction as is mentioned in section 13 clause (*a*)." It omits clause (*b*) which relates to "particular instances." "Statements," moreover, cannot be called "instances" though the whole litigation ending with the judgment may be an "instance."

But even if the statements of the deceased persons made after the controversy had arisen are admissible, we do not think that they are of any value. Rani Siromani had set up a Will. Mohesh was deeply interested in denying the power of the Raja to make a Will, because he could not possibly succeed to the Raja if the Will was genuine and the Raja had power to make it. In the circumstances we are unable to attach any weight to the statements.

As stated above, one of the suits was instituted by Nityanand (son of Kamala Kant belonging to the Jamboni branch) on the 4th October 1888. He was nearer to Ram Chandra by one degree than Satrughna. The defendants to the suit were 1 Satrughna, 2 Rani Siromani, 3 and 4 the other two Ranis, 5 and 6 Kishori and her son, 7 Madhu Sudan (the father of the present defendant) and 8 Iswar (the father of the present plaintiff). It was stated in the plaint that the widows had no right, that the estate was the joint ancestral property of the family governed by Mitakshara, but being an impartible Raj and according to the custom prevailing in the Dhalbhum Raj the nearest and eldest member of the family was entitled to succeed, the other members being entitled to maintenance only. The appellant relies upon the statement, that the estate was the joint ancestral property of the family, governed by Mitakshara and that it was an impartible Raj, in Nityananda's plaint, and similar statements in the pleadings of Satrughna and Iswar in the several suits, as showing that when the question of succession arose, the members of the family were agreed that the estate was joint ancestral family property. It is also pointed out that in the judgment in Nityananda's suit it was held that though separate in mess, he (Nityananda though of the Jamboni branch) was not separate in estate from Ram Chandra. But the fact that the family was joint is now admitted in the present case. The question is whether the holder of the estate had the power of alienation.

In the plaint in the suit brought by Nityananda reference was made to a pretended claim of one Kishori Debi under a Will alleged to have been executed by Raja Ram Chandra in favour of her son, and it was stated that she was not the married wife of Raja Ram Chandra that the Will was a manufactured document and was "not valid in accordance with law." There was no statement that it was not valid according to custom. In the written statement of Satrughna in that suit filed on the 9th September 1890 nothing was said about the custom of inalienability, it being only stated that the estate was "an undivided joint ancestral and impartible Raj." It appears, therefore, that nothing was said about the *custom* of inalienability either by Nityananda in his plaint or by Satrughna in his written statement. Nor is there any reference to such a custom in Iswari's written statement filed on the 11th September 1890 in the suit, by Nityananda, the Will set up by Kishori being challenged as manufactured and "illegal." In the suit by Iswar, he stated in his plaint that certain *Hikimali mauzas* had been granted to him by Raja Ram Chandra by way of maintenance when he was appointed *Hikim*, in order to show that he was joint with Ram Chandra. The case of Satrughna was that neither Iswar nor Kamalakanta was joint with Raja Ram Chandra that he, Satrughna, was joint with Ram Chandra and that the grants set up by Iswar must have been obtained by underhand means. In his

written statement he challenged the *khorposh mokarari pattas* secured, from Raja Ram Chandra who "used to remain always in a drunken condition," by the plaintiff Iswar and other persons, and that the said settlements, could not "do any harm to this defendant" nor could the plaintiff be held to be joint with the late Raja Ram Chandra. This is relied upon as evidence of inalienability. The words "can do no harm" *i.e.*, that they are not binding may involve an assertion of inalienability. But in the first place there was no question of inalienability raised in that suit, secondly, the only question was whether Iswar was joint with Ram Chandra and so in the suit of Nityananda. The fact remains that Raja Ram Chandra did make alienations which were never even attempted to be set aside by Satrughna. Reliance was placed by the respondent on the 4th paragraph of the written statement where Satrughna denied that there was any custom that a person related as a brother and belonging to the eldest branch would be appointed *Hikim* or that the person so appointed *Hikim* would get the Raj. But the non-existence of the custom of appointing a successor by giving *tika* is quite different from the custom of inalienability.

In his written statement in Siromani's title suit, filed on the 9th September 1890 Satrughna stated (in paragraph 14) as follows:—"The Will referred to by the plaintiff in paragraph 5 of the plaint is a manufactured and illegal document. This defendant does not believe that the said Will was signed by the late Raja while he was in his senses and the said Raja had no right to make a Will. The words in Bengali are "*Will karibar khamata chhilana*" The word *khamata* may mean "power" or "right" and it is contended by the respondent that it referred to his want of physical capacity to make the Will and the same view has been taken by the Court below. But having regard to the fact that the Raja's physical incapacity is dealt with in the earlier part of the passage, the concluding sentence would seem to refer to his "right" to make a Will. But although it is so, no *custom* of inalienability is pleaded, and the statement does not carry the case further than what was stated in his petition of objection in the Probate case, Exhibit B (a).

As already stated, Satrughna was assailed on three sides Rani Siromani set up a Will and asserted that the family was governed by the Dayabhaga. So far as those two matters are concerned Satrughna, Iswar and Nityananda were equally interested in opposing her. As between Iswar and Nityanand on the one hand and Satrughna on the other, the questions were whether the two former were joint with Raja Ram Chandra whether Kamala Kant was the second son and Hikim Nursingh was the third son of Raja Jagannath, and lastly whether ordinary or lineal primogeniture was the rule of succession.

Nityananda claimed preference on the ground that he was nearer in blood *i. e.*, on the ground of ordinary primogeniture while Iswar claimed succession on the ground of lineal primogeniture.

They were, however, all interested in attacking the Will whether set up by Rani Siromani, or any Will which Nityananda apprehended might be set up by Kishori. The controversy then had arisen as to the power of making testamentary alienation, and the parties were fighting in Courts of law. Statements made by Iswar or Mahesh (grandson of Nityananda) under such circumstances in support of their case would be more evidence than the statement of Rani Siromani made in support of her case.

Reliance is also placed upon the deposition of Mahendra Narain Deo in Suit No. 10 of 1906 given on the 20th and 21st February 1907 in connection with a litigation relating to the Raipur family which together with the Ghatsila (Dhalbhum) are included in the nine *mahals*, which are cognate. Mahendra Narain stated: "In our nine *mahals* there is no custom of making Will or partition. The Raja has no right

to make a Will." It is contended by the appellant that Mahendra Narain being a member of the Raipur family had special means of knowledge of the customs of the nine families. But Mahendra Narain was the father-in-law of Raja Balbhadra the plaintiff in the said suit and his evidence was given at a time when a controversy had arisen upon the question of alienability in the Raipur family. In cross-examination he stated that no one ever made any Will in the nine *mahals*. "From the papers I have seen that they cannot make any Will and so I have said that they cannot make any Will, I have seen this in the decrees." His knowledge, therefore, was derived from records but he could not tell in which decree he saw it. He further stated that the Rajas of the nine *mahals* cannot make a gift of any property but they can grant *mokarari* &c., and they can mortgage their properties. The Court in that suit held that "the estate being an impartible and ancient Raj and the rule of succession thereto being lineal primogeniture, the Raja had no power to make a Will depriving the legal heir." Nothing, however, was said about any custom of inalienability nor is there anything to show that Mahendra's evidence was believed. In the next Raipur case (Suit No. 215 of 1910) the deposition of Mahendra Narain was put in, and the Court did not accept his statements, and held that the Raja had the power to make a Will.

Iswar in his suit asserted that Raja Ram Chandra had made him *Hikim* and associated him in the management of the estate. Certain ladies of the Jamboni family *viz.*, Chura Kumari, Padmabati and Brahma Kumari were examined on interrogatories. They were examined to support his claim, based upon the ground that Ram Chandra had made him *Hikim* and he was associated with the management of the estate. In cross-examination they had to admit that the Raja could not at his pleasure interfere with the ordinary course of succession by primogeniture. Before Wills were made, the method of nomination was by giving *tika* or by mentioning the nominee in some document. It is accordingly contended that if the Raja could not nominate his successor at his pleasure, and was bound by custom as to the manner in which the estate was to descend, the power of making testamentary disposition was of no value. We have already dealt with this question in an earlier part of the judgment. There may be power of alienation without the power of diverting the course of succession, though by the exercise of the power of alienation, the course of succession may practically be altered. In any case the evidence of the ladies has no direct bearing upon the question of alienation.

Siromani's title suit was dismissed by the Trial Court on the 19th August 1891, and her appeal dismissed by the High Court on the 15th August 1893. The suit by Iswar (to which practically all the members of the family were parties) was disposed of in terms of a *solenama* on the 30th November 1892. It was settled that Satrughna would remain in possession of the estate and own it from generation to generation, that he would grant a *patni* of some *mouzas* belonging to the estate yielding an income of Rs. 9,000 a year on the estate being released from management under the Encumbered Estates Act, and that if Satrughna left no son or grandson, or great-grandson, then Iswar or his son (the present plaintiff) would get the Estate. The name of Madhu Sudan (father of the defendant) appeared as a party to the *solenama* decree, but he applied for review on the ground that his name had been fraudulently introduced into the settlement. The decree was declared inoperative as against Madhu Sudan. Iswar having died, his son Jagadish (the present plaintiff) was allowed to withdraw the suit against Madhu Sudan with liberty to bring a fresh suit. So far, therefore, as Madhu Sudan was concerned he refused to be a party to the compromise.

Nityananda's suit was decided against him by the Trial Court on the 28th

December 1891, by the High Court on the 21st August 1896, and by the Privy Council on the 22nd February 1922.

While the litigation was pending Satrughna applied to the Deputy Commissioner Singhbhum on the 2nd December 1892 for release of the Estate from the Encumbered Estates Act under which it had come upon the application of Ram Chandra in 1886. Satrughna in his petition asserted that the estate was not liable for any of the debts incurred by Ram Chandra specially such as were illegal or immoral that no portion of the debts or liabilities could be satisfied out of the proceeds of the ancestral estate, that the debts were being satisfied out of the estates under the Encumbered Estates Act and that he was very much injured thereby. It appears, however, that most of the debts were raised on single bonds, and the debts of a previous holder are not binding unless charged upon the estate. But apart from that it is difficult to rely upon any particular statement made by Satrughna as he seems to have made assertions with respect to the power of making alienations from time to time as suited him.

We now consider the oral evidence adduced by the defendant on the alleged custom of inalienability.

Gopal Chandra Sen, aged 74, says that he was in the service of Raja Satrughna for about 30 years, and that during the pendency of the Probate proceedings instituted by Rani Siromani, a conversation in regard to it took place in his presence between Satrughna, Madhu Sudan, Sarthaka Roy (the Dewan) and Dibakar Das who was then the acting priest of the family. Satrughna remarked, and he was borne out by the Dewan, that the power of making a Will was opposed to the Raj family custom. Satrughna's statement, if accepted, does not go beyond his averment in his petition of objection in the Will case. The weight to be attached to the witness is, however, insignificant. He is not disinterested as he deposed for Madhu Sudan against Iswar in the Jamboni case, and was reproducing a conversation he had heard 33 years before, though he had no occasion to re-call it in the interval. Khetra Mohan, aged 50, son of the above named Dibakar states that he also officiated as priest in Satrughna's time, and heard (from some person unknown) of the family *Kulachar* prohibiting the Raja from adopting a son or from alienating the estate by gift. He speaks of a "Committee" of members and officers of the family, meeting after Raja Ram Chandra's death to discuss the succession when Rani Dhajamoni declared from behind the *purdah* that a female could not become the Raja.

His evidence is plainly untrustworthy. According to his own showing he was no more than 15 or 16 years of age at the time and would thus be unlikely to remember a casual remark made about 32 years ago. It is also noteworthy that according to him no mention was made at the meeting of the Will propounded by Rani Siromani; though that would obviously have been in the forefront of the debate.

He is also not independent as he deposed for the defendant and against the plaintiff in the Probate case and is in possession of two *mouzas* under *brahmattar* grant from the Raj.

Gadadhar Pande, aged 58, the *pujari* of Rankini Debi (the family deity) speaks of a proposal made by Satrughna to marry the daughter of one of the Singhbhum Babus. The Babu stipulated that if the lady had no child, Satrughna should give her the estate, to which Satrughna replied that according to the *Kulachar* of the family, he could not give the estate to a female. This does not show that the Raja had no power of alienation. On the other hand the witness himself holds 400 or 500 *bighas* under a *mokarari* grant from the Raj.

Tritbhuban Ojha, aged 68, who has been the Raj priest since Ram Chandra's day says that Jagannath, Nityananda and the Ranis told him of the *Kulachar* of the family, namely, that there was no custom of alienation by Will, gift or sale, nor of adoption nor of female succession. He states that Rani Dhajamani

asked him to dissuade Rani Siromani from propounding the Will as being against the family custom, and that he tried to do so but failed. He was a witness in that case and was disbelieved. He was witness for the defendant in the Probate case of the present plaintiff and was disbelieved. He confesses to having been no more than twelve years old when Jagannath explained the family *Kulachars* to him an incredible proposition. His evidence on the custom of inalienability is negatived by his own admission that he holds seven *brahmattar mouzas* aggregating 4569 *bighas* under a grant from the Raj and that he cannot be evicted even if his tenure of office as family priest is determined. The Court below itself has not accepted his testimony in the present case notwithstanding that he is described as "a respectable straightforward witness."

Ram Chandra Sripati, aged 65, states that he was told by Satrughna and the Raj officers of the family *Kulachars*, namely that the eldest son becomes the Raja, that the estate is not partitioned, and the Raja may not adopt a son or alienate the estate by Will. It transpires, however, that Satrughna made these statements to him at the time of Siromani's Will case which makes them of little value. Moreover, the witness is not independent as he holds one entire *brahmouza* and part of another under a *brahmattar* grant made by the Raja to his grandfather.

Siba Prosad Misra, aged 60, states that one day about 25 or 30 years ago he went for a walk with Satrughna who told him of the family *Kulachars* prohibiting alienation by gift, Will, adoption or sale. It is not clear whether Siromani's case was pending at the time.

This witness, like the last, gives *Bhets* to the Raj family. He is the *Baibahik* of Khetra Mohan Das and cousin of Ram Chandra, and his grandfather was given some *brahmattar* lands by the Raja.

Madan Mohan Seranji, aged 63, who lived at the Rajbati with his father, the Sabha Pandit of the Raja Ram Chandra and Jagannath, says that he was told at different times of the *Kulachars* by Dhajamani, Satrughna and Kripasindhu Das. There was a custom of impartibility and lineal primogeniture, and no custom of alienation or of testamentary disposition while adoption was prohibited. He states that about 1290 Raja Ram Chandra wished to borrow some money from one Dabriel but the negotiations fell through because as the witness was told by his father, it was against the family custom to take loans. Kripasindhu, who is a relation of the witness, confirmed this though the source of his knowledge does not appear. Satrughna's statement to him was made 12 or 14 years ago after the disputed Will case, while Dhajamani's was nearly 40 years ago.

The witness is not disinterested as he holds four *mouzas* under *murashi mokarari brahmattar* right, two being granted by Raja Ram Chandra and two by Raja Jagannath.

From this review of the evidence it is plain that though the witnesses are at one in declaring that there is no custom of alienation of the Raj estate, they all in point of fact hold a number of *mouzas* under permanent grants from the Raj. We agree with the Court below in thinking that their testimony is untrustworthy. They have been set up with the transparent object of amplifying and perhaps embroidering the statement made by Satrughna in the Probate proceedings.

On behalf of the appellant reference was made to the case of *Sivasubramania Naicker* v. *Krishnammal* (22), where Muthusami Ayar, J., after referring to the "settled rule of law that though mere absence of alienation is of itself no proof of inalienability, yet such absence when it is coupled with special facts that would render alienation probable is relevant evidence, though its probative value may depend on the special circumstances of each case" observed:—"Eight of the nine *zemindars* who held the estate prior to the first defendant either left sons or widows for whom they would ordinarily desire to make some provisions, and the peculiar custom which is shown to prevail in regard to succession must have imparted

(22) 18 M. 287 at p. 294; 5 M. L. J. 168; 6 Ind. Dec. (N. S.) 549.

to that desire more than its ordinary strength as an inducement to alienation. Notwithstanding this, there has been no sale or gift for more than three centuries .....and ought to be considered together with such other evidence of inalienability as there is on record."

The custom in that case (*Dayadi Pattani*) was of a very peculiar nature. The succession did not devolve upon the heir according to Mitakshara Law, nor on the eldest son according to the rule of primogeniture, but on the Dayadi or cousin of the deceased *palayagar* who was senior in age and who was descended from one of the three brothers who originally formed a joint Hindu family. It appears that in five cases the deceased *palayagar* left sons, and in three left widows, but in all the senior *Dayadi* took the estate to their exclusion. In such cases the *zemindar* would naturally desire to make some provision for his own son or widow when according to the peculiar custom they would be excluded, and the estate taken by a *Dayadi* a distant agnate, and in these circumstances the absence of any sale or gift for more than three centuries was held to be relevant evidence. The observations of the learned Judges in that cannot apply to the Dhalbhum family where in the majority of the cases the succession devolved upon the eldest son, or where there was no son, upon the brother and it was only in the last case on the death of Ram Chandra III under special circumstances that it devolved upon a somewhat distant agnate.

Plaintiff's documentary evidence regarding alienations in the Dhalbhum Estate.

The earliest document produced on the point relates to a permanent grant of 18 *mouzas* by Raja Chitreswar II to Kanhu Dhal the grantfather of the defendant, on the 8th April 1850 by way of maintenance. It appears that when Chitreswar II was an infant, Jugal Kishore got possession of 64 *mouzas* which he alleged was for his maintenance. Those 64 *mouzas* were, however, resumed and after some litigation 18 *mouzas* were granted by the deed. One of them is *Mouza* Dakhinsol, which was claimed by the defendant's father in his deposition in a land acquisition case as a *mokarari khorposh mouza* descending to him by right of succession from his grantfather. The *mouzas*, therefore, according to the defendant are permanent alienations. The area of the 18 *mouzas* is 49,293 *bighas* and they are still in the possession of the defendant.

It is contended by the appellant that it was a *khorposh* grant, and that there was a condition in the deed that the grantee will have no power to transfer by way of gift or sale without the consent of the grantor and that any gift or sale without such consent shall be null and void." But there is no provision for re-entry, and that being so the restraint against alienation is void.

There is a reference in the settlement *khewat* to a Mahatran *patta* dated the 21st November 1854 by Raja Chitreswar II in favour of one Jaga Mohan Sarkar in respect of *Mouza* Kalajhore consisting of 2455 *bighas* at a rent of Rs. 4-6-0. It is described as *mokarari* and non-resumable in the settlement *khewat*. The original *potta* has not been produced. In some other cases too, it was not produced and the respondent relied upon the entries in the Settlement *khewat*. These Settlement *khewats* were produced on the 7th August 1922, when the trial commenced. It is contended by the appellant that the Settlement *khewat* cannot prove the grant. But the entries made in the Settlement Record are such as the Settlement Officer is authorised to make under section 102 of the Bengal Tenancy Act, and such entries are presumed to be correct under section 103B of the Act. But even if the entries do not come under section 102 of the Tenancy Act, they are relevant under section 35 of the Evidence Act, being made by a public officer in the discharge of official duties. [See *Lekhraj Rai* v. *Mahipal Singh* (23)].

It appears from the judgment dated the 27th July 1905, in a suit by Raja Satrughna against Janardan Pal and another for resumption of a *Mouza* Paru-

(23) 5 C. 744; 6 C. L. R. 593; 7 I. A. 63; 4 Sar. P. C. J. 93; 3 Suth. P. C. J. 704; Rafique and Jackson's P .C. No. 61; 4 Ind. Jur. 423; 2 Ind. Dec. (N. s.) 1081 (P. C.).

lia on the ground that it was a Hikimali *khorposh* grant made to the plaintiff's grandfather which was held as Hikimali *khorposh* by his grandfather, father and by himself and that it was resumable at the pleasure of the Raja for the time being. It was alleged that the plaintiff (Satrughna) had executed a usufructuary mortgage of the *mouza* to one Janardan, for a term, and on the expiry of the term obtained *khas* possession but that the defendant claiming the *mouza* under a *kotkobala* from one Sarthak Ray obtained decree for rent against the defendant No. 2, and the plaintiff, therefore, sought to recover *khas* possession. The defence was that the plaintiff, his father and grandfather had for a century treated the property as their permanent transferable *lakheraj* property and that the Rajas of Dhalbhum had recognised the permanent transferable *lakheraj* right. The Court held that plaintiff had failed to prove that it was a *khorposh* grant, that the grant of the *mouza*, to the grandfather of the plaintiff was an absolute and irrevocable *lakheraj* grant made in full satisfaction of all claims of future maintenance and conferring on the grantee not only an heritable but an alienable estate. It further held that "all the nine *mouzas* that were originally granted to the plaintiff's grandfather have been gradually transferred by sale, gift or mortgage and all these *mouzas* are in possession of the transferees, whose transfers have been recognised by the Raja by receiving road-cess and in several other ways and came to the conclusion that the grant to the plaintiff's grandfather was an "absolute and irrevocable one". It appears, therefore, nine *mouzas* were permanently alienated from the Raj estate either by Raja Jagannath I or Raja Ram Chandra, the area of one *Mouza* Purulia alone being about 10,000 *bighas*.

4. A *mokarari* grant by Jagannath II to one Hari Majhi dated the 25th June 1866 of *Mouza* Chalkuri. The *patta* is not produced, but there are entries in the Settlement *khewat* which show that the area of the *mouza* is 2259 *bighas* the rent being 6 annas and odd, and that there have been successive transfers (sales) of the *mouza*. Another *mokarari patta* by Raja Jagannath dated the 31st May 1866 in respect of an entire *Mouza* Tangram consisting of 1560 *bighas* to one Zabbar Khan at a fixed rent of Rs. 11.

5. A similar grant by Raja Jagannath II to one Hari Prosad Ghosh of *Mouza* Rosunchepa consisting of 944 *bighas* at a rent of 6-12-0 on the 30th September 1866. The *patta* is not produced but the Settlement *khewat* refer to it, and it is described as *mokarari* and non-resumable.

6. A permanent *mahatran* grant dated the 18th May 1883 by Raja Ram Chandra II to Joy Prokash Lal (the then manager under the Court of Wards) in respect of *Mouza* Manpur from generation to generation. The *mouza* appears from the Settlement *khewat* to consist of 5463 *bighas* and was granted at a rent of Rs. 5-4 as a *mohatran* which means a "heritable, transferable and non-reasonable grant" (See *District Gazetteer* Singhbhum, page 186).

7. A permanent grant of *Mouza* Gopalpur dated the 16th June 1883 by Ram Chandra III, to Sarthak Raj Dewan from generation to generation" at a rent of Rs. 25. The area appears from the Settlement papers to be 1257 *bighas*.

8. *Patta* dated the 26th June 1884 by Raja Ram Chandra III to one Kartick Chandra of *Mouza* Matkundi. The *patta* is not produced, but is referred to in the Settlement *khewat*, and is described as consisting of 1212 *bighas* at a rent of Rs. 4-4-0.

9. *Mokarari patta* dated the 17th October 1884 in respect of *Mouza* Harindukri consisting of 1873 *bighas* granted by Raja Ram Chandra to one Sahadeb Napit at a rent of Rs. 18-8. It appears that the grantee was holding the *mouza* from before as a Prodhani *mouza* for a term, and by the *patta* it was granted as *mokarari* at a fixed unalterable rent.

10. *Brahmattar* grant dated the 28th November 1884 by Ram Chandra III to Chandra Kumar Sanyal of *Mouza* Kashidi, the area being 146 *bighas* at a rent of Rs. 2-8-0. The *patta* is not

produced but is referred to in *khewat*, Exhibit 19 (3).

11. *Lakheraj patta* dated the 11th September 1885 in respect of 4 *mouzas* by Raja Ram Chandra to one Udhab Chandra Das. It appears that the latter held certain lands as Sardar Ghatwal and in consequence of a *solenama* between him and the Government he was to get a 2-annas share in the profits of certain *mouzas*. In exchange for the said share of the profits he was by the *patta* granted two *mouzas*, and another two *mouzas* by way of reward, as *lakheraj*, the *mouzas* being valued at Rs. 13,205. The area of the first two *mouzas* appears from the *Thana* list of villages (Exhibit 42) to be 2800 *bighas* and that of the last two 2094 *bighas*. Even if all the *mouzas* were given in consideration of the surrender of a 2-annas share of the profits, it would none-the-less be a case of alienation.

Non-resumable *brahmattar* grant by Raja Satrughna to Bhikari Mahapatra of *Mouza* Debanki (area 1357 *bighas* rent Rs. 3-12). The *patta* is not produced but is referred to in the Settlement *khewat*, Exhibit 19 (1).

12. An *ijara* lease of the estate by Raja Satrughna to Mr. Mathewson for 25 years dated the 8th March 1905, in consideration of a loan of one lac of rupees carrying interest at 7 per cent. It is true that it was a lease for a term but Madhu Sudan (the defendant's father) challenged it as wholly unnecessary in his petition of objection to the Deputy Commissioner. That lease is still running.

In this *ijara* lease as already stated there is a recital of a loan of three lacs of rupees taken by Satrughna from Jogendra Nath Roy and others by *hatkhola* on a mortgage of his estate. It is contended by the appellant that there was legal necessity for it. It is true that there was costly litigation which Satrughna had to conduct for a long time. But the litigation had ended in 1892, and there was only one case pending before the Privy Council which ended in 1902. In the 84th paragraph of the judgment in the suit of Nityananda against Satrughna dated the 28th December 1891 the Court found that Iswar Chandra had advanced large sums of money to Satrughna and his (Iswar's) statement was that Satrughna had undertaken to let out the *zemindari* (the income of which was about Rs. 60,000) to him at a rent of Rs. 12,000. In the petition of Madhu Sudan to the Deputy Commissioner referred to above, he stated (in paragraph 6) that Satrughna had without the least necessity incurred a debt of three lacs of rupees, and was about to grant an *ijara* of the entire estate to a trading concern. Satrughna stated in his petition that he was compelled by legal and moral necessity to defend a number of costly suits, and that he borrowed three lacs of rupees with which he had cleared his debts incurred under dire necessity, and in paragraph 28 he stated that he could legally sell his entire estate outright or lease it in *patni* to clear off the debts and no one could question his right. It appears, therefore, that Madhu Sudan asserted that there was no necessity for the loan and Satrughna asserted that there was. There is the fact that he raised a loan of three lacs of rupees on mortgage of the estate and it was for the defendant who had to establish the circumstances under which the transfer was made to show by facts and figures that there was legal necessity and the extent thereof. It is to be observed that Madhu Sudan in his petition to the Deputy Commissioner alleged that Satrughna had by gifts of villages to his wives, concubine's relations, and his favourites reduced the assets of the estate by nearly rupees ten thousand a year, but nothing was said by him about Satrughna not having any power of alienation. The estate was taken over under the Encumbered Estates Act by an order dated the 2nd August 1905. Madhu Sudan asserted that there was no necessity for the debts incurred by Satrughna and suggested a scheme for liquidating the debt of three lacs of rupees in 14 years. He proceeds, therefore, on the footing that the debts though unnecessarily incurred were binding upon the estate, and that unless Satrughna was restrained from alienating and incurring fresh debts, the estate

would be ruined to his own detriment. It appears, therefore, that both according to Satrughna and Madhu Sudan the former had the power of alienation.

As already stated Satrughna by a *patta* dated the 10th January 1900 permanently settled the mining rights in the entire Pargana with Prince Mahomed Bukhtear Shah, (see recital in the *ijara patta* in favour of Mr. Mathewson dated the 8th March 1905). It was certainly a very valuable right and although this took place in 1900, Madhu Sudan did not protest against it nor have any steps been taken to have it set aside up to now. It is contended by the appellant that there is nothing to show that Madhu Sudan was aware of it. But in the first place a Permanent Settlement of the mining rights in the entire estate must have been a matter of notoriety. Secondly, it was recited in the *ijara patta* to Mr. Mathewson, and Madhu Sudan in his petition to the Deputy Commissioner referred to that *ijara* and lastly the defendant Protap in his petition dated the 19th August 1919 to the Government of Behar referred to the fact that Satrughna had granted a "mining lease of the entire *zemindari* to the late Prince Mahomed Bakhtear Shah on a rather inadequate consideration" and submitted that "attempts should be made to purchase the mining rights on behalf of the estate as it will be a valuable acquisition to, and an improvement of the estate and that the estate should be retained under the management of the Encumbered Estates Act. It is not suggested that any of these alienations had ever been challenged by the Encumbered Estate Act Authorities.

These circumstances go to show the conciousness of Madhu Sudan and of the defendant himself as to the power of alienation possessed by the holder of the estate.

The list given above does not include the ordinary *khorposh* grants to members of the family. It does not include some *khorposh* grants but they are or have been found to be permanent alienations and, therefore, are not in the nature of ordinary *khorposh* grants. Nor does the list refer to alienations made by the grantees of the *mouzas* to third parties.

It was suggested in the evidence of one of the witnesses for the defendants that some of the grants to servants and some other persons were for services. But the Settlement Record shows that they were non-resumable permanent grants.

The witnesses examined by the defendants also admit holding large quantities of land granted as *brahmattar* or *mokarari* to their predecessors by the Raj.

	mouzas	*Bighas*	Rent	Rs.	a.	p.
Khetra Mohan (W. No. 2).	3	2226	"	6	3	0
Jatadhar (W. No. 3.)	1	798	"	4	0	0
Tribhuban Ojha (W. No. 4).	7	4569	"	27	4	0
Ram Chandra (W. No. 5).	2	567	"	3	15	3
Shib Prosad Misra		24	"	0	8	0
Madan Mohan (W. No. 7).	4	7128	"			
	of two of the *Mauzas* being			5	15	0

The total area held by these witnesses would come up to 15312 *bighas*.

It is said that there were 1640 villages in Singbhum, and 46 villages in Midnapur comprised in the estate. The area included in the estate is said to be about 22 lacs of *bighas* which was settled at Rs. 4,000 only at the Permanent Settlement. But the alienations were also of considerable quantities of land, and extending over a long period, though most of them were made since the time of Ram Chandra III.

Custom of Nine Mehalls.

Besides the evidence of custom in the Dhalbhum family, the parties adduced evidence of custom in some other cognate Estates. They are referred to as jungle *mehals* or nine *mehals*.

It is pointed out by the respondent that the defendant in his written statement (paragraph 2) described the Dhal-

bhum Estate as a part of the locality known as the jungle *mehals* of Midnapur, and in paragraph 3 referred to the customs prevailing in the said Dhalbhum family and in the locality known as the jungle *mehals*. The 11th issue raised the question of custom prevailing in the jungle *mehals*, and the special custom of nine *mehals* now set up in argument on behalf of the appellant was not set up in the pleadings.

In Hunter's Satistical Account of Bengal, Volume XVII, page 325, it is stated "Barabhum with Ambikanagar, Supur, Shyamsundarpore, Phulkusma, Manbhum and Raipur and two other Estates which now form part of Singbhum district are known locally as the nine *mehals*." The two other Estates of Singbhum are not named by Hunter.

We will now refer to evidence adduced with regard to these *mehals*.

The Raipur Estate is a branch of the Bishenpur Raj. It is included in the jungle *mehals* and nine *mehals*, and is governed by the Dayabhaga, but the custom of impartibility and succession by lineal primogeniture prevails.

In a suit between *Raja Balbhadra* v. *Hari Kishen Rathi and other defendants* (Suit No. 10 of 1906), it was held that the estate being an impartible ancient Raj, and the rule of succession thereto being lineal primogeniture, the Raja had no power to make a Will depriving the legal heir Lal Singh and the plaintiff from the estate.

It was in this suit that Mahendra Narain Deo of the Manbhum family examined as a witness on behalf of his son-in-law Balbhadra Singh stated that "in our nine *mehals* there is no custom of making a Will," but the Court did not decide any question of custom of inalienability but based its decision upon the ground of impartibility and lineal primogeniture. It appears from the judgment in a subsequent Suit No. 215 of 1920 between Raja Radhashyam against Raja Balbhadra that the plaintiffs' case was that "the owners of the estate possess an absolute power of disposal over the estate by sale, gift, Will or mortgage and settlement at rent, and that this power has been exercised from remote times" and the plaintiff set up a Will said to have been executed by Raja Indra Singh. The deposition of Mahendra Narain (who was then dead) was put in evidence in this suit but the Trial Court was not disposed to "attach much worth to his testimony," and held that Indra Singh had power to make a Will but that the Will was not genuine. On appeal to the High Court it was held that Indra Singh did not execute the Will and that the suit was barred by limitation, no opinion being expressed as to the power to make a Will.

Saharjora. The Saharjora Estate is a dependent of the Bishenpore Raj, and is governed by the Dayabhaga. It appears that Nimai Narayan of Saharjora had three sons Joy Narayan, Rup Narayan and Sankar. Joy Narayan left a son Hari Narain, and Rup Narayan left a son Jadab Narayan. In a suit by Hari Narayan (the son of Joy Narayan) who claimed the estate, Sankar set up a *hebanama* under which he claimed the entire estate. In that suit the Provincial Court held that the *hebanama* was valid. Pending the appeal to the Sudder Dewany Adalat, Hari Narayan died and Jadav (the son of Rup Narayan) applied for an order for substitution in the place of Hari Narayan. When the matter came up for final hearing the Sudder Dewani Adalat held that Jadab Narayan had no right to be substituted, and, therefore, did not consider the validity of the *hebanama*, the result being that the decision of the Provincial Court holding the *hebanama* was valid, was not set aside. The next suit was brought by Jadav against Sankar and succeeded in the Court of first instance. He lost, however, in the Provincial Court on the ground of limitation, and also in the Sudder Dewani Adalat. The result was that the possession of Sankar obtained under the *hebanama* continued, though in the second suit, neither the Provincial Court nor the Sudder Dewani entered into the question of title.

Pandra is one of the jungle *mehals* though not one of the nine *mehals* and is governed by the Dayabhaga. The

estate is an impartible one. In the litigation which came up to the High Court on appeal (see judgment of the High Court dated the 11th June 1889) the question for decision was whether the custom of lineal primogeniture was proved and the question was answered in the affirmative both by the Trial Court and the High Court. There was no issue about the custom of inalienability. In the course of their judgment, the learned Judges observed: "It appears that sometimes a new Raj has been created by a grant from the head of the family to which the grantee belonged. Pandra itself is an instance of this". They were however, "exceptional and did not take place in regualr course, they were dispositions of parts of the Raj property, not made as of right but were either the result of force or were made in gratitude for services done or were prompted by affection of perhaps family ambition." The learned Judges referred to the evidence of a *khorposhdar* of the Srirampur Raj who stated that all the Rajas of Srirampur who held the Raj before it became subject to the control of "the British Government could have made over their Raj to any of their sons as they chose". The question, however, of the custom of alienability was not raised nor decided by the Court.

Fulkusma and Sildah. Fulkusma is one of the nine *mehals* and is governed by Mitakshara. The Will executed by Raja Mukunda Narain of Fulkusma on the 15th March 1869 recited that his maternal grandfather Raja Mangovinda having died without a son, one Ganapanta Mahapatra set himself up as his adopted son and thereupon a suit was instituted by Mukunda's mother against him, and a decree was obtained. Mukunda on her death obtained possession of the Sildah Estate and gave a *patni* of 4-annas share of Fulkusma to Ram Chand Dutt on the 29th *Sravan* 1268, and subsequently granted a *patni* of 6-annas share of Sildah to Ram Chand Dutt, in 1269, and took back the *patni* of Fulkusma from him. He bequeathes this ancestral estate Fulkusma to his eldest son and a 4-annas share of Sildah to Rani Durga Kumari and his youngest son Joggeswar Narain in equal shares. It appears, therefore, that a *patni* was granted in respect of 4-annas share of Fulkusma which was subsequently taken back, and a *patni* of 6-annas share of Sildah granted. It also shows that the Raja executed a Will in favour of his eldest son. The eldest son, no doubt, would have got the estate by succession but it shows the exercise of the power of testamentary disposition on the part of the Raja. Rani Durga Kumari granted *mourashi istimrari* lease of her share to Ram Chand Dutt and Joggessar gave *ijara* of his share to Watson & Co., and subsequently their interests were sold in execution of decrees It is to be observed, however, that Sildah was obtained by Mokunda from his maternal grandfather by inheritance.

Jamkundi is one of the jungle *mehals*. It is impartible Raj and the succession to it is governed by rule of lineal primogeniture. In a suit relating to the succession to the estate it was held that the Raja (Nursingh Deb) had power to dispose of his property by Will and authorise his widow to adopt a son, (See judgment of Sub-Judge dated the 17th September 1912 Exhibit 38 (3)) and the suit was decided on that footing which, however, was based on an admission of the defendant's Pleader.

Supur (or Khatra) is also one of the nine *mehals*. The sale certificate, Exhibit 43, shows that a portion of the estate (48 villages comprised in the estate) was sold in execution of a decree of the Civil Court against Hiteshar Dhal the proprietor of the estate in 1869 and purchased by one Raja Chandra Mohan Singh.

Shyamsunderpore is one of the nine *mehals* and governed by the Dayabhaga. It appears from the *kobala* dated the 4th July 1883 [Exhibit 45 (2)] that Raja Sunder Narayan of Shyamsunderpore sold a number of *mouzas* forming portion of the estate to Raja Natabar of Simlapal for Rs. 21,000 to liquidate his debts for which decrees had been obtained and the sale of his properties advertised. Natabar's son Jagabandhu got his name registered in the Collectorate See Exhibit 44 (9).

Dhalbhum and Jamboni are governed by the Mitakshara.

Barabhum. Out of the documents admitted in evidence in this Court is a judgment of the Sudder Dewani Adalat dated the 4th June 1804 in a litigation between Madho Singh plaintiff and Ganga Gobind Singh defendant. It related to the Barabhum Estate one of the nine *mehals* (in the jungle *mehals*). Madho Singh's case was that he was the son of the Patrani (the senior wife) though he was younger in age to Ganga Gobinda who was the son by a junior wife, and further that his father had made a Will or *hebanama* in his favour, and he was accordingly entitled to succeed. The document is referred to as *hebanama* in the letter of the Collector of Midnapur to the Board of Revenue dated the 10th April 1800. Ganga Gobinda's case was that the plaintiff was not the son of the Patrani, that under the custom the eldest son, whether he was or was not the son of a Patrani, succeeded, and that the *hebanama* was not genuine. The *hebanama* was not proved, and there is no further mention of it in the further stages of the suit. The Trial Court decided that according to custom, the son of a Patrani was not entitled to any preference and did not go into question of the *hebanama*. The Provincial Court held that he was entitled to preference, but the question of the *hebanama* was not gone into by that Court either.

The Sudder Dewani Adalat held that the custom of the succession of the son of a Patrani junior in age in preference to an elder son by a junior wife was conflicting in some of the *mehals* contiguous to Barabhum and that the plaintiff had failed to prove the custom in his family. The right of the defendant as the eldest son was accordingly maintained, and it was held that the plaintiff should contain a maintenance allowance. The defendant Ganga Gobinda challenged the genuineness of the Will. He stated that "the Raja on the morning of which date he died, was quite unconscious and unable to speak from the severity of his disease, so how does the plaintiff state that on the 14th of the said month he made the Will in plaintiff's favour and gave the *tika* of Rajaship to him." As stated above Madho Singh although he set up a Will did not prove it after its genuineness was challenged by Ganga Gobinda. But it is to be observed that although he challenged the genuineness of the Will he did not plead that even if the Will was genuine the Raja was precluded by custom from making a Will. Having regard to the fact that both parties referred to the custom of the family, and to the fact that the plaintiff set up a Will, it is strange that Ganga Gobinda did not plead that the Raja had no power to make a Will.

Another document relating to the succession to the Barabhum Estate mentioned above is a letter from the Collector of Midnapur to the Board of Revenue dated the 10th April 1800, in which the document set up by Madho Singh was referred to as a *hebanama*. The Collector wrote as follows: "But though this writing were authentic which is very doubtful I conceive that it could not alter the rule of succession and that the circumstances of its having been procured affords a strong presumption that he was considered as having otherwise no right to the "*zemindari*". This passage is relied upon on behalf of the defendant. But in the first place the authenticity of the document was considered doubtful by the Collector and we have seen that it was not proved in the title suit which came up to the Sudder Dewani Adalat nor was the question of the power of the Raja to make such an alienation raised for consideration before, nor considered by, any of the Courts in the litigation. In the next place "even if authentic the *hebanama* could not alter the rule of succession" was merely the view of law of the Collector. An opinion expressed in 1800 long before the Judicial Committee laid down in *Sartaj Kuari* v. *Deoraj Kuari* (2) that an impartible Raj is alienable. Then again the Collector's opinion was given in such a way ("I conceive") that it was not of any value. Lastly the Collector was not considering the custom of not making a Will, and it does not appear that he had any special knowledge of custom.

PROTAP CHANDRA *v.* JAGADISH CHANDRA.

It is true that in course of time some of the nine *mehals* or *jungle mehals* came to be governed by Dayabhaga and others by the Mitakshara, and it is contended by the appellant that with regard to those governed by the Dayabhaga the same rigour with regard to inalienability could not possibly be expected. But with regard to impartible estates there is no difference, upon the authorities, between Dayabhaga and Mitakshara so far as the question of alienation is concerned, and it is not established that there has been any definite and uniform custom of inalienability either in the *jungle mehals* or in the nine *mehals*.

Reliance was made on behalf of the appellant to certain passages in the judgment of the Board of Revenue dated the 13th July in the Land Registration proceedings between the present parties where it was stated that there was "no evidence of the estate ever having been transferred by Will out of the line of descent to the next heir", that Dhalbhum is one of the *jungle mehals*, that in the early days there was no custom of devisability by Will, and from this it may be presumed in the absence of rebutting evidence that this custom still maintains. But although as already stated, the absence of any transfer by Will is a circumstance in favour of non-alienability, what is to be proved is a custom of non-alienability, and not a custom of alienation. On the whole we think that the defendant has failed to prove the custom of inalienability. There is no doubt that the bulk of the estate has existed from ancient times, and the fact it has not been split up and dissipated in the course of centuries is certainly in favour of the plaintiff. It is useless to refer to the state of affairs before the British Government was established because at that time these Rajas were in the position of military chiefs, and we have no materials of that period for determining the question of custom. After British administration was established and before *Sartaj Kuari* v. *Deoraj Kuari* (2) was decided in 1889, the law as laid down by the Courts was that an impartible estate was inalienable. As pointed out by Sadasiva Aiyar, J., in the Madras High Court in *Zemindar of Karvetinagar* v. *Subbaraya Pillai* (24) "where a supposed custom has followed the ordinary law as laid down by the Courts, though it was wrongly assumed to be the ordinary law that supposed custom which did not modify the understood general law and which had, therefore, not independently the force of law, cannot be recognised by Courts as a custom having the force of law, even after it is established that the supposed ordinary law which it was alleged to have followed was not the ordinary law. I, therefore, agree with the lower Court and with my learned brother that there was no proof of any family usage having been consciously followed which was considered to be a special custom at variance with the ordinary Hindu Law", and having regard to the nature of evidence required to prove inalienability as laid down by the authorities already cited, it is not to be wondered at that defendant has failed to prove the custom of inalienability.

Nature of the Tenure.

It is contended that at its inception the Dhalbhum Estate was in the nature of a principality. It is also pointed out that in 1767 Nursingh who was on the *guddi* of the Raj was fighting with the British. He was deposed and Jagannath was placed on the *guddi*, but he too began to fight with the British. He was deposed and Nimai *alias* Baikuntha was put in his place. But he had neither money nor support and Jagannath was again placed on the *guddi*, and the first Settlement of the estate was made with him in 1777. (See *taslinama* Exhibit 66). In 1800 the estate was permanently settled with Raja Ram Chandra and after his death, Baikuntha Nath renewed the *kabuliyat* in December 1821.

But although the *jungle mehal* Chiefs seemed to have exercised semi-sovereign powers before British power was established and the Raj might

(24) 43 Ind. Cas. 871 at p. 875; 7 L. W. 36; (1918) M. W. N. 146.

have been in its inception in the nature of a principality as most, if not all, impartible estates were in their inception, and although some of the Rajas fought with the British when they were first established in this country, there was nothing military after the settlement with Jagannath in 1777. The *taslinama* of that year was on the usual conditions on which grants were made to *zemindars*. There is nothing military or feudal in it. Certain Police duties were imposed on the *zemindars* of *jungle mehals* by Regulation XVIII of 1805 which were assigned to the numerous *ghatwals* under the Raj but they were subsequently discharged from those obligations. *The Hundwa case*[*Satya Narayan Singh* v. *Satya Niranjan Chakravarti*] (25) referred to on behalf of the appellant related to a *ghatwali* tenure the incidents of which were materially different. It was found that the tenure was a service tenure, *ghatwal* in its nature, inalienable and indivisible and incapable of being sold in execution of a decree against the person of the incumbent of the office of *ghatwal* for the time being, it was further held that the question whether or not a given *ghatwali* tenure is a Government *ghatwali* tenure or not must depend on the original grant; and unless inclusion of the tenure in the assessment of the *zemindari* lands can be shown to have amounted to a release by the Government of the *ghatwali* services or to a grant to a third party of the right to appoint the *ghatwal* the tenure must remain as it originally was a Government *ghatwali* tenure. On the other hand in the case reported as *Zemindar of Karvetinagar* v. *Subbaraya Pillai* (24) where the estate was held more than a century ago under a military tenure, the Madras High Court held that "as soon as the military tenure under which the properties were held was put an end to about 120 years ago, that is, when the British Government granted the lands to the *zemindar* under a quite different tenure with express powers of alienation and after imposing a liability on the lands to be attached and sold in execution of decrees passed against the grantee, the restraint on alienation without the permission of the overlord came to an absolute end." The observation of the Judicial Committee in the case of *Rajkishen Singh* v. *Ramjoy Surma Mozoomdar* (26) was referred to. In the present case there was no military tenure, it was an ordinary *zemindari*, and the Police duties which were at one time imposed upon the *jungle mehal zemindars* having been abolished, the inalienability, if any, arising therefrom was gone.

It is to be observed that in the Court below the learned Counsel for the defendant conceded that he "could not press the contention that the estate was inalienable on account of its being one of military or feudal nature."

Regulation XI of 1793 referred to the custom of impartibility and primogeniture originating in considerations of financil convenience in "some of the most extensive *zemindaris*" and declared them to be partible and alienable in case of persons dying intestate. Mr. Strachey the Magistrate of Midnapur in his letter dated the 30th October 1800 to the Government stated that Regulation XI of 1793 had never operated in the *jungle mehals*, that the effect of that Regulation might easily have been obviated by the *zemindars* making Wills for it is intended to operate only in case of the proprietors dying intestate "but it was not usual to make Wills in the *jungles* before this Regulation does not appear to have introduced the custom", and he recommended that a Regulation be passed for preventing the division of landed estates in the *jungle mehals*". Accordingly Regulation X of 1800 was passed declaring that Regulation XI of 1793 "shall not be considered to supersede or affect any established usage which may have obtained in the *jungle mehals* of Midnapur and other Districts by which the succession to landed estates, the proprietor of which

(25) 79 Ind. Cas. 825; 28 C. W. N. 351; 5 P. L. T. 171; 3 Pat. 183; (1924) A. I. R. (P. C.) 5 (P. C.).

(26) 1 C. 186; 19 W. R. 8; 3 Sar. P. C. J. 174; 8 Mad. Jur. 151; 2 Suth. P. C. J. 744; 1 Ind. Dec. (N. S.) 119 (P. C.).

may die intestate has hitherto been considered to devolve to a single heir to the exclusion of the other heirs of the deceased. In the *mehals* in question the local custom of the country shall be continued in full force as heretofore".

But the passing of Regulation X of 1800 appears to have had no effect upon alienation. Mr. Dent, Commissioner of Hazaribagh, in his letter to the Government dated the 4th September 1833 referred to the "Practice to hold the estates of these Rajas (of *jungle mehals*) liable to sale for arrears of revenue as also for private debts and observed that "even if legal it is proved by experience to be a very objectionable mode of proceeding". He referred to the sales of certain estates, and states considerations for discontinuing the practice of selling such estates, expressed his opinion that the estates being entailed property and having descended to a single heir from ancient times were not legally liable to sale, and strongly urged the necessity of their being in future treated as entails and declared exempt from sale or transfer for the Raja's private debts.

The matter was more forcibly put by Mr. Dalton, Commissioner of Chota Nagpur, in his letter to the Government dated the 6th November 1869 in paragraph 14 of which he wrote as follows: "It has, however, always been held that the Commissioners, in refusing to sell an estate may order its sequestration till the debt be paid, this power is exercised as derived from the orders of the 13th October and appears a necessary corollary to the authority conferred to stay sales of estates. I have no hesitation in saying that had this power not been conferred on the "Commissioner very few of the estates in Chota Nagpur, would, up to this time, have remained in the hands of the old proprietors and it would have been a calamity to the people if they had passed into the hands of aliens. It is with them a maxim that, however ignorant, dissipated, extravagant their *zemindars* or more properly chiefs, of the old line may be, they are to them better and kinder landlords than the most enlightened of interlopers. It is, however, to be regretted that the rules issued for the preservation of estates were not more comprehensive and complete. What was wanted and what we should have here is a law of entail that would strictly limit the interest of each chief and debar any alienation of the property beyond his own life". This appears to have led to the passing of the Chota Nagpur Encumbered Estates Act.

The letter of Mr. Dent shows the practice of alienation up to 1833 and the letter of Mr. Dalton shows that estates were being sold up to 1869.

The last contention is that the Will of Satrughna under which the plaintiff claims is invalid having regard to the provisions of the Encumbered Estates Act, Bengal Act VI of 1876.

It appears that the estate came under the Act during the lifetime of Ram Chandra III and remained under management until 1899 when it was released to Satrughna who got possession. It again came under the Act in 1905 upon the application of Madhu Sudan (the father of the defendant) notwithstanding Satrughna's objections. Madhu Sudan made the application on the 10th March 1905, it was resubmitted on the 11th April 1905. Satrughna's petition of objection was filed on the 8th May 1905. The notification under Act VI of 1876 was made on the 2nd August 1905. In the meantime on the 11th May 1905 Satrughna made his Will. He died on the 1st March 1916. The estate remained in charge of the Encumbered Estates Act Authorities from 2nd August 1905 until October 1920 when it was taken charge of by the Court of Wards.

At the time when Satrughna made his Will (11th May 1905) the estate had not come under the Act, but it was so at the time of his death (1st March 1916) and so continued subsequently up to October 1920. Section 3 (*thirdly*) of the Act provides that "so long as such management continues the holder of the said immoveable property and his heir shall be incompetent to mortgage charge, lease or alienate their immoveable property or any part thereof

or to grant valid receipts for the rents and profits arising or accruing therefrom".

It is contended by the appellant that the word 'alienate' though used after the words mortgage and charge etc., should not be taken *ejusdem generis* so as to apply only to transfers having present operation, but should be construed in its usual and general sense having regard to the object of the Act *viz.*, relief to be given to the holder of an Estate in Chota Nagpur and his heir and that so construed, the power of making a Will is also taken away during the period the estate is under management under the Act. Though the Will was executed before the estate was taken charge of under the Act, it is contended that the Will was invalid, as a Will operates only on the death of the testator and the manager under the Act was in possession at the moment of Satrughna's death. The management may continue until the holder or his heir is restored to possession which is to be notified in the *Gazette* (see section 12 of the Act), and in this case did continue until long afterwards and the attempted alienation by a Will was, therefore, void under section 12-A (clause 4).

The principle of *ejusdem generis* has been stated in Beal on Cardinal Rules of Legal Interpretation, 3rd Edition, page 355 thus:

" General words in a Statute are *prima facie* to be taken in their usual sense, General words following specific words in a Statute are *prima facie* to be taken in their general sense, unless the reasonable interpretation of the Statute requires them to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before."

We have, therefore, to consider the provisions of the Act.

The Judicial Committee in the case of *Jyoti Prashad Singh Deo Bahadur* [*Raja of Pachete*] v. *Kumud Nath Chatterji* (27) observed: "The preamble is material, for it defines the purpose of the measure as the provision of relief of holders of land in Chota Nagpur who may be in debt and whose immoveable property may be subject to mortgages, charges and liens" under section 2 the "holder", or "the person who would be heir to such holder if he died intestate", or the Deputy Commissioner (in case where a sale is imminent or "where the holder has entered upon a cause of wasteful extravagance likely to dissipate his property") may make an application to the Commissioner for applying the provisions of the Act, and the Commissioner may appoint a manager and vest in him the management of the estate. The proviso to the section directs postponement of the order until enquiry. Section 2A empowers the Deputy Commissioner to order production of accounts and documents with the object of finding out the debts and liabilities and the income of the estate. Section 3 lays down that on the publication of an order under section 2, the following consequences will ensue:—

"*First*, all proceedings which may then be pending in any Civil Court in British India or in any Revenue Court in Bengal in respect of such debt, or liabilities, shall be barred; and all processes, executions and attachments for or in respect of such debts and liabilities shall become null and void;

Secondly, so long as such management continues, the holder of the said property and his heir shall not be liable to arrest for or in respect of the debts and liabilities to which the said holder was immediately before the said publication subject, or with which the property so vested as aforesaid or any part thereof was at the time of the said publication charge, other than debts due, or liabilities incurred, to Government.

Nor shall their moveable property be liable to attachment or sale under process of any Civil Court in British India or any Revenue Court in Bengal for or in respect of such debts and liabilities other than as aforesaid; and

Thirdly, so long as such management continues,

(27) 45 Ind. Cas. 827; 45 I. A. 103 at pp. 105, 108; 16 A. L. J. 569; 5 P. L. W. 64; (1918) M. W. N. 441; 24 M. L. T. 66; 28 C. L. J. 165; 8 L. W. 186; 22 C. W. N. 1009; 20 Bom. L. R. 856; 35 M. L. J. 347; 46 C. 1 (P. C.).

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(*a*) the holder of the said immoveable property and his heir shall be incompetent to mortgage, charge, lease or alienate their immoveable property or any part thereof, or to grant valid receipt for the rents and profits arising or accruing therefrom,

(*b*) such property shall be exempt from attachment or sale under such process as aforesaid, except for or in respect of debts due, or liabilities incurred, to Government, and

(*c*) the holder of the same property and his heir shall be incapable of entering into any contract which may involve them, or either of them, in pecuniary liability."

Section 4 lays down the duties of the manager, to receive rents and profits and pay thereform the Government demand, rent due to superior landlord, the maintenance of the holder and his heir, to re-pay loans, costs of repairs and improvements, and to apply the residue in discharge of the costs of management and in settlement of such debts and liabilities of the holder of the property and his heir as may be established under the succeeding provisions of the Act. Part IV containing sections 5 to 10 lays down the procedure for the determination of the debts of the holder of the property, and section 11 provides for preparation of a schedule of debts and liabilities and a scheme for the settlement thereof, which when approved by the Commissioner shall be carried into effect. Section 12 provides for restoration of the owner to his property, when the debts and liabilities are discharged and in certain other cases. In these events such holder or his heir shall be restored to the possession and enjoyment of the property or of such part thereof as has not been sold by the manager, but subject to the leases and mortgages, if any, granted and made by the manager under the powers conferred under the Act. Provided that where a fresh order has been made under section 2 in pursuance of section 12-A sub-section (5) re-appointing a manger and vesting in him the management of the whole or any portion of the property of any holder, such property shall not be restored to such holder but shall be retained by the manager for restoration to the heir of such holder in due course. Section 12-A provides that :

(1) when the possession and enjoyment of property is restored under the circumstances mentioned in the first or the third clause of section 12 to the person who was the holder of such property when the application under section 2 was made, such person shall not be competent, without the previous sanction of the Commissioner

(*a*) to alienate such property or any part thereof in any way or

(*b*) to create any charge thereon extending beyond his lifetime...

(3) every alienation and charge made or attempted in contravention of sub-section (1) shall be void.

(4). The Deputy Commissioner may make an enquiry to ascertain whether any holder of property has made or attempted to make an alienation in contravention of sub-sections (1) and (5); if he is satisfied after enquiry that such holder has made or attempted to make any such alienation, he may report to the Commissioner requesting that the provisions of the Act be re-applied to his case, and the Commissioner may publish a fresh order under section 2, re-appointing a manager and vesting in him the management of the whole or any portion of the property of such holder.

Section 12-A was introduced into the Act by the Amending Act III (B. C.) of 1909 The provisions of that section do not apply to Satrughna and that for two reasons. In the first place the section was enacted after Satrughna made his Will on the 11th May 1905. In the next place the section deals with the case of restoration of possession to the person who was the holder of such property when the application under section 2 was made. The estate was restored to Satrughna in 1889. He was not the holder when the application was made; the holder of the property at that time was Ram Chandra.

The next question is what sort of alienation is contemplated by section 12-A? Sub-section (1) provides for

alienation with the sanction of the Commissioner and sub-section (2) provides for an appeal to the Board of Revenue when sanction is refused by the Commissioner. The mere execution of a Will does not amount to alienation as it passes no property at the time. A Will operates only from the death of the testator and there can be no question of sanction after the death of the testator when only the Will takes effect. Sub-section (4) provides for the Deputy Commissioner requesting the Commissiner to re-apply the provisions of the Act. After the death of the holder no question of re-applying the provisions of the Act to the case of the deceased can arise. All these considerations show that the alienation mentioned in section 12-A refers to alienation *inter vivos* and not to Wills. And if the expression "alienate" has been used in that sense in section 12-A it should be taken to have that meaning in sectien 3 also, unless it is clear that some other meaning was intended.

On the 11th May 1905, when the Will was executed by Satrughna, he was competent to make a sale, gift or charge the estate or alienate in any way he liked (except that a lease granted by him might be set aside under certain circumstances under section 9) and it cannot be held that he had no power to make a Will at that time. Then when did the testamentary disposition become invalid? It was not invalid under section 12-A for reasons already stated. It may be said that it could not have effect on his death because the estate might continue under the management under the Act (as in fact it did) until the debts and liabilities were discharged. But management of the estate is one thing and the *right* to the estate is another. It is true the Act recognises only the heir and not the devisee, and the restoration of the estate is to be made to the heir on the death of the holder. But under section 23, the Civil Courts in Chota Nagpur have jurisdiction to entertain and dispose of suits relating to the succession to immoveable property. "Succession" would include intestate as well as testamentary succession, so that although the heir would be restored to possession and a person claiming under a testamentary disposition would have to establish such claim in the Civil Court, the possession of the heir would be subject to the result of such suit.

Under section 2 of the Act what is vested in the manager is the management of the property, and the provisions of the Act are all directed towards securing the effective control of the estate by the manager. The holder of the estate is prohibited from mortgaging, charging, leasing or alienating his immoveable property; or entering into any contract which may involve him in pecuniary liability and the property is exempt from attachment and sale so long as such mangement continues. Without such prohibitions the management could not proceed, nor could the scheme for discharge of the debts and liabilities be carried out. But a testamentary disposition cannot interfere with mangement by the manager. The Act creates a sort of administration of the immoveable estate of a debtor in some respects resembling that pursued in an administration suit but with the material difference that whereas in an administrution suit the satisfaction of the claims of the creditors is primarily in view, in proceedings under the Act, the protection of the debtor and the protection of his estate so far as practicable in spite of its encumbered condition is the main solicitude of the authorities concerned [see *Kameshar Prasad* v. *Bhkian Naran Singh* (28) and *Beicha Ram Sahu* v. *Bishambhar Nath Sahi* (29)].

It is contended on behalf of the appellant that the scope and object of the Act is the preservation of the property of the holder and his heir; and that the introduction of the heir makes the object clear. Section 3 provides that the holder and his heir shall not be liable to arrest for the debts and liabilities of the holder, nor shall their im-

(28) 20 C. 609 at p. 625; 10 Ind. Dec. (N. S.) 412.

(29) 17 Ind. Cas. 957; 16 C. L. J. 527; 17 C. W. N. 754.

moveable properties be liable to attachment and sale, and the holder and his heir shall be incompetent to mortgage, charge, lease or alienate. It is difficult to see how the heir can be arrested, his moveable properties attached and sold for the debts and liabilities of the holder, However, that may be, the Act restricts the power of the holder in disposing of the property in so far as it would interfere with the management of the estate. But the right to succession to the estate of the holder is not affected by the Act. It is saved by the provisions of section 23. It is true that the management may continue even after the death of the holder if the debts and liabilities are not discharged before his death. But that would merely postpone the possession of the successor until the debts are satisfied; it cannot affect his title to the property. Section 12 provides for restoration of the holder or his heir to possession and management of the estate, and the Act does not provide for cases of testamentary succession. But the question is does the Act prohibit such succession?

There is no express provision to that effect in the Act, and the proviso contained in section 23 goes against that view.

It is contended that the object of the Act is to preserve the estate belonging to families of political or social importance and that the object would be frustrated if testamentary dispositions were allowed. It is true that section 2 (*thirdly*) lays down that the consent of the Local Government shall not be given in the case of any holder who has "entered upon a course of wasteful extravagance likely to dissipate his property" unless such holder belongs to a family of political or social importance; but that is not the only case, because under the same section such consent may be given where the Government "is satisfied that it is desirable that such consent should be given".

It is pointed out on behalf of the respondent that whenever it is intended to restrict alienation by Will it is expressly so provided as for instance in the Madras Court of Wards Act (section 34 of Act I of 1902), and in the Bombay Act section 38 of Bombay Act I of 1905, See also section 37 of the United Provinces Court of Wards Act IV of 1912) though Act XXIV of 1870 (Oudh Talukdars Act upon which Bengal Act VI is based) does not contain any restriction as to Wills. This appears to be so but the Statutes in other Provinces do not give us much assistance in construing Bengal Act VI of 1876, as each Act must be construed with reference to its own provisions.

The Allahabad High Court in the case of *Muhammad Sayeed* v. *Muhammad Ismail* (30) held that a Will is not an alienation falling within the prohibition in section 325-A of the Code of Civil Procedure XIV of 1882 (corresponding to the Third Schedule in Act V of 1908 paragraph 11) which is similar to the prohibition contained in section 3 of Act VI of 1876. The learned Judges observed "The word 'alienate' in our opinion was used *ejusdem generis* with the words preceding, namely, mortgage, charge lease and manifestly contemplates a transfer which would have present effect and not a devise which can only have operation after the death of the testator. In this view the Will was not void and the lady was not incompetent to make it". There are differences, however, between the provisions of the Third Schedule and those of Bengal Act VI of 1876, more specially as Act VI of 1876 confers certain privileges and imposes certain disabilities upon the heir, whereas there are no such provisions in the Third Schedule, and even some of the provisions relating to the holder of the property under Act VI of 1876 are different from those relating to the judgment-debtor under the Third Schedule. The decision referred to above, therefore, is not of much assistance in deciding the question before us.

It has been held by the Judicial Committee that the Chota Nagpur Encumbered Estates Act (VI of 1876) does not apply to immoveable property outside Chota Nagpur (see *Jyoti Prashad Singh*

(30) 8 Ind. Cas. 834; 33 A. 233; 7 A. L. J. 1176.

Deo Bahadur [Raja of Pachete] v. *Kumud Nath Chatterji* (27). That being so, the Act cannot in any case apply to properties in the District of Midnapur.

As pointed out by Pigot, J., in *Kameshar Prasad* v. *Bhikan Narain Singh* (28):

"The Act is so framed as to render it not easy to construe", and the Judicial Committee in the case of *Raja of Pachete [Jyoti Parashad Singh Deo Bahadur* v. *Kumud Nath Chatterji* (27)] referred to the language of the Act as "obscure". An Act imposing disabilities should be strictly construed and if, as we hold, the restrictions imposed by the Act upon the holder of the estate (or his heir) are only for the purpose of carrying out the management of the estate and do not affect the rights of the holder of the properties, we think that the restrictions as to alienation refer only to alienation *inter vivos* having present operation and not to testamentary dispositions. We have already pointed out that a person claiming under a testamentary disposition cannot interfere with the management of the estate if such management continues after the death of the holder, and such a person can only get the estate after the management comes to an end. For all these reasons we are unable to hold that the Will of Satrughna executed at a time when his estate had not come under the management of the Act is invalid.

On the whole we think that the decree of the Court below should be affirmed. The appeal is accordingly dismissed with costs.

The plaintiff has claimed the amounts paid to the defendant for maintenance as mesne profits. There is no doubt that the defendant is entitled to maintenance and we are not inclined to interfere with the order for mesne profits made by the Court below, *viz.*, that they should come out of the Dhalbhum Estate and that the defendant shall not be personally liable for the same.

The plaintiff denied that the defendant was joint with the deceased and made no offer to pay maintenance. In the circumstances we do not interfere with the order for costs made by the Court below. The costs of the plaintiff in the Court below as well as in this Court will come out of the Dhalbhum Estate and the defendant will not be personally liable for the same.

The cross-objections are accordingly dismissed. We make no order as to costs.

It is pointed out on behalf of the respondent that the Court of Wards was in charge of the estate at the time when the decree of the Court below was passed, and accordingly there are references to the Court of Wards in the ordering portion of the decree. As the Court of Wards has subsequently given up the management of the estate and has placed it in the hands of the Receiver appointed by this Court, the references in the ordering portion of the decree of the Court of Wards should be interpreted as applying to the Receiver appointed by this Court and the expression "Ward defendant" will be interpreted to mean "defendant-appellant".

M. M. B.

Appeal and Cross Objection dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 51 OF 1922.

July 9, 1924.

Present:—Mr. Justice Devadoss.

KASIVASI CHIDAMBARA SWAMIGAL —PLAINTIFF—APPELLANT

versus

RAMAKRISHNA REDDIAR AND OTHERS—DEFENDANTS Nos. 1 TO 3 —RESPONDENTS.

Minor—Specific performance—Agreement for sale of immoveable property by guardian—Benefit of minor—Subsequent better terms, effect of.

A decree for specific performance can be passed in certain circumstances against a minor on a contract entered into by his guardian.

Specific performance of a valid agreement by a guardian, for sale of immoveable property belonging to a minor at a price proper and adequate at the time of the agreement, cannot be refused merely because subsequently some body else is prepared to offer a better price for the property.

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Batchu Ramajogayya v. *Vajjula Jagannadham*, 49 Ind. Cas. 872; 42 M. 185; 25 M. L. T. 23; 9 L. W. 229; 36 M. L. J. 29; (1919) M. W. N. 148 (F. B.), applied.

Chhitar Mal v. *Jagannath Prasad*, 29 A. 213; 4 A. L. J. 24; A. W. N. (1907) 25, distinguished.

Lal Gopal Datta v. *The Khorooriah Majozilla Zemindary Syndicate Ltd.*, 13 Ind. Cas. 673; 16 C. W. N. 297, relied on.

Second appeal against the decree of the Court of the Subordinate Judge, Cuddalore, in Appeal Suit No. 33 of 1921 (A. S. No. 187 of 1920, on the file of the District Court, South Arcot), preferred against the decree of the Court of the District Munsif, Chidambaram, in O. S. No. 319 of 1919.

Mr. *M. Patanjali Sastry*, for the Appellant.

Mr. *N. S. Srinivasa Iyer*, for the Respondents.

JUDGMENT.—The main question argued in this second appeal is whether the contract entered into by the guardian of a minor for the sale of immoveable property belonging to the minor could be specifically enforced. The plaintiff contracted to buy a portion of the minor's property for Rs. 1,150. Two months after, the property was sold for Rs. 1,500 to the third defendant. The plaintiff has brought the suit for the purpose of enforcing specific performance of the contract in his favour and the 3rd defendant resists the suit. The District Munsif gave a decree in favour of the plaintiff and the Subordinate Judge has reversed the judgment and has dismissed the plaintiff's suit.

The question in this case is whether the contract by the guardian on behalf of the minor could be specifically enforced. Mr. Patanjali Sastri who appears for the appellant relies upon the case reported in *Batchu Ramajogayya* v. *Vajjula Jagannadham* (1). In that case the opinion of the majority was that no decree should be passed against the minor's estate on a contract entered into on his behalf by the guardian under which covenant no charge is created on the estate except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject. In this case the minor is a Hindu and the guardian is his mother. The contract to sell a portion of the property was in discharge of a debt incurred by the father. The question whether she could sell a portion of the property of the minor for discharging a debt due by the minor's father has to be decided with reference to *Batchu Ramajogayya* v. *Vajjulla Jagannadham* (1). It is urged on behalf of the respondent that the question of necessity has not been gone into. The third defendant, who contested the suit, did not raise the question as to the necessity for the sale. Evidently it did not suit his purpose to raise such a question for, he himself is a purchaser from the guardian, and so he cannot now reasonably complain that the question of necessity was not gone into. As it was not specifically raised in the pleadings, the District Munsif rightly disallowed the question as to necessity. The Subordinate Judge based his decision mainly relying upon the decisions referred to in *Batchu Ramajogayya* v. *Vajjula Jagannadham* (1). Whatever may be the effect of those decisions, I am bound to follow the decision reported as *Batchu Ramajogayya* v. *Vajjula Jagannadham* (1). According to that decision a decree could be passed in certain circumstances against the minor on a contract entered into by the guardian. The contract in favour of the plaintiff is not impeached on the ground of fraud or collusion or on any other ground which would be a proper defence to an action of this kind. The respondent's Vakil urged that this is not a case for specific performance and no specific performance of the contract should be given when the estate of the minor is likely to suffer, and his contention was that as the 3rd defendant was able to pay a better price the contract in favour of the plaintiff should not be enforced, and he relied upon *Chhitar Mal* v. *Jagannath Prasad* (2). In that case, the learned Judge has held that it was not proper that

(1) 49 Ind. Cas. 872; 42 M. 185; 25 M. L. T. 23; 9 L. W. 229; 36 M. L. J. 29; (1919) M. W. N. 148 (F. B.).

(2) 29 A. 213; 4 A. L. J. 24; A. W. N. (1907) 25.

specific performance of a contract should be granted in a case where the minor's estate was likely to suffer, but that case is no authority for refusing relief where there is a valid contract and at the time when such contract was made there were no circumstances which could invalidate it for the simple reason that somebody else is prepared to offer a better price. In a case reported in *Lal Gopal Datta* v. *The Khorooriah Majozilla Zemindary Syndicate Ltd.* (3) a Bench of the Allahabad High Court held that the case in *Chhitar Mal* v. *Jagan Nath Prasad* (2) was not an authority for holding that, when a valid agreement had been lawfully entered into on behalf of a minor and was to the minor's benefit, it could be repudiated if the guardian subsequently found he could obtain more. To hold that a Court should not grant specific performance of a valid contract if better terms are forthcoming would be putting a premium upon offers of a better price, a long time after the contract is entered into. I do not think that in this case the guardian acted against the interest of the minor at the time when the contract in favour of the plaintiff was entered into. If any evidence was forthcoming that the contract was not a proper contract, or that there were other circumstances which could in any way invalidate, or go to show that the minor's guardian was not acting as a free agent, certainly the Court would not be well advised in granting specific performance. But no such case was put forward either on behalf of the minor or on behalf of the third defendant.

In the result the second appeal is allowed and the plaintiff's suit is decreed with costs throughout. The plaintiff will pay the whole of the price less Rs. 100 into Court within 14 days from to-day. If he fails to do so, his suit will stand dismissed with costs throughout.

V. N. V. *Appeal allowed.*

(3) 13 Ind. Cas. 673; 16 C. W. N. 297.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 520 OF 1923.

August 1, 1924.

Present:—Mr. Justice Jackson.

SINNAPPA NADAN—PLAINTIFF—PETITIONER

versus

SINNAPPA NAICKEN—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Plaint presented out of Court hours—Discretion of Judge—Revision.

The discretion of the Judge of a Civil Court in declining to accept a plaint presented out of office hours at his club cannot be interfered with in revision by the High Court.

Din Ram v. *Hari Das*, 14 Ind. Cas. 744; 34 A. 482; 9 A. L. J. 743, and *Sattaya Padayachi* v. *Soundrathachi*, 79 Ind. Cas. 1017; 46 M. L. J. 78; (1924) M. W. N. 162; 19 L. W. 468; 47 M. 312; (1924) A. I. R. (M.) 448, distinguished.

Petition, under section 25 of Act IX of 1887, and section 107 of the Government of India Act, praying the High Court to revise an order, dated the 1st December 1922, of the Court of the District Munsif, Periyakulam, on the plaint presented by the petitioner herein to the said Court.

Mr. *N. Ramachandra Iyer*, for the Petitioner.

JUDGMENT.—In this case the petitioner's plaint was time-barred when the Court rose and he pursued the District Munsif to his club where he declined to receive it at 6-30 P. M. I am now asked to treat it as if he had received it because in the light of *Din Ram* v. *Hari Das* (1) and *Sattaya Padayachi* v. *Soundrathachi* (2) he might have received it.

This cannot be done. The District Munsif was within his discretion in refusing to receive a plaint at his club, and it is impossible to consider at this stage what might have happened if he had exercised his discretion in another way. The petition is dismissed.

V. N. V. *Petition dismissed.*

(1) 14 Ind. Cas. 744; 34 A. 482; 9 A. L. J. 743.

(2) 79 Ind. Cas. 1017; 46 M. L. J. 78; (1924) M. W. N. 162; 19 L. W. 468; 47 M. 312; (1924) A. I. R. (M.) 448.

GANJAM MANIKYAMBA *v.* PASALA MALLAYYA.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 433 OF 1922.

April 23, 1924.

Present:—Mr. Justice Krishnan and Mr. Justice Odgers.

GANJAM MANIKYAMBA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

PASALA MALLAYYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 3 (5), 6, 8—Kudivaramdar, *acquisition of* melwaram *rights by*—Kudivaram *rights, if lost*—"*Land-holder,*" *meaning of*—*Suit for possession*—*Jurisdiction of Civil Courts.*

When a *kudivaramdar* gets by transfer or otherwise the *melwaram* interest in the land, he does not lose his *kudivaram* interest thereby, and the persons who were in occupation of the lands as tenants under him as *kudivaramdar* do not become "*raiyats*" and do not get *kudivaram* rights automatically transferred to them by the transfer of *melwaram* rights to him. [p. 929, col. 2.]

Such a *kudivaramdar* is not a "land-holder" within the meaning of section 3 (5), Madras Estates Land Act, and a suit by him in ejectment against the tenants in possession can be tried by a Civil Court. [p. 930, col. 1.]

Section 8 of the Madras Estates Land Act must be read subject to the Explanation to section 6 of the Act. [*ibid.*]

Marina Veeraswamy v. *Boyinapalli Venkatrayudu*, 57 Ind. Cas. 778; 39 M. L. J. 225; 12 L. W. 51; 28 M. L. T. 458 (F. B.), followed.

Jurugumilli Brahmayya v. *Chellaghali Achiraju*, 70 Ind. Cas. 615; 45 M. 716; (1922) M. W. N. 280; 31 M. L. T. 91; 43 M. L. J. 229; (1922) A. I. R. (M.) 373 (F. B.), distinguished.

Appeal against the order, dated the 21st April 1922, of the Court of the Additional Subordinate Judge, Cocanada, in A. S. No. 20 of 1921 (preferred against the order of the Court of the District Munsif, Ramachandrapur, in O. S. No. 692 of 1917).

Mr. *Ch. Raghava Rao*, for the Appellants.

Mr. *K. Srinivasa Rao*, for the Respondents.

JUDGMENT.—This appeal is against an order of the Subordinate Judge of Rajahmundri returning a plaint to be presented to the proper Court; the Subordinate Judge held that the Civil Court had no jurisdiction to try the suit but only the Revenue Court had. The suit was for the recovery of possession of certain properties on the strength of a lease alleged to have been given orally to the first defendant by the second plaintiff. The defendant denied the lease and claimed occupancy rights in the lands and also pleaded that the plaintiff as *inamdar* was a land-holder within the meaning of the Madras Estates Land Act, and, therefore, the suit could not be tried by the Civil Court. The Subordinate Judge decided on the first part of issue No. 3 that the suit is a *dharmilla inam* and that finding we must accept. He then considered himself bound by the ruling of the Full Bench reported as *Jurugumilli Brahmayya* v. *Chellaghali Achiraju* (1) to hold that the plaintiff as a *dharmilla inamdar* was a land-holder within the meaning of the Act, and, therefore, the Civil Court had no jurisdiction to try this suit and he directed the plaint to be returned to the proper Court. It is pointed out to us that the plaintiffs' case was that they owned the *kudivaram* interest to start with in this land and that it was only subsequently that they obtained by grant the *melwaram* interest from the *zemindar*. It was argued that when a *kudivaramdar* gets by transfer or otherwise the *melwaram* interest in the land, the *kudivaramdar* does not lose his *kudivaram* interest thereby, and the persons who were in occupation of the lands as tenants under him as *kudivaramdar* do not become *raiyats* and do not get *kudivaram* rights automatically transferred to them by the transfer of *melwaram* rights to the original *kudivaramdar*. The Full Bench case referred to is sought to be distinguished from the present case on this ground. In the Full Bench case, the transfer was of both the *varams* simultaneously to the grantee and the question arose whether under those circumstances the suit by the grantee for rent should be tried by the Revenue Court or the Civil Court. The question depended upon whether he was a land-holder within the meaning of the Act or not. The majority of the Judges held that in the circumstances he was a land-holder.

Here we have a different case put forward by the plaintiff, namely, a case of the transfer of *melwaram* to a

(1) 70 Ind. Cas. 615; 45 M. 716; (1922) M. W. N. 280; 31 M. L. T. 91; 43 M. L. J. 229; (1922) A. I. R. (M.) 373 (F. B.).

person who already owned the *kudivaram* right. If the plaintiff was a *kudivaramdar* to start with before the *melwaram* right was transferred to him his position is different from the position of the parties in the Full Bench case. The Subordinate Judge has not considered the question whether the plaintiff's allegation, that he was a *kudivaramdar* to start with is true or not. The District Munsif discussed the question and came to the conclusion that the plaintiff's allegation was true. That finding of the District Munsif has not been displaced by the Subordinate Judge. We must, therefore, for the purpose of this appeal assume that the plaintiff was a *kudivaramdar* before he got the *melvaram* interest. In such circumstances we are of opinion that the ruling in the Full Bench case above cited will not apply. The Estates Land Act itself in the Explanation to section 6 recognises that a person owning a right of occupancy already in the land does not lose it subsequently by getting the interest of the land-holder in the lands. No doubt as pointed out by Mr. Justice Oldfield in the Full Bench case there is some difficulty in reconciling this Explanation with section 8. We must take it that section 8 must be read subject to the Explanation in section 6. A question similar to the one before us arose before another Full Bench in this Court, on a former occasion in *Marina Veeraswamy* v. *Bayinapalli Venkatrayudu* (2). It was held by that Full Bench of five Judges that a person who was already the owner of a *kudivaram* right and to whom the *zemindar* granted the *melwaram* subsequently is not a person holding an estate or part thereof and is also not a person entitled to collect the rent by virtue of a transfer from the owner of his predecessor-in-title within the meaning of section 3 (5) of the Estates Land Act, and, therefore, he did not acquire the status of a landholder in consequence of the grant by the *zemindar* and his suit was maintainable in the ordinary Civil Court against his tenants for recovery of rent.

(2) 57 Ind. Cas. 778; 39 M. L. J. 225; 12 L. W. 51; 28 M. L. T. 458 (F. B.).

The authority of that Full Bench is still subsisting and it has not been overruled by any subsequent Full Bench of this High Court. We must, therefore, hold that the Subordinate Judge was not right in disposing of this case without going into the question whether the plaintiff owned the *kudivaram* interest before the *melwaram* was granted to him. If he finds that the plaintiff had no *kudivaram* interest at all, that he become an *inamdar* solely by virtue of the grant made by the *zemindar* of *melwaram* rights, his view that the plaintiff could not maintain the suit in the Civil Court would be right; but if, on the other hand, he comes to the conclusion, as the Munsif has done, that the plaintiffs owned the *kudivaram* interest before they became entitled to the *melwaram* by the grant by the *zamindar*, the Full Bench case in *Marina Veeraswamy* v. *Boyinapalli Venkatrajulu* (2), already referred to, will apply and the present case will have to be tried by the Civil Court. In the latter case the Subordinate Judge will consider the other issues in the case and dispose of the appeal himself. In the former case the order returning the plaint would be re-affirmed. We, therefore, set aside the order of the Subordinate Judge and remand the appeal to him to be disposed of in the light of the observations made above. Costs will abide and follow the result of the appeal. The Court fee paid for the appeal in this Court will be refunded to the appellant.

V. N. V. *Appeal remanded.*

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL JURISDICTION No. 151 OF 1923.

November 12, 1923.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Thomas Richardson, KT.

S. N. HALDER—APPELLANT

versus

S. N. MALLIK AND ANOTHER—RESPONDENTS.

Specific Relief Act (I of 1877), s. 45—Court's

jurisdiction, nature of—Specific remedy available—High Court, whether will take action—Bengal Electoral Rules, r. 31—Election, whether can be questioned in Court.

The jurisdiction given to the High Court under section 45 of the Specific Relief Act is a discretionary jurisdiction and is limited by provisos and exemptions which are set out in the section. [p. 932, col. 2.]

One *H* applied under section 45 of the Specific Relief Act for an order requiring the Returning Officer to accept his nomination paper for election to the Bengal Legislative Council and reject that of his rival candidate *M*. The application having been rejected *H* appealed but during the pendency of the appeal the Returning Officer declared *M* to be duly elected:

Held, (1) that inasumch as it was open to *H* to contest the election of *M* by an election petition, he had another specific and adequate legal remedy, and the Court had, therefore, no jurisdiction to make an order under section 45 of the Specific Relief Act; [*ibid.*]

(2) that as *M* had been declared to be duly elected the Court had no jurisdiction to interfere with that declaration in those proceedings. [*ibid.*]

Appeal against an order of Mr. Justice Page, dated the 2nd November 1923, passed in the exercise of Ordinary Original Civil Jurisdiction.

Mr. *D. N. Sen*, (with him Mr. *S. C. Roy*), for the Appellant.

Mr. *S. R. Das*, Advocate-General, and Mr. *B. L. Mitter*, Sir *B. C. Mitter* and Messrs. *N. N. Sarkar* and *S. M. Bose*, for the Respondents.

JUDGMENT.

Sanderson, C. J.—This is an appeal from a judgment of my learned brother Mr. Justice Page.

I need not deal with the first Rule which was issued, because, as I understand, that was discharged by my learned brother Mr. Justice Cuming, who thereupon issued another Rule. That Rule was issued on the 15th of October 1923. The Rule called upon Mr. S. N. Mallik and the Returning Officer to show cause why the Returning Officer should not accept the nomination paper of Surendra Nath Halder and include the name of the said Surendra Nath Halder in the list of valid nominations which he was preparing and why he should not reject the nomination paper of the said S. N. Mallik and exclude his name from the list of valid nominations and why they should not pay to the said Surendra Nath Halder his costs.

Mr. Justice Cuming, as we have been informed, made an *ad interim* injunction restraining the Returning Officer from preparing the list or from taking any further steps in the election.

The Rule was heard by my learned brother Mr. Justice Page on the 29th of October. He reserved judgment and continued the *ad interim* injunction until the date of delivery of his judgment. On the 2nd of November by his judgment he discharged the Rule and set aside the *ad interim* injunction.

This is an appeal from that judgment. The facts which it is necessary for me to state for the purpose of my judgment are as follows: These two gentlemen Mr. S. N. Halder and Mr. S. N. Mullik desired to be candidates for a particular seat in the election for the Bengal Legislative Council. Mr. Halder presented his nomination paper on the 8th of October 1923. The nomination paper contains a paragraph which is to be filled in by the Returning Officer as follows: "This nomination paper was delivered to me in my office at (date and hour .....)." The Returning Officer filled in the date and hour and signed his own name. In the presence of the Returning Officer Mr. Halder signed what is called "declaration by candidate" which runs as follows: "I hereby declare that I agree to this nomination." Mr. Halder signed that declaration on the 8th of October last in the presence of the Returning Officer. He did not fill in the date upon which he signed the declaration. When the time came for investigating the validity of the nomination papers, namely, on the 11th of October 1923, a point was taken by or on behalf of Mr. Mallik that the nomination paper of Mr. Halder was not valid because the declaration signed by Mr. Halder did not bear a date, though, as I have said, he signed it on the 8th October actually in the presence of the Returning Officer. The Returning Officer decided that the ground that the declaration of Mr. Halder did not bear a date, was sufficient to invalidate the nomination paper and he

rejected the nomination paper of Mr. Halder.

It is not necessary for me to express any opinion as to whether the Returning Officer's decision on this point was a correct decision or not and I express no opinion in respect thereof. The point has not been argued before us and it would not be right for me in any shape or form to express an opinion thereon.

Mr. Halder apparently took an objection to Mr. Mallik's nomination paper. The argument in respect of that objection has not been elaborated in this Court but I understand that the ground was that Mr. Mallik was a Government Official. The Returning Officer, as I have been informed, came to the conclusion that he had no jurisdiction to decide that question and accepted Mr. Mallik's nomination paper.

After the judgment of my learned brother Mr. Justice Page was delivered on the 2nd of November by which, as I have already stated, he discharged the Rule and dissolved the injunction, the Returning Officer under rule 14 (2) of the Bengal Electoral Rules declared Mr. Mallik to be elected. Rule 14 (2) runs as follows: "If the number of such candidates is equal to the number of vacancies, all such candidates shall be declared to be duly elected." The result of the Returning Officer's rejecting Mr. Halder's nomination paper and accepting Mr. Mallik's nomination paper was that there was one vacancy and one candidate; and, therefore, on the 2nd November, after Mr. Justice Page's judgment had been delivered, he declared Mr. Mallik to be elected. Under date the 5th November this notice appears in the Gazette: "It is hereby notified in pursuance of rule 14 (9) of the rules for the election and nomination of members to the Bengal Legislative Council that Mr. Surendra Nath Mallik has been declared under rule 14 (2) of the aforesaid rules to have been duly elected by the Calcutta South (Non-Muhammadan) Constituency to be a member of the Bengal Legislative Council."

These are the facts which, in my judgment, it is necessary for me to state.

In my judgment this appeal must be dismissed on the following grounds:—

The application, upon which the Rule was founded, was made under section 45 of the Specific Relief Act. It is not necessary for me to refer at any length to the provisions of that section as they are all well known and there have been many decisions in this Court in respect thereof. It is sufficient for me to say, in the first place, that the jurisdiction which is given to the Court under that section is a discretionary jurisdiction: and, in the second place, that jurisdiction is limited by the provisos and exemptions which are set out in the section. I desire to refer to three of these, *viz.*, (*d*), (*e*) and (*h*). The section provides that the Court may "make an order requiring any specific act to be done or forborne.....by any person holding a public office..... provided, (*d*) that the applicant has no other specific and adequate legal remedy, and (*e*) that the remedy given by the order applied for will be complete" and one of the exemptions from such power is as follows:—

(*h*) "Nothing in this section shall be deemed to authorise any High Court to make any order which is otherwise expressly excluded by any law for the time being in force." It has been admitted by the learned Counsel, who argued this case, that it will be open to his client to present an election petition based upon the allegations upon which he now relies. It seems to me, therefore, that the applicant has another specific and adequate legal remedy.

Further, it seems to me that if we were to allow this appeal and make the order, which my learned brother was asked to make and direct that the Returning Officer should accept Mr. Halder's nomination paper, the remedy, which we should be able to give would not be complete because we have no power in these proceedings to set aside the election which has been declared and the result might be to reduce these proceedings to an absurdity inasmuch as we should be directing the Returning Officer to receive the nomination paper of Mr. Halder after he has declared Mr. Mallik to be duly

elected—a declaration, with which this Court in these proceedings has no jurisdiction to interfere.

There is a further ground, namely, that by rule 31 of the Bengal Electoral Rules and Regulations it is provided that "no election shall be called in question except by an election petition presented in accordance with the provisions of this part." The learned Counsel has admitted that that rule may be said to be "a law for the time being in force" and one of the exemptions from the provisions of section 45 of the Specific Relief Act, as I have stated, is that "nothing in this section shall be deemed to authorise any High Court to make any order which is otherwise expressly excluded by any law for the time being in force."

For these reasons, in my judgment, this appeal must be dismissed with costs.

Richardson, J.—I am entirely of the same opinion.

K. S. D. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 100 OF 1922.

July 22, 1924.

Present:—Mr. Justice Jackson.

TALLAPRAGADA SATYANARAYANA MURTHY—DEFENDANT—APPELLANT

versus

MADDU RAMIREDDY (RECEIVER) AND ANOTHER—PETITIONERS—RESPONDENTS.

Limitation Act (IX of 1908), s. 19—Acknowledgment—Construction.

The question whether a statement by a debtor is an acknowledgment of debt within the meaning of section 19 of the Limitation Act is one that has to be considered on the merits and having regard to the exact language used.

A statement by a debtor was as follows:—"The debt due to the creditor *K B* was a mortgage debt. It ripened into a decree. He gave me a letter that he would proceed against the mortgaged properties only and would not proceed against my person." At the end were these words, "these debts were due by me along with others but they were paid by me alone. I, therefore, owe no debts to any of my creditors";

Held, that the statement only meant there was no claim against the person of the deponent but there was a clear admission of the existence of a debt which amounted to an acknowledgment within the meaning of section 19, Limitation Act.

Hingan Lal v. *Mansa Ram*, 18 A. 334; A. W. N. (1896) 101; 8 Ind. Dec. (N. S.) 963, *Muthu Kumara Mudaliar* v. *Chockalinga Mudaliar*, 73 Ind. Cas. 952; 17 L. W. 674; (1923) M. W. N. 634 and *Kandasami Reddi* v. *Suppammal*, 70 Ind. Cas. 576; 45 M. 443; 15 L. W. 325; 42 M. L. J. 268; (1922) M. W. N. 168; (1922) A. I. R. (M.) 104; 32 M. L. T. 166, distinguished.

Appeal against the order of the District Court, Kistna (at Masulipatam), in A. S. No. 327 of 1920, preferred against the order of the Court of the Subordinate Judge, Ellore, in E. P. No. 92 of 1919, in O. S. No. 80 of 1910.

Mr. *P. Somasundaram*, for the Appellant.

Mr. *G. Lakshmanna*, for the Respondents.

JUDGMENT.—This is an appeal from the order of the District Judge of Kistna at Masulipatam in Appeal Suit No. 327 of 1920 preferred against the order of the Court of the Subordinate Judge of Ellore in Execution Petition No. 92 of 1919 in Original Suit No. 80 of 1910.

The sole point for determination in this appeal is whether the learned District Judge has correctly held that the statement made by the appellant, Exhibit A, amounted to an acknowledgment of liability within the meaning of section 19 of the Indian Limitation Act, so as to save the bar of limitation.

The statement is as follows:—"The debt due to the creditor, K. Bavasa Reddi was a mortgage debt. It ripened into a decree. It was in Original Suit No. 80 of 1910 on the file of the Ellore Sub-Court. He gave me a letter that he would proceed against the mortgaged properties only and would not proceed against my person."

At the end of the same statement he says: "These debts are due by me along with others, but they were paid by me alone. I, therefore, owe no debts to any of my creditors."

There can be no doubt that this must mean that the debt is due to K. Bavasa Reddi; but inasmuch as he has undertaken to satisfy it by proceeding against

the mortgaged properties only, there is no claim against the person of the appellant. And this is the sense in which it has been taken by the learned Subordinate Judge and the learned District Judge. I agree with them that the deposition is a clear admission that the appellant was in debt to the plaintiff.

The appellant has cited three cases all of which can be distinguished, firstly *Hingan Lal* v. *Mansa Ram* (1). There the statement relied upon was merely the fact that the judgment-debtor had been declared liable to pay a certain sum of money by a certain decree. There was no statement that the debt was due. So too in *Muthu Kumara Mudaliar* v. *Chockalinga Mudaliar* (2), the statement is "I am the 3rd defendant. I and the 2nd defendant purchased some land from the 1st defendant. For the balance of price due to her, Exhibit A was executed." It is not stated that any debt under Exhibit A was still due.

And lastly in *Kandasami Reddi* v. *Suppammal* (3), the passage runs thus:—"The first plaintiff and his brother, the second plaintiff, namely, Suppa Reddy, jointly executed to him (first defendant) on the said date an hypothecation deed for Rs. 200 after deducting the sums paid towards the said *othi* amount of Rs. 275. Along with the said deed, the deed of *othi* executed in the year 1888, and the *othi* deed of 1907 were also given to the first defendant." Again there is no admission that any debt under these deeds was due.

The rulings lay down that each case is to be considered on its merits and having regard to the exact language used, I have no doubt that in this case there is an acknowledgment of debt and hence no bar of limitation.

The appeal is dismissed with costs.

V. N. V.

S. D. *Appeal dismissed.*

(1) 18 A. 384; A. W. N. (1896) 101; 8 Ind. Dec. (N. S.) 963.

(2) 73 Ind. Cas. 952; 17 L. W. 674; (1923) M. W. N. 634.

(3) 70 Ind. Cas. 576; 45 M. 443; 15 L. W. 325; 42 M. L. J. 268; (1922) M. W. N. 168; (1922) A. I. R (M.) 104; 32 M. L. T. 166.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 181 OF 1922.

August 28, 1923.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Chotzner.

BHUBANMOHINI DASI AND OTHERS —DEFENDANTS—APPELLANTS

versus

KUMUDBALA DASI AND OTHERS— —PLAINTIFFS—RESPONDENTS.

Hindu Law—Joint family—Property in name of female, nature of—Benami *transaction—Test—Onus—Nature of evidence necessary—Decision, how arrived at—Appeal—Appellant, what must prove—Procedure—Inconsistent pleadings, whether permissible—Partition—Partition of portion of estate—Decree, effect of—Question involving title, when should be decided.*

There is no presumption that a property standing in the name of a Hindu female, who is a member of a joint Hindu family, belongs to the joint family and is not her *stridhan* property. [p. 937, col. 1.]

Diwan Ran Bijai Bahadur Singh v. *Inderpal Singh*, 26 I. A. 226; 26 C. 871; 4 C. W. N. 1; 2 Bom. L. R. 1; 7 Sar. P. C. J. 578; 13 Ind. Dec. (N. S.) 1158 (P. C.), *Dharani Kant Lahiri Chowdhry* v. *Kristo Kumari Chowdhrani*, 13 I. A. 70; 13 C. 181; 10 Ind. Jur. 270; 4 Sar. P. C. J. 709; 6 Ind. Dec. (N. S.) 620 (P. C.), *Chowdrani* v. *Tariny Kanth Lahiry Chowdhry*, 8 C. 545; 11 C. L. R. 41; 4 Ind. Dec. (N. S.) 351, *Bindoo Bashinee Debee* v. *Pearee Mohun Bose*, 6 W. R. 312 and *Thakro* v. *Ganga Parsad*, 15 I. A. 29; 10 A. 197; 5 Sar. P. C. J. 133; 6 Ind. Dec. (N. S.) 132 (P. C.), followed.

Narayana v. *Krishna*, 8 M. 214; 3 Ind. Dec. (N. S.) 148, *Narasimma Ammal* v. *Srinivasa Raçava Iyangar*, 5 Ind. Cas. 760; 33 M. 112; 7 M. L. T. 89, *Bai Motivahoo* v. *Purshotam Dayal*, 29 B. 206; 6 Bom. L. R. 975, *Durga Prasad Sinha* v. *Prankrishna Sinha*, 39 Ind. Cas. 530; 3 P. L. W. 241 and *Protap Chandra Gope* v. *Sarat Chandra Gangopadhya*, 62 Ind. Cas. 348; 33 C. L. J. 201; 25 C. W. N. 544, referred to.

As *benami* transactions are very familiar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose. [p. 937, col. 2.]

Uman Parshad v. *Gandharp Singh*, 14 I. A. 127; 15 C. 20; 11 Ind. Jur. 474; 5 Sar. P. C. J. 71; Rafique & Jackson's P. C. No. 98; 7 Ind. Dec. (N. S.) 599 (P. C.) and *Muhammad Mahtab Ali Khan* v. *Bharat Indu*, 53 Ind. Cas. 54; 23 C. W. N. 221; (1919) M. W. N. 507 (P. C.), followed.

The person who impugns the apparent character of a transaction must not rely, however, solely on probabilities. He must show something definite to establish that it is a sham transaction, on the principle that the burden of proof lies upon the person, who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things. [p. 938, col. 1.]

Irshad Ali v. *Kariman*, 46 Ind. Cas. 217; 22 C. W. N. 530; (1918) M. W. N. 394; 21 O. C. 86; 5 O.

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L. J 197; 28 C. L. J. 173; 20 Bom. L. R 790; 24 M. L. T. 86 (P. C.), followed.

Nawab Azimat Ali Khan v. *Hurdwaree Mull*, 13 M. I. A. 395; 5 B. L. R. P. C. 578; 14 W. R. P. C. 14; 2 Suth. P. C. J. 343; 2 Sar. P. C. J. 571; 20 E. R. 599 (P. C), *Faez Buksh Chowdhry* v. *Fukeeroodeen Mahomed Ahassun Chowdhry*, 14 M. I. A. 234; 9 B. L. R. 456; 2 Sar. P. C. J. 733; 2 Suth. P. C. J. 490; 20 E. R. 775 (P. C.), *Suleiman Kadr Bahadur* v. *Mehndi Begum*, 25 I. A. 15; 25 C. 473; 2 C. W. N. 186; 7 Sar. P. C. J. 254; 13 Ind. Dec. (N. S.) 313 (P. C.), *Nirmal Chunder Banerjee* v. *Mahomed Siddik*, 25 I. A. 225; 26 C. 11; 7 Sar. P. C. J. 383; 13 Ind. Dec. (N. S.) 611 (P. C.) and *Moti Lal* v. *Kundan Lal*, 39 Ind. Cas. 964; 21 C. W. N. 929; 25 C. L. J. 581; 32 M. L. J. 468; 15 A. L. J. 329; 1 P. L. W. 490; 19 Bom. L. R. 471; 22 M. L. T. 10; (1917) M. W. N. 464; 6 L. W. 92 (P. C.), referred to.

The most important test to be applied in these cases is the source whence the consideration came. [p. 938, col. 1.]

Nrityamoni Dassi v. *Lakhan Chunder Sen*, 33 Ind. Cas. 452; 43 C. 660; 20 C. W. N. 522; 24 C. L. J. 1; 30 M. L. J. 529; (1916) 1 M. W. N. 332; 3 L. W. 471; 18 Bom. L. R. 418; 20 M. L. T. 10 (P. C.), relied on.

Where it is asserted that an assignment in the name of one person is really for the benefit of another person, the principle applies that the trust of the legal estate results to the man who pays the purchase money. [p. 938, col. 1.]

Parbati Dasi v. *Baikuntha Nath Das*, 22 Ind. Cas. 51; 18 C. W. N. 428; 19 C. L. J. 129; 15 M. L. T. 66; (1914) M. W. N. 42; 12 A. L. J. 79; 16 Bom. L. R. 101; 26 M. L. J. 248 (P. C.), *Dhurm Dass Pandey* v. *Shama Soondri Dibiah*, 3 M. I. A. 229; 6 W. R. P. C. 43; 18 E. R. 484; 1 Sar. P. C. J. 271; 1 Suth. P. C. J. 147 (P. C.) and *Gopeekrist Gosain* v. *Gungapersaud Gosain*, 6 M. I. A. 53; 4 W. R. P. C. 46; 1 Sar. P. C. J. 493; 2 Suth. P. C. J. 13; 19 E. R. 20 (P. C.), referred to.

The decision of the Court should rest not upon suspicion but upon legal grounds established by legal testimony. [p. 937, col. 2.]

Maniklal Mansukbai v. *Bijoy Singh Dudhuria*, 62 Ind. Cas. 356; 25 C. W. N. 409; (1921) M. W. N. 80 (P. C.), followed.

Where, however, from the lapse of time, direct evidence of a conclusive or reliable character is not forthcoming, as to the payment of consideration, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. [p. 938, col. 2.]

The doctrine of advancement in favour of wife or child does not apply in India, but the relationship is a circumstance which is taken into consideration in determining whether the transaction is *benami* or not. [p. 940, col. 2; p. 941, col. 1.]

Bilas Kunwar v. *Desraj Ranjit Singh*, 39 Ind. Cas. 299; 42 I. A. 202; 37 A. 557; 19 C. W. N. 1207; 22 C. L. J. 516; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; 22 C. L. J. 516; (1915) M. W. N. 757 (P. C.) and *Gopeekrist Gosain* v. *Gunjapersaud Gosain*, 6 M. I. A. 53; 4 W. R. P. C. 46; 1 Sar. P. C. J. 493; 2 Suth. P. C. J. 13; 19 E. R. 20 (P. C.), relied on.

Abdul Rahiman v. *Mirathayar Ammal*, 24 Ind. Cas. 10; 1 L. W. 451, *Kerwick* v. *Kerwick*, 57 Ind. Cas. 834; 47 I. A. 275; 32 C. L. J. 490; (1920) M. W. N. 738; 39 M. L. J. 296; 28 M. L. T. 194; 2 U. P. L. R. (P. C.) 153; 13 L. W. 455; 23 Bom. L. R. 730; 48 C. 260; 10 L. B. R. 335 (P. C.), explained.

In appeals, the burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calculations which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded. [p. 939, col. 2; p. 940, col. 1.]

Nabakishore Mandal v. *Upendrakishore Mandal*, 65 Ind. Cas. 305; 26 C. W. N. 322; 35 C. L. J. 116; 20 A. L. J. 22; (1922) M. W. N. 95; 42 M. L. J. 253; 24 Bom. L. R. 346; 15 L. W. 417; 30 M. L. T. 234; 3 P. L. T. 311; (1922) A. I. R. (P. C.) 39 (P. C.), followed.

The Code of Civil Procedure does not prohibit inconsistent pleadings, and there is nothing to prevent either party from setting up two or more inconsistent sets of material facts and claiming relief thereunder in the alternative. A plaintiff may rely upon several different rights alternatively, although they may be inconsistent; so, a defendant may raise, by his statement of defence, without leave, as many distinct and separate, and, therefore, inconsistent, defences as he may think proper. [p. 940, col. 1.]

Narendra Nath Barai v. *Abhoy Charan Chattopadhya*, 34 C. 51; 4 C. L. J. 437; 11 C. W. N. 20; 1 M. L. T. 364 (F. B.), followed.

Mati Lal Poddar v. *Judhistir Das*, 31 Ind. Cas. 181; 22 C. L. J. 254; 20 C. W. N. 310, *Official Assignee of the Calcutta High Court* v. *Bidyasundari Dasi*, 54 Ind. Cas. 700; 30 C. L. J. 428; 24 C. W. N. 145 and *Purnendu Narain Roy* v. *Dwijendra Narain Roy*, 8 C. L. J. 289, referred to.

Although co-owners cannot enforce a partition of a part only of the common lands, leaving the rest undivided, and although the entire property must be included in the partition, yet if, by mistake, fraud or like reason, or by consent of the co-owners acting innocently and fairly, a partition of a portion only of their estate has been made, whether by order of the Court or otherwise, there is no reson why the Court should not subsequently grant a division of the remainder at the instance of one or more of the co-owners. [p. 941, col. 2.]

The effect of a decree in a partition suit leaves untouched the joint title and possession of the parties in the remainder. [*ibid.*]

Jogendra Nath Rai v. *Baldeo Das*, 35 C. 961; 12 C. W. N. 127; 6 C. L. J. 735, followed.

All questions involving the title of the parties and their right to any relief within the issues, are judicial in character, and must be determined by the Court, such determination to be made ordinarily by the Court and incorporated in the interlocutory decree before any partition is made or directed. [p. 941, col. 2.]

Upendra Nath Banerjee v. *Umesh Chandra Banerjee*, 6 Ind. Cas. 346; 12 C. L. J. 25; 15 C. W. N. 375, *Satya Kumar Banerjee* v. *Satya Kirpal Banerjee*, 3 Ind. Cas. 247; 10 C. L. J. 503, and *Tincowri Debi* v. *Suttya Doyal Banerji*, 6 C. L. J. 105, relied on.

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The Court has ample authority to direct successive trials of different issues and even to record interlocutory judgments thereon, to be made the basis of the final judgment at the conclusion of the trial of the whole case. [p. 942, col. 1.]

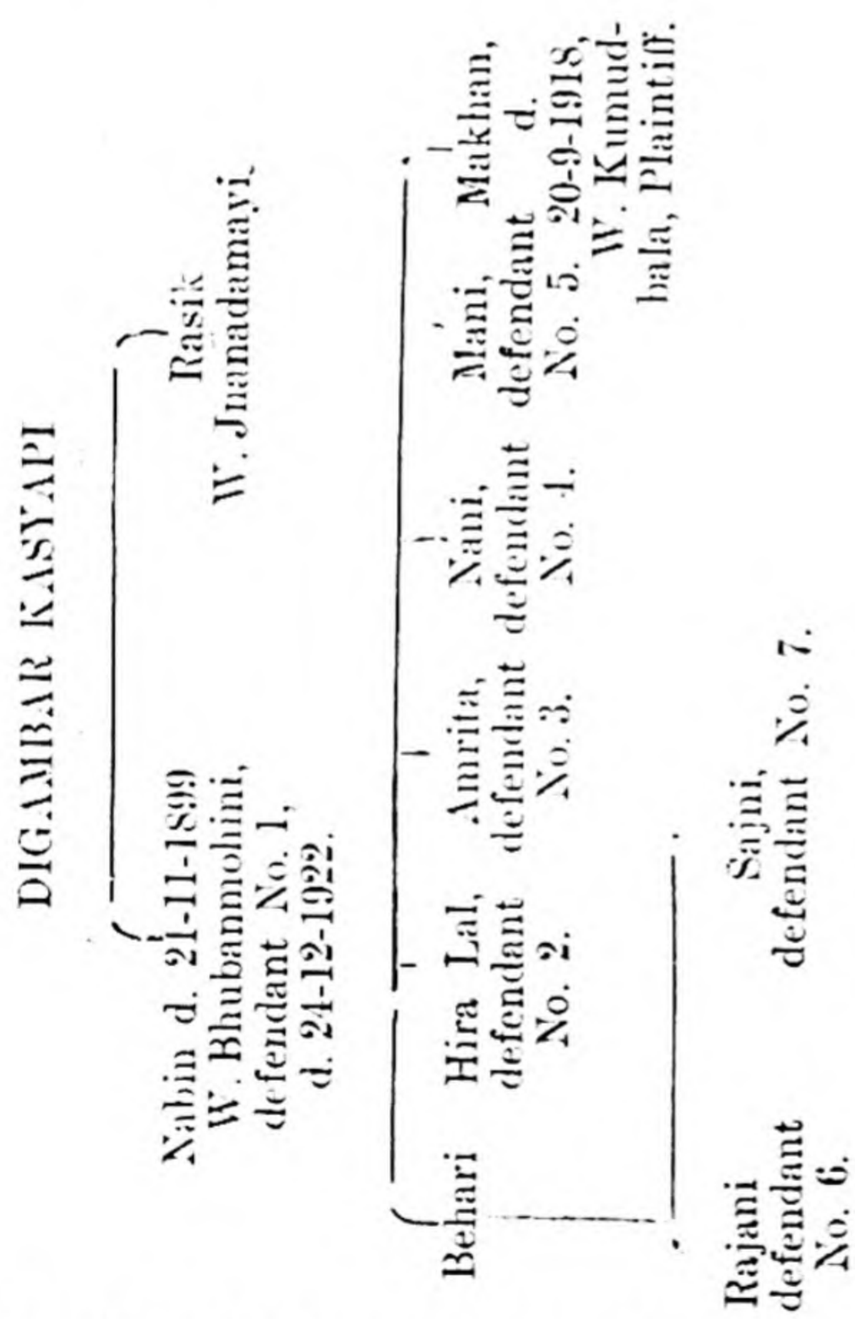
Annapurna Debya v. *Amiyanath Banerjee*, 68 Ind. Cas. 482; 35 C. L. J. 530; (1922) A. I. R. (C.) 307, relied on.

Appeal from the decree of the Subordinate Judge, 24-Perganahs, dated the 16th February 1922.

Babu *Harendra Kumar Sarbadhikari*, for the Appellants.

Babus *Surendra Nath Basu*, *Paresh Nath Mookerjee*, for the Respondents.

JUDGMENT.—This is an appeal by the third, fourth and fifth defendants in a suit for partition of joint family properties. The relationship of the parties may be gathered from the following genealogical table :—



The founder of the family, Digambar Kasyapi, left two sons, Nabin and Rasik. Nabin amassed a considerable fortune and died on the 21st November 1899. He left a widow Bhubanmohini and six sons. One of them, Behari, died leaving two sons, Rajani and Sajani. Another son, Makhan, died on the 20th September 1918, leaving a widow, Kumudbala, who had been married to him for thirty years. It is common ground that the sons of Nabin formed a joint Hindu family governed by the Dayabhaga Law. On the 31st March 1919, Kumudbala, the widow of Makhan, instituted the present suit for partition of the joint family estate. Her mother-in-law Bhubanmohini was joined at the first defendant; her surviving brothers-in-law were the next four defendants; and the sons of her deceased brother-in-law were two other defendants. The Subordinate Judge decreed the suit on the 16th February 1922 and made a preliminary decree, awarding the plaintiff a share of specified properties and giving various incidental directions. The present appeal was lodged in this Court by three of the defendants on the 7th June 1922. During the pendency of the appeal, the first defendant Bhubanmohini died on the 24th December 1922. We have heard the appeal on the record and without a printed paper-book, because the parties found themselves in a position of considerable embarrassment, owing to the inability of the Receiver in charge of the estate to collect sufficient funds for the conduct of the litigation. The facts have been placed before us in detail by Mr. Sarbadhikari who has argued the case on behalf of the Appellants very fully and we have also looked into the record for ourselves.

The preliminary decree made by the Subordinate Judge has been assailed substantially on three grounds, namely, first, that the properties which stand in the name of Bhubanmohini should have been regarded as her self-acquisition and not as part of the family estate liable to be partitioned; secondly, that if the properties which stand in the name of Bhubanmohini are found to have been acquired, not from her own funds but with the money of her husband, they should have been regarded as given to her in absolute right; and, thirdly, that the Subordinate Judge should not have made an order on the defendants for discovery of joint properties other than those included in the suit.

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As regards the first point, reference has been made to eight conveyances, dated 26th January 1873 for Rs. 50, 1st May 1887 for Rs. 400, 5th November 1888 for Rs. 150, 15th September 1891 for Rs. 300, 9th November 1892 for Rs. 475, 27th July 1898 for Rs. 112, 14th August 1898 for Rs. 16 and 1st October 1898 for Rs. 200. The properties acquired under these documents are claimed by the plaintiff as included in the family estate though they all stand in the name of Bhubanmohini. Bhubanmohini, on the other hand, maintained that the consideration in each instance was paid by her, and the properties formed her exclusive *stridhan*. In this, she was supported by three of her sons, the present appellants. Another son, however, the second defendant and the two grandsons, the sixth and seventh defendants, disputed her allegation, and supported the plaintiff. It may be observed in passing that originally one written statement was filed on behalf of all the defendants jointly, but, later on, the second, sixth and seventh defendants stated that they had no knowledge of the written statement and took up a position hostile to that maintained by the third, fourth and fifth defendants. This dissension among the defendants has undoubtedly tended to weaken their opposition to the claim put forward by the plaintiff.

Before the evidence is examined, we may usefully recall that as pointed out by the Judicial Committee more than once, there is no presumption that a property standing in the name of a Hindu female, who is a member of a joint Hindu family, belongs to the joint family and is not her *stridhan* property, *Diwan Ran Bijai Bahadur Singh* v. *Inderpal Singh* (1), *Dharani Kant Lahiri Chowdhry* v. *Kristo Kumari Chowdhrani* (2), *Chowdrani* v. *Tariny Kanth Lahiry Chowdhry* (3) which had disapproved of *Bindoo Bashinee Debee* v. *Pearee Mohun Bose* (4) and *Thakro* v. *Ganga Parsad* (5). The same principle will be found recognised and applied in *Narayana* v. *Krishna* (6), *Narasimma Ammal* v. *Srinivasa Ragava Iyangar* (7), *Bai Motivahoo* v. *Purshotam Dayal* (8), *Durga Prasad Sinha* v. *Prankrishna Sinha* (9) and *Protap Chandra Gope* v. *Sarat Chandra Gangopadhya* (10). The rule thus enunciated must be coupled with the elementary principle that the burden of proof lies upon the person who asserts that the apparent is not the real state of things. It is important to bear in mind in this class of cases that, as pointed out by Lord Phillimore in *Maniklal Mansukbai* v. *Bijoy Singh Dudhuria* (11), the decision of the Court should rest not upon suspicion but upon legal grounds established by legal testimony. This re-calls the earlier pronouncements to the same effect by Lord Westbury in *Sreemanchunder Dey* v. *Gopal Chunder Chuckerbutty* (12) and by Sir Lawrence Jenkins in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* (13). But we are not unmindful that, in the words of Lord Hobhouse in *Uman Parshad* v. *Gandharp Singh* (14) and of Lord Shaw in *Muhammad Mahbub Ali Khan* v. *Bharat Indu* (15), as *benami* transactions are very familiar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may

(1) 26 I. A. 226; 26 C. 871; 4 C. W. N. 1; 2 Bom. L. R. 1; 7 Sar. P. C. J. 578; 13 Ind. Dec. (N. S.) 1158 (P. C.).

(2) 13 I. A. 70; 13 C. 181; 10 Ind. Jur. 270; 4 Sar. P. C. J. 709; 6 Ind. Dec. (N. S.) 620 (P. C.).

(3) 8 C. 545; 11 C. L. R. 41; 4 Ind. Dec. (N. S.) 351.

(4) 6 W. R. 312.

(5) 15 I. A. 29; 10 A. 197; 5 Sar. P. C. J. 133; 6 Ind. Dec. (N. S.) 132 (P. C.).

(6) 8 M. 214; 3 Ind. Dec. (N. S.) 145.

(7) 5 Ind. Cas. 760; 33 M. 112; 7 M. L. T 89.

(8) 29 B. 306; 6 Bom. L. R. 975.

(9) 39 Ind. Cas. 530; 3 P. L. W. 311.

(10) 62 Ind. Cas. 348; 33 C. L. J. 201; 25 C. W. N. 514.

(11) 62 Ind. Cas. 356; 25 C. W. N. 409; (1921) M. W. N. 80 (P. C.).

(12) 11 M. J. A. 28 at p. 43; 7 W. R. P. C. 10; 1 Suth. P. C. J. 651; 2 Sar. P. C. J. 215; 20 E. R. 11 (P. C.).

(13) 40 Ind. Cas. 242; 44 I. A. 72; 44 C. 662; 21 C. W. N. 585; 25 C. L. J. 508; 1 P. L. W. 425; 5 L. W. 711; 32 M. L. J. 425; 21 M. L. T. 344; 15 A. L. J. 382; 19 Bom. L. R. 424; (1917) M. W. N. 473 (P. C.).

(14) 14 I. A. 127; 15 C. 20; 11 Ind. Jur. 474; 5 Sar. P. C. J. 71; Rafique & Jackson's P. C. No. 98; 7 Ind. Dec. (N. S.) 599 (P. C.).

(15) 53 Ind. Cas. 54; 23 C. W. N. 321; (1919) M. W. N. 507 (P. C.).

suffice for the purpose. The person who impugns its apparent character must not rely, however, solely on probabilities, as Lord Buckmaster observed in *Irshad Ali* v. *Kariman* (16). He must show something definite to establish that it is a sham transaction, on the principle that the burden of proof lies upon the person; who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things: *Nawab Azimat Ali Khan* v. *Hardwaree Mull* (17), *Faez Buksh Chowdhury* v. *Fukeeroodeen Mahomed Ahasun Chowdhry* (18), *Suleiman Kadr Bahadur* v. *Mehndi Begum* (19), *Nirmal Chunder Banerjee* v. *Mahomed Siddik* (20) and *Moti Lal* v. *Kundan Lal* (21). The most important test to be applied in these cases is, as observed by Mr. Ameer Ali in *Nrityamoni Dasi* v. *Lakhan Chunder Sen* (22), the source whence the consideration came. Sir George Farwell formulated the same test in different language, when he observed in *Bilas Kunwar* v. *Desraj Ranjit Singh* (23), that where it is asserted that an assignment in the name of one person is really for the benefit of another person, the principle applies that the trust of the legal estate results to the man who pays the purchase money. To the same effect is the decision of the Judicial Committee in *Parbati Dasi* v. *Baikuntha Nath Das* (24), which re-calls the earlier pronouncements by Lord Campbell in *Dhurm Dass Pandey* v. *Shama Soondri Dibiah* (25), and by Knight Bruce, L. J., in *Gopeekrist Gosain* v. *Gangapersaud Gosain* (26). Where, however, from the lapse of time, direct evidence of a conclusive or reliable character is not forthcoming, as to the payment of consideration, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts. Sir Arthur Wilson emphasised this when he observed in *Dalip Singh* v. *Chaudhrain Nawal Kunwar* (27), that if the evidence on neither side is wholly convincing as to the fundamental criterion, namely, the source of the purchase money, if the evidence given and withheld is open to adverse criticism, the Court must rely on the surrounding circumstances, the position of the parties and their relation to one another, the motives which could govern their actions and their subsequent conduct, including their dealings with or enjoyment of the disputed property; see *Upendra Nath Nag* v. *Bhupendra Nath Nag* (28). We must further look to the substance of the transaction as evidenced in the deeds of the parties, not permitting the real question to be obscured by what Knight Bruce, L. J. calls in *Hunoomanpersaud Panday* v. *Babooee Munraj Koonweree* (29), the form of expression, the literal sense, nor by what Lord Macnaghten describes in *Lal Achal*

(16) 46 Ind. Cas. 217; 22 C. W. N. 530; (1918) M. W. N. 394; 21 O. C. 86; 5 O. L. J. 197; 28 C. L. J. 173; 20 Bom. L. R. 790; 24 M. L. T. 86 (P. C.).

(17) 13 M. I. A. 395; 5 B. L. R. P. C. 578; 14 W. R. P. C. 14; 2 Suth. P. C. J. 343; 2 Sar. P. C. J. 571; 20 E. R. 599 (P. C.).

(18) 14 M. I. A. 234; 9 B. L. R. 456; 2 Sar. P. C. J. 733; 2 Suth. P. C. J. 490; 20 E. R. 775 (P. C.).

(19) 25 I. A. 15; 25 C. 473; 2 C. W. N. 186; 7 Sar. P. C. J. 254; 13 Ind. Dec. (N. s.) 313 (P. C.).

(20) 25 I. A. 225; 26 C. 11; 7 Sar. P. C. J. 383; 13 Ind. Dec. (N. s.) 611 (P. C.).

(21) 39 Ind. Cas. 964; 21 C. W. N. 929; 25 C. L. J. 581; 32 M. L. J. 468; 15 A. L. J. 329; 1 P. L. W. 490; 19 Bom. L. R. 471; 22 M. L. T. 10; (1917) M. W. N. 464; 6 L. W. 92 (P. C.).

(22) 33 Ind. Cas. 452; 43 C. 660; 20 C. W. N. 522; 24 C. L. J. 1; 30 M. L. J. 529; (1916) 1 M. W. N. 332; 3 L. W. 471; 18 Bom. L. R. 418; 20 M. L. T. 10 (P. C.).

(23) 30 Ind. Cas. 299; 42 I. A. 202; 37 A. 557; 19 C. W. N. 1207; 22 C. L. J. 516; 29 M. L. J. 335; 2 L. W. 830; 18 M. L. T. 248; 13 A. L. J. 991; 17 Bom. L. R. 1006; 22 C. L. J. 516; (1915) M. W. N. 757 (P. C.)

(24) 22 Ind. Cas. 51; 18 C. W. N. 428; 19 C. L. J. 129; 15 M. L. T. 66; (1914) M. W. N. 42; 12 A. L. J. 79; 16 Bom. L. R. 101; 26 M. L. J. 248 (P. C.).

(25) 3 M. I. A. 229; 6 W. R. P. C. 43; 18 E. R. 484; 1 Sar. P. C. J. 271; 1 Suth. P. C. J. 147 (P. C.).

(26) 6 M. I. A. 53; 4 W. R. P. C. 46; 1 Sar. P. C. J. 493; 2 Suth. P. C. J. 13; 19 E. R. 20 (P. C.).

(27) 35 I. A. 104; 30 A. 258; 12 C. W. N. 609; 10 Bom. L. R. 660; 14 Bur. L. R. 151; 4 M. L. T. 141 (P. C.).

(28) 32 Ind. Cas. 267; 21 C. W. N. 280.

(29) 6 M. I. A. 393; 18 W. R. 81*n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; Sevestre 253*n*; 19 E. R. 147 (P. C.).

Ram v. *Raja Kazim Husain Khan* (30), as exhibitions of the art of the conveyancer in the shape of recitals of obviously untrue statements introduced to impart some additional solemnity to an instrument: *Promode Kumar Roy* v. *Kali Mohan Saha Pramanik* (31), *Lalit Mohan Sen* v. *Manoranjan Ghosh Chaudhuri* (32) and *Jasoda Lal Pal* v. *Balaram Poddar* (33). The same view was recently emphasised by Lord Atkinson in *Arab Ali Khan* v. *Mahmud Ali Khan* (34), and by Lord Phillimore in *Radha Krishna* v. *Bisheshwar Sahay* (35). In the case before us, it was asserted by Bhubanmohini that she had her own private funds which enabled her to purchase the disputed and other properties. She alleged that she had received Rs. 100 from her father and Rs. 500 from her maternal grand-mother and that she used to carry on a money-lending business. She was eighty years old when her deposition was taken in 1921. She could give no indication as to the time or occasion of the alleged gifts; nor were any accounts produced of the alleged money-lending business. No independent witness was brought forward to corroborate her story. On the other hand, witnesses for the plaintiff asserted that neither the paternal nor the maternal relations of Bhubanmohini were well-to-do people who were likely to have made gifts of money to her; this much is plain that those families and their properties, if any, have completely disappeared. As against this, we have the undisputed fact that Nabin, the husband of Bhubanmohini, prospered in life and acquired considerable sums of money; and there is no question that during the period of acquisition of the disputed properties in the name of Bhubanmohini the requisite funds could have been provided by her husband. On this state of the evidence, the Subordinate Judge declined to believe the story that Bhubanmohini possessed any *stridhan* obtained from her paternal and maternal relations and provided the requisite sum from such separate fund. The Subordinate Judge has also pointed out that on the 8th March 1910 and 2nd May 1917, the third defendant, Amrita, who now supports the story of his mother, executed mortgages of the disputed properties on the allegation that they belonged to his father. This defendant, at any rate, has not treated the property as the *stridhan* of his mother; although it is not clear that she was aware of these transactions. We may add that upon the question of possession, the evidence is ambiguous. The properties were managed by Nabin, and, after his death, by his sons. This, however, would not necessarily militate against the theory that they belonged to Bhubanmohini; for in the case of a *pardanashin* lady her estate might, in the normal course of events, be looked after by her husband or her sons. But it is important to bear in mind that there is no reliable evidence to show that the income was actually enjoyed by Bhubanmohini. On the whole, we are of opinion that the evidence as to the source of the consideration money and the treatment and possession of the disputed properties amply justifies the conclusion of the Subordinate Judge that they were not the self-acquisitions of Bhubanmohini. In this connection, we may re-call the observations of Lord Buckmaster in *Nabakishore Mandal* v. *Upendrakishore Mandal* (36). "In appeals the burden of showing that the judgment appealed from is wrong lies upon the appellant. If all he can show is nicely balanced calcula-

(30) 32 I. A. 113; 27 A. 271; 9 C. W. N. 477; 8 O. C. 155; 15 M. L. J. 197; 8 Sar. P. C. J. 772 (P. C.).

(31) 70 Ind. Cas. 555; 36 C. L. J. 396 at p. 400; 27 C. W. N. 305; (1923) A. I. R. (C.) 228.

(32) 72 Ind. Cas. 698; 36 C. L. J. 208 at p. 211; (1923) A. I. R. (C.) 13.

(33) 69 Ind. Cas. 67; 35 C. L. J. 589 at p. 591; (1922) A. I. R. (C.) 488.

(34) 67 Ind. Cas. 444; 35 C. L. J. 554; 20 A. L. J. 545; (1922) A. I. R. (P. C.) 84; 43 M. L. J. 104; 31 M. L. T. 94; 24 Bom. L. R. 951 (P. C.).

(35) 67 Ind. Cas. 914; 49 I. A. 312; 27 C. W. N. 294; 37 C. L. J. 430; 3 P. L. T. 529; 16 L. W. 190; 31 M. L. T. 209; (1922) A. I. R. (P. C.) 336; 1 Pat. 733; 21 A. L. J. 23; 9 O. & A. L. R. 194; 44 M. L. J. 718; 25 Bom. L. R. 930 (P. C.).

(36) 65 Ind. Cas. 305; 26 C. W. N. 322; 35 C. L. J. 116; 20 A. L. J. 22; (1922) M. W. N. 95; 42 M. L. J. 253; 24 Bom. L. R. 346; 15 L. W. 417; 30 M. L. T. 234; 3 P. L. T. 311; (1922) A. I. R. (P. C.) 39 (P. C.).

tions which lead to the equal possibility of the judgment on either the one side or the other being right, he has not succeeded." It is not necessary to invoke this doctrine against the appellant, because, for reasons that have already been stated, the case set up by them fails; nevertheless, the fact that the Trial Judge has disbelieved the story narrated by the first defendant, is a factor which cannot altogether be ignored. The first point urged by the appellants must consequently fail.

As regards the second point, the plaintiff-respondent has urged that the theory of advancement was not put forward in the Trial Court and should not be entertained here. It cannot be seriously disputed that the alternative position taken up by the appellants contradicts the case attempted to be established by evidence before the Subordinate Judge. The contesting defendants have hitherto maintained that the disputed properties were purchased by the lady with her own money. They now turn round and contend that the properties were acquired by her husband with his own money but in her name, because he intended to make an absolute gift of them in her favour. It may be conceded that the Code of Civil Procedure does not prohibit inconsistent pleadings, and that there is nothing to prevent either party from setting up two or more inconsistent sets of material facts and claiming relief thereunder in the alternative. A plaintiff may rely upon several different rights alternatively, although they may be inconsistent; so, a defendant may raise, by his statement of defence, without leave, as many distinct and separate, and, therefore, inconsistent, defences as he may think proper. This is fully established by the decision of the Full Bench in *Narendra Nath Barari* v. *Abhoy Charan Chattopadhya* (37), and illustrations of the application of this doctrine to inconsistent claims by the plaintiff may be found in *Mati Lal Poddar* v. *Judhistir Das* (38) and *Official Assignee of the Calcutta High Court* v. *Bidyasundari Dasi* (39) and to conflicting defences by the defendant may be gathered from *Purnendu Narain Roy* v. *Dwijendra Narain Roy* (40) and *Sri Rang Behary Lal* v. *Ranchheyya Lal* (41). But, as was emphasised in some of these cases, the litigant who avails himself of the right to press inconsistent cases before the Court and endeavours to establish both the alternatives by contradictory oral testimony, plainly places himself in peril and may find himself entangled in inextricable difficulty; for evidence adduced in support of two absolutely inconsistent cases, which are mutually destructive, can hardly be expected to secure confidence. Apart from this, there is no valid answer to the objection of the plaintiff-respondent that she cannot now be called upon to meet a case which was not put forward in the Trial Court. Whether the husband of the first defendant intended to make a gift of the properties to her or took the conveyances in her name so as to make her only the ostensible owner, is largely a question of intention. The facts relevant for the determination of this question of intention have not been explored. We cannot overlook that there are numerous instances of cases in the reports where purchases in the name of female members have led to controversies—whether the acquisition was for the benefit of the lady or of the person who found the money; see *Ram Narain* v. *Muhammad Hadi* (42), *Muhammad Mahbub Ali Khan* v. *Bharat Indu* (15), *Basar Khan* v. *Leakat Hossain* (43) and *Nrityamoni Dassi* v. *Lakhan Chander Sen* (22). In this connection, it is important to bear in mind that, as emphasised by Sir George Farwell in *Bilas Kunwar* v. *Desraj Ranjit Singh* (23), the doctrine of advancement in favour of wife or child does not apply in India [*Gopeekrist Gosain* v. *Gungapersaud*

(37) 34 C. 51; 4 C. L. J. 437; 11 C. W. N. 20; 1 M. L. T. 261 (F. B.).
(38) 31 Ind. Cas. 181; 22 C. L. J. 254; 20 C. W. N. 310
(39) 54 Ind. Cas. 700; 30 C. L. J. 428; 24 C. W. N. 145.
(40) 8 C. L. J. 289.
(41) 13 Ind. Cas. 128; 15 C. L. J. 439.
(42) 26 I. A. 38; 26 C. 227; 3 C. W. N. 113; 7 Sar. P. C. J. 425; 13 Ind. Dec. (N. S.) 749 (P. C.).
(43) 50 Ind. Cas. 678; 23 C. W. N. 841 (P. C.).

Gosain (26)], but the relationship is a circumstance which is taken into consideration in India in determining whether the transaction is *benami* or not. This was apparently overlooked in *Abdul Rahiman* v. *Mirathayar Ammal* (44). But, the true position was clearly recapitulated by Lord Atkinson in *Kerwick* v. *Kerwick* (45), where he observed as follows :—

"It has been established by the decisions in the cases of *Gopeekrist Gosain* v. *Gungapersaud Gosain* (26) and *Moulvie Sayyud Uzhur Ali* v. *Bebee Ultaf Fatima* (46), that owing to the wide-spread and persistent practice which prevails amongst the natives of India, whether Muhammadan or Hindu, for owners of property to make grants and transfers of it *benami* for no obvious reason or apparent purpose, without the slightest intention of vesting in the donee any beneficial interest in the property granted or transferred, as well as the usages which these natives have adopted and which have been protected by Statute, no exception has ever been engrafted on the general law of India negativing the presumption of the resulting trust in favour of the person providing the purchase money such as has, by the Courts of Chancery in the exercise of their equitable jurisdiction, been engrafted on the corresponding law in England in those cases where a husband or father pays the money and the purchase is taken in the name of a wife or child. In such a case there is, under the general law in India, no presumption of an intended advancement as there is in England."

We are consequently of opinion that the appellants cannot possibly succeed on the second point, which was not urged in the Trial Court and which the plaintiff hitherto had no opportunity to controvert.

(44) 24 Ind. Cas. 10; 1 L. W. 451.
(45) 57 Ind. Cas. 834; 47 I. A. 275; 32 C. L. J. 490 (1920) M. W. N. 738; 39 M. L. J. 296; 28 M. L. T. 194; 2 U. P. L. R. (P. C.) 153; 13 L. W. 455; 23 Bom. L. R. 730; 48 C. 260; 10 L. B. R. 335 (P. C.).
(46) 13 M. I. A. 232; 13 W. R. P. C. 1; 4 B. L. R. P. C. 1; 2 Sar. P. C. J. 522; 20 E. R. 538 (P. C.).

As regards the third point, there can be no doubt that the Subordinate Judge has properly made an order for discovery. All the joint properties, which belong to the family, must be included in the suit. The contesting defendants can gain no permanent advantage by the exclusion of any of the joint properties from this litigation. It is well-established that although co-owners cannot enforce a partition of a part only of the common lands, leaving the rest undivided, and although the entire property must be included in the partition, yet if, by mistake, fraud or like reason, or by consent of the co-owners acting innocently and fairly, a partition of a portion only of their estate has been made, whether by order of the Court or otherwise, there is no reason why the Court should not subsequently grant a division of the remainder at the instance of one or more of the co-owners. The substance of the matter is that the effect of a decree in a partition suit leaves untouched the joint title and possession of the parties in the remainder; *Jogendra Nath Rai* v. *Baldeo Das* (47). Consequently, it is to the interest of all parties concerned that all the joint properties should be ascertained and included in this suit, and any controversy as to whether a particular property alleged to be joint really possesses that character or not, must be determined before the preliminary decree is made. As was pointed out in *Upendra Nath Banerjee* v. *Umesh Chandra Banerjee* (48), *Satya Kumar Banerjee* v. *Satya Kirpal Banerjee* (49), and *Tincowri Debi* v. *Suttya Doyal Banerji* (50), all questions involving the title of the parties and their right to any relief within the issues, are judicial in character, and must be determined by the Court, such determination to be made ordinarily by the Court and incorporated in the interlocutory decree before any partition is made or directed. From this standpoint, the order for discovery made by the

(47) 35 C. 961; 12 C. W. N. 127; 5 C L. J. 735.
(48) 6 Ind. Cas. 346; 12 C. L. J. 25; 15 C W. N. 375.
(49) 3 Ind. Cas. 247; 10 C. L. J. 503.
(50) 6 C. L. J. 105.

Subordinate Judge may be open to the criticism that it should have been made and carried out before the preliminary decree was passed. Such an objection, if taken, must be deemed unsubstantial; because, as explained in *Annapurna Debya* v. *Amiyanath Banerjee* (51), the Court has ample authority to direct successive trials of different issues and even to record interlocutory judgments thereon, to be made the basis of the final judgment at the conclusion of the trial of the whole case. There is thus no reason why we should not confirm the preliminary decree as made by the Subordinate Judge, and leave it open to him to make a supplemental preliminary decree in respect of such additional joint properties as the defendants may be compelled to discover on oath in pursuance of his order. The third point, like the first and the second, must consequently fail.

The result is that the decree made by the Subordinate Judge is affirmed and this appeal dismissed with costs. We assess the hearing fee at fifteen gold *mohurs*.

The Receiver now in charge of the estate will continue (until otherwise directed by the Subordinate Judge) till the final decree for partition has been made.

The question of distribution of money in the hands of the Receiver will be dealt with by the Subordinate Judge.

K. S. D. *Appeal dismissed.*

(51) 68 Ind. Cas. 482; 35 C. L. J. 530; (1922) A. I. R. (C.) 307.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 137 OF 1923.
March 24, 1924.
Present:—Mr. Justice Jackson.
SAHADEVA REDDI—PLAINTIFF—PETITIONER
versus
LINGAPPA ASARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Hereditary Village Offices Act (III of 1895), ss. 13, 21—Jurisdiction of Civil Court—Suit by alienee from office holder, whether barred—Practice—Unreported judgment of High Court, exhibiting of.

Section 21 of the Madras Hereditary Village Offices Act, must be read with section 13 of the Act. The jurisdiction of the Civil Court is taken away only in those cases in which it is conferred on the Revenue Court by section 13. [p. 943, col. 1.]

Mavoulu Seetharam Naidu v. *Doddi Rami Naidu*, 5 Ind. Cas. 137; 33 M. 208; 7 M. L. T. 181; 20 M. L. J. 91, relied on.

A lessee from the holder of enfranchised service *inam* lands is a mere alienee and is not debarred by section 21 of the Madras Hereditary Village Offices Act from maintaining a suit in the ordinary Civil Courts. [*ibid.*]

Palamalai Padayachi v. *Shanmuga Ausari*, 17 M. 302; 4 M. L. J. 99; 6 Ind. Dec. (N. S.) 209 (F. B.), and *Vecrabadran Achari* v. *Suppiah Achari*, 5 Ind. Cas. 477; 33 M. 488; 7 M. L. T. 198, distinguished.

The question of jurisdiction of Courts to try suits is merely mechanical and involves no equities. [*ibid.*]

Courts should depend upon reported cases for guidance. [*ibid.*]

The practice of exhibiting certified copies of judgments in unreported cases of the High Court is deprecable. [*ibid.*]

Petition, under sections 115 of Act V of 1908 and section 107 of the Government of India Act, praying the High Court to revise the order of the District Court, Chingleput, dated the 18th September 1922, in Miscellaneous Appeal No. 3 of 1922, preferred against the order of the Court of the Additional District Munsif, Chingleput, dated the 10th December 1921 in O. S. No. 218 of 1919, (O. S. No. 426 of 1919 on the file of the Court of the District Munsif, Tiruvellore.)

Mr. *L. A. Govinda Raghava Iyer*, for the Petitioner.

Messrs. *Rajagopalan* and *Rajagopalan*, for the Respondents.

JUDGMENT.—In Original Suit No. 426 of 1919 on the file of the Court of the District Munsif of Tiruvellore, plaintiff sued for Rs. 210 alleging that he held a lease of blacksmith's *inam* from the previous holder which had been continued by the present holders, defendants Nos. 1 and 2. The other defendants Nos. 3 to 8 denied that these holders had title. The District Munsif and the District Judge on appeal have held that the jurisdiction vested in the Revenue Court, and the plaintiff seeks to revise the order and judgment of the District Court.

This is an unenfranchised *inam* and a point directly in issue is whether the defendants Nos. 1 and 2 have any claim to succeed to the office, and whether the plaintiff as lessee can recover the emoluments of the office. Section 21 Act III of 1895 would seem, therefore, to apply. But it has been settled that section 21 must be read with section 13. In spite of the generality of the language of section 21, the jurisdiction of the Civil Court is taken away only in those cases in which it is conferred on the Revenue Court by section 13: *Mavoulu Seetharam Naidu* v. *Doddi Rami Naidu* (1). Under section 13 any person may sue before the (Collector for a village office or for its emoluments on the ground that he is entitled to hold such office and enjoy such emoluments. The section is clearly confined to the persons claiming in their own rights as holders. On behalf of the respondents, it is urged that if this be so, a holder has only to lease the emoluments and leave it to the lessee to sue on his title in order to carry the suit away from the jurisdiction of the Revenue Courts. The short answer is, that he can do this if he so pleases. The question of jurisdiction is merely mechanical and involves no equities. If a holder wants to sue, the Legislature has provided the Revenue Court as his forum ; if any other person is suing it has provided the ordinary Civil Courts.

The defence has exhibited a certified copy of judgment in an unreported case of this Court. I deprecate the practice. Courts should depend upon reported cases for guidance. In this Exhibit it has been ruled that although the plaintiff is not a holder of the office and is a mere alienee from the office holder the suit is still governed by section 21, Act III of 1895 on the authority of *Palamalai Padayachi* v. *Shanmuga Ausari* (2) and *Veerabadran Achari* v. *Suppiah Achari* (3). In *Palamalai Padayachi* v. *Shanmuga Ausari* (2) the plaintiff sued on the ground that he was the village carpenter and as such entitled to the lands attached to that office. The question for determination was whether the suit was barred by section 3, Regulation VI of 1831 and a Full Bench found it to be so barred. In *Veerabadran Achari* v. *Suibbah Achari* (3) the plaintiff sued as holders for the office of carpenter, and it was found that the office in this case was not one covered by the special acts. No reported case has been brought to my notice in which it has been ruled that a mere alienee is barred under section 21, Act III of 1895 and as at present advised I do not see how it could be so ruled.

I must, therefore, allow this petition, and reverse the judgment and order of the lower Appellate Court. The District Munsif of Tiruvellore has jurisdiction and must proceed with the suit.

Petitioner will have costs throughout.

V. N. V. *Petition allowed.*

(1) 5 Ind. Cas. 137; 33 M. 208; 7 M. L. T. 181; 20 M. L. J. 91.

(2) 17 M. 302; 4 M. L. J. 99; 6 Ind. Dec. (N. S.) 209 (F. B.).

(3) 5 Ind. Cas. 477; 33 M. 488; 7 M. L. T. 198.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 947 OF 1921.
April 17, 1924.
Present:—Mr. Justice Phillips and Mr. Justice Madhavan Nair.

DEYNANTAKATH DEYNAN KUNHATHUMMA—PLAINTIFF—APPELLANT

versus

PATINHARAYIL AVULLA AND OTHERS—DEFENDANTS NOS. 2, 3, 4 AND 6 AND 5TH DEFENDANT'S LEGAL REPRESENTATIVE—RESPONDENTS.

Mortgage—Redemption—Owner of partial equity of redemption—Right to redeem entire mortgage—Safeguarding of rights of others.

The owner of a partial equity of redemption is entitled to redeem the entire mortgage, subject to the safeguarding of the equal title to redeem of any other person who has a right of redemption.

Mirza Yadalli Beg v. *Tukaram*, 57 Ind. Cas. 535; 18 C. 22; (1920) M. W. N. 369; 28 M. L. T.

95; 39 M. L. J. 147; 2 U. P. L. R. (P. C.) 123; 16 N. L. R. 154; 12 L. W. 503; 22 Bom. L. R. 1315; 47 I. A. 207; 25 C. W. N. 241 (P. C.), *Huthasanan Nambudri* v. *Parameswaram Nambudri*, 22 M. 209; 8 Ind. Dec. (N. S.) 149, *Mora Joshi* v. *Ramchandra Dinkar Joshi*, 15 B. 24; 8 Ind. Dec. (N. S.) 17, *Narayan* v. *Ganpat*, 21 B. 619; 11 Ind. Dec. (N. S.) 415, relied on.

Rathna Mudali v. *Perumal Reddy*, 17 Ind. Cas. 837; 38 M. 310; 12 M. L. T. 484; (1912) M. W. N. 1168; 23 M. L. J. 576, not followed.

Second appeal against the decree of the Court of the Subordinate Judge, Tellicherry, in Appeal Suit No. 77 of 1918, (Appeal Suit No. 594 of 1916, on the file of the District Court, North Malabar), preferred against the decree of the Court of the Principal District Munsif, Badagara, in Original Suit No, 685 of 1911.

Mr. *K. Govinda Menon*, for the Appellant.

Mr. *C. V. Ananta Krishna Iyer*, for the Respondents.

JUDGMENT.—In this case the plaintiff is the owner of one share in the equity of redemption of the plaint properties which have been mortgaged to the second defendant. The Subordinate Judge held that the plaintiff was entitled to a decree for redemption of her share alone, but, as the plaintiff was not willing to take such a decree, her suit has been dismissed, and now in appeal she contends that she is entitled to redeem the whole of the property on payment of the whole of the mortgage amount. This is in accordance with the decision in *Huthasanan Nambudri* v. *Parameswaram Nambudri* (1) and also the decision in *Mora Joshi* v. *Ramchandra Dinkar Joshi* (2) and *Narayan* v. *Ganpat* (3) but the former decision was expressly dissented from in a later one reported as *Rathna Mudali* v. *Perumal Reddy* (4). Our attention has however, been called to a very recent ruling of the Privy Council reported as *Mirza Yadelli Beg* v. *Tukaram* (5) in which it is held that, subject to the safeguarding of the equal title to redeem of any other person who had a right of redemption, the owner of a partial equity of redemption is entitled to redeem the entire mortgage. It follows that if the plaintiff is to be allowed to redeem the entire mortgage, we must in accordance with the above ruling provide for safeguarding the interests of her co-owners. It would be quite possible for the plaintiff to obtain a decree for redemption and then in collusion with the mortgagee allow that decree to become barred by non-payment of the mortgage amount and, consequently, deprive her co-owners of their right to redeem. We think that in this case it will be advisable to send the case down to the lower Appellate Court in order to ascertain the amount due upon the mortgage, including the value of improvements, and to pass an order directing the plaintiff to deposit that amount in Court within three months of its ascertainment, and directing on such deposit being made a decree for redemption to be passed. If the plaintiff fails to deposit the amount her suit will have to be dismissed. We, therefore, send back the suit to the lower Appellate Court for disposal in the light of the above remarks.

Ordinarily a mortgagee is entitled to his costs; but, as he has failed in this Court the plaintiff would be entitled to her costs so far as this second appeal is concerned; but considering the fact that the learned Subordinate Judge's decision was in accordance with the latest ruling of this Court and was arrived at before the decision of the Privy Council was reported as *Mirza Yadelli Beg* v. *Tukaram* (5) we think that each party should bear his own costs in this second appeal.

V. N. V. *Case sent back.*

(1) 22 M. 209; 8 Ind. Dec. (N. S.) 149.
(2) 15 B. 24; 8 Ind. Dec. (N. S.) 17.
(3) 21 B. 619; 11 Ind. Dec. (N. S.) 415.
(4) 17 Ind Cas. 837; 38 M. 310; 12 M. L. T. 484; (1912) M. W. N. 1168; 23 M. L. J. 576.
(5) 57 Ind. Cas. 535; 48 C. 22; (1920) M. W. N. 369; 28 M. L. T. 95; 39 M. L. J. 147; 2 U. P. L. R. (P. C.) 123; 16 N. L. R. 154; 12 L. W. 503; 22 Bom. L. R. 1315; 47 I. A. 207; 25 C. W. N. 241 (P. C.).

RAJAGOPAL CHETTY *v.* SIVAGAMI AMMAL.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 458 OF 1922.

April 11, 1924.

Present :—Mr. Justice Krishnan and Mr. Justice Odgers.

RAJAGOPAL CHETTY—APPELLANT

versus

SIVAGAMI AMMAL AND ANOTHER—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 53—Fraudulent transfer—Impugning creditor, whether should be creditor at date of alienation—Consideration—Settlement on account of natural love and affection.

It is not necessary under section 53 of the Transfer of Property Act that the creditor impugning the alienation should have been a creditor at the time of the alienation. If a person makes a transfer of his property in view of his becoming a debtor or of getting a decree passed against him in the future, and if the object of the transfer is shown to have been to defeat the claims of his creditors, section 53 will cover the case.

From the mere fact that a settlement deed was executed on account of natural love and affection, it does not follow that the intention was not to defeat creditors. The question has to be decided on evidence as to circumstances under which the transfer was made.

Appeal against an order of the District Court, North Arcot, in C. M. P. No. 104 of 1922 (E. P. No. 19 of 1920—O. S. No. 19 of 1919, on the file of the Court of the Additional Subordinate Judge, Chittoor—O. S. No. 24 of 1919 on the file of the Court of the Temporary Subordinate Judge, Vellore.

Mr. *C. V. Ananta Krishna Iyer* for the Appellant.

JUDGMENT.—This is an appeal under sections 47 and 96 of the Civil Procedure Code in an execution matter. The appellant had obtained a decree for a sum of Rs. 4,000 and odd against the second respondent his father and in execution of that decree had attached certain items of properties. Now these items had been transferred by the father to his second wife, after the suit had been brought but before attachment, by a deed of settlement. The document is not on the record but we understand that there is such a deed of settlement. The plaintiff thereupon inpugned the document as one fraudulently executed with a view to defeat and delay the claims of creditors, particularly of himself. The learned Judge disposed of the matter without taking any evidence as to the circumstances under which the settlement was executed to see whether it was not a case of fraudulent conveyance. He starts by observing that the plaintiff cannot be regarded as one of his father's creditors at the time when the settlement was executed as he had not obtained his decree yet, the suit being only one on account. It is not, however, necessary under section 53 of the Transfer of Property Act that the creditor impugning the alienation should have been a creditor at the time of the alienation. If a person makes a transfer of his property in view of his becoming a debtor or of getting a decree passed against him in the furture, and if the object of the transfer is shown to have been to defeat the claims of his creditors, section 53 will cover the case. The District Judge also says that the settlement deed was not executed gratuitously but on account of natural love and affection. That may be so but it does not necessarily follow that the intention was not to defeat the creditors ; a man may merely make a transfer to his wife or a near relation of his to defeat creditors. The question has to be decided on evidence as to the circumstances under which the transfer was made. In this case the father is said to have transferred all his properties to his second wife, after the son had brought his suit for an account and for the delivery of his share of the family properties. The transfer seems *prima facie* to be fraudulent but the question must be decided by the Court after taking evidence. We set aside the order of the District Judge and remand the case to the lower Court for disposal in the light of the observations above made. Costs will abide and follow the result.

V. N. V.

Case remanded.

MITRA SEN SINGH *v.* JANKI KUAR.

PRIVY COUNCIL.

APPEAL FROM THE OUDH JUDICIAL COMMISSIONER'S COURT.

July 1, 1924.

Present:—Lord Shaw, Lord Phillimore, Sir John Edge and Mr. Ameer Ali.

MITRA SEN SINGH AND OTHERS—APPELLANTS

versus

Musammat JANKI KUAR AND OTHERS—RESPONDENTS.

Evidence Act (I of 1872), s. 115—Mutation—Acceptance of rent—Estoppel.

The mere mutation of the name of a person in place of that of a deceased under-proprietor in respect of certain land, followed by acceptance of rent from him by the proprietor, without any inquiry as to his title, does not operate as an estoppel against the proprietor. [p. 948, col. 1.]

The law of estoppel is compendiously set forth in section 115, Evidence Act, under which it is necessary that the person sought to be estopped should have intentionally caused or permitted the other party to believe a certain thing to be true and to act upon that belief. [p. 947, col. 2.]

Appeal from the decree of the Court of the Judicial Commissioner, Oudh, dated the 10th March 1919, (Pandit Kanhaiya Lal, A. J. C., and Mr. Daniels, A. J. C.), reported as 54 Ind. Cas. 901, reversing that of the Subordinate Judge, Fyazabad, dated the 25th April 1916.

Messrs. *De Gruyther, K. C.*, and *Raikes*, for the Appellants.

Mr. *Dube*, for the Respondents.

JUDGMENT.

Lord Shaw.—This is an appeal from a decree, dated the 10th March, 1919, of the Court of the Judicial Commissioner of Oudh, which reversed the decree, dated the 25th April, 1916, of the Subordinate Judge of Fyzabad.

The appellants are the plaintiffs in a suit for possession of certain villages. They also claimed mesne profits, a claim which was rightly disallowed and of which no more need be said. What remains is the suit for possession itself. Both the Courts before whom the suit came in India held that the plaintiffs' title to the villages was proved. Their Lordships are in entire agreement with that conclusion.

The Trial Judge decreed the suit for possession. The Appellate Court dismissed it on the ground that the appellants were estopped from denying all claim of the first respondent to hold the villages for life as an under-proprietor without power of alienation. The only question in the appeal is whether the appellants' suit fails by reason of this alleged estoppel. In the opinion of the Board it does not so fail, and the appellants are not estopped.

The villages are in the Fyzabad District and were the absolute property of one Dhup Narain Singh. He was the owner of the *taluk* which embraced them. On his death his wife, Rajau Kuar, claimed to be in possession of these villages as *pukhtadar*. Had she been so she would have been an under-proprietor with a right both heritable and transferable. In May, 1878, this question having been raised in Court, was settled by a compromise; and it is to the terms of that compromise that both parties refer. These terms are as follows:—

"In the case noted above I, the plaintiff, have claimed an under-proprietary right in 10 *biswas* share in village Mendhi Salimpur. We, the parties, have agreed to these terms, that in village Mendhi Salimpur I, the plaintiff, shall remain in possession of the defendant's share as under-proprietor during my life-time without the power of transfer and sale; that after my (the plaintiff's death) the wife of Babu Kalka Bakhsh Singh, my son, shall also enter into possession without the power of alienation and sale and any other person shall have nothing to do with it; that I shall continue to pay the Government land revenue and 15 per cent. the profits to the *Talukdar* defendant."

Rajau Kuar had possession of the villages under the agreement of May, 1878, till her death in 1901, when her rights of course came to an end. *Musammat* Sunder Kuar, the wife of Kalka Bakhsh Singh, under the terms of the agreement of compromise thereafter possessed the villages, but her rights ceased with her death in 1905.

As the Judicial Commissioner properly observes in his judgment "Kalka Bakhsh Singh is not shown to have had any other wife then alive. The limited rights created by the compromise,

therefore, came to an end on the expiry of the above life estates; and the property, which was the subject of these rights, subsequently reverted to the heir and successor in interest of the grantee then in existence. As Kalka Bakhsh Singh, the son and successor of the grantor, had sold his entire right, title and interest in the property in dispute to the Court of Wards..... the vested interest he held in the reversion passed by the sale to the Court of Wards, who became entitled to that reversion on her death."

In 1906 Kalka Bakhsh Singh married a second wife and there is no doubt of the fact that she remained in possession for a period of about eight years. Further, there is no doubt that she obtained a mutation of names, and that she paid rent with 15 per cent. for collection to the *Talukdar*, that is to say, to the Court of Wards. It is upon these facts that the claim of estoppel arises.

The assertion made when mutation of names was obtained was of course erroneous and must have been so to her knowledge. *Musammat* Janki Kuar was entitled neither to be entered in the under-proprietary registry as a *pukhtadar*, nor had she under the compromise agreement, which was the sole basis of title which could be founded upon, any rights whatsoever to possession of the villages. Very possibly what happened was simply that the Collector and the officials charged with the mutation record assumed that she, another wife of Kalka Bakhsh Singh, was possessing the same villages on the same title as her predecessor. Two officials are examined (one a translator and petition writer in the Civil Court who identifies the signatures of the *zilladars* the other the *zilladar* and collector of rates) and they gave evidence that the Court of Wards made no enquiries about the status of the persons to whom the receipts were issued or whether the defendant was in truth the *pukhtadar*.

The Court of Wards, however, has discovered the mistake which has been made and the fact that *Musammat* Janki Kuar had no title whatsoever to the *pukhtadari* rights and the present suit has been brought.

With all respect to the Court of the Judicial Commissioner it is difficult to understand how the doctrine of estoppel applies to a case of this character. There is no peculiarity in the law of India as distinguished from that of England which would justify such an application. The law of India is compendiously set forth in section 115 of the Indian Evidence Act, Act I of 1872. It will save a long statement by simply stating that section, which is as follows:—

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

There seems no place upon the facts for the suggestion that the Court of Wards has intentionally caused or permitted Janki Kuar to believe it to be true and to act upon the belief that she was a *talukdar* or that she had any right of possession under the compromise agreement already alluded to. That point might be quite sufficient to dispose of the case.

But the Court of the Judicial Commissioner goes so far as to declare that what has happened is "tantamount to a waiver for the time being of the right of reversion," and that " the Court of Wards has thus been committed to recognition of the right of *Musammat* Janki Kuar to succeed to the *pukhtadari* rights under the compromise as if she had been the wife of Kalka Bakhsh Singh when *Musammat* Sunder Kuar died." Their Lordships fail to understand how the doctrine of estoppel could ever be founded upon for the purposes of the recognition of any such claim or the rearing up of any such right. The whole of this doctrine appears to be founded simply upon the transaction of taking rent each year, but the taking of a rent each year may, and as the Courts have properly held, did, bar by estoppel the Court of Wards from any claim for

mesne profits during the particular year or years for which such rent was received. It estopped the Court of Wards from maintaning that the lady possessed the property with a liability to account or possess on any other or further terms than on payment of the rent made and taken.

But there estoppel stops and it can never be reared up into the creation of a *pukhtadari* right of a proprietary, heritable, and transferable character, nor can it ever create a right of possession of the property for life under the same terms as some other person had previously possessed it upon. Such foundations of title are unknown and they can never be created in such a manner.

At their Lordships' Bar Mr. Dube ingeniously argued that there were, however, other circumstances which might be founded upon for the purpose of producing such rights either of permanent ownership or possession for life. Even were such a thing legally possible, it need only be remarked that in cases of estoppel the onus of establishing the facts and circumstances from which estoppel arises rests upon the person pleading it. No facts and circumstances whatsoever, apart from the occupation, appear to the Board to have been established in this case. Their Lordships must decline to accept statements made in another suit (one which was dismissed) on the subject of the payment of mortgages resting upon properties. It is nowhere established that this lady ever disbursed any payments of the kind, and it has to be remarked, in conclusion that she herself, who knew all the facts and the circumstances of the situation, did not give evidence in the case. On examination accordingly the case for estoppel seems to be ill-founded in law, and if it were well-founded in law seems to be quite unsubstantiated in fact.

The decision in the case of *President and Governors of Magdalen Hospital* v. *Knotts* (1) which was referred to in discussion, afforded no help to the respondents because, as observed by Lord Selborne, a long term was "attempted to be granted by a charitable corporation at a peppercorn rent. If any rent had been reserved and received, however small, the legal relation of a tenancy *from year to year* would have been created, and the Statute of Limitations could not have run."

Their Lordships will humbly advise His Majesty that the appeal should be allowed and the decree of the Trial Judge be restored with cost since that date in the Courts below, and with the costs of this appeal.

N. H. *Appeal allowed.*

Solicitors for the Appellants.—Messrs. *Watkins* and *Hunter.*

Solicitors for the Respondents.—Messrs. *Barrow, Rogers* and *Neville.*

(1) (1879) 4 A. C. 324; 48 L. J. Ch. 579; 40 L. T. 466; 27 W. R. 602.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 436 OF 1922.

July 10, 1924.

Present:—Mr. Justice Wallace and Mr. Justice Jackson.

RAJARATHNA NAIDU—APPELLANT

versus

RAMACHANDRA NAIDU AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 16, Proviso 2—Decree for payment of money—Mortgage-decree for sale.

The second proviso to r. 16 of O. XXI, Civil Procedure Code, does not apply to a mortgage-decree for sale which in essence is not a decree for payment of money.

Laldhari Singh v. *Manager Bhabatpura Estate,* 12 Ind. Cas. 70; 14 C. L. J. 639 at p. 642; 16 C. W. N. 132, *Lalla Bhagun Pershad* v. *Halloway,* 11 C. 393; 5 Ind. Dec. (N. S.) 1021, *Jagabandhu Pal* v. *Haladhar Pal,* 41 Ind. Cas. 269; 27 C. L. J. 110, relied on.

Vaidhinathasamy Iyer v. *Somasundram Pillai,* 28 M. 473; 15 M. L. J. 126, *Bayyana Ramayya* v. *Nidamarthi Krishnamurthi,* 32 Ind. Cas. 952; 40 M. 296; 3 L. W. 186; 19 M. L. T. 124; (1916) 1 M. W. N. 133, *Sadagopa Aiyengar* v. *Sellammal,* 72 Ind. Cas. 861; 43 M. L. J. 761; 16 L. W. 758; 31 M. L. T. 463; (1922) A. I. R. (M.) 510, distinguished.

Appeal against an order of the District Court, Chinglepat, in E. P. No. 51 of 1920 in O. S. No. 32 of 1916.

SABDI BEPARI *v.* BUDHAI.

Mr. *S. E. Sankara Iyer*, for the Appellant.

Mr. *T. R. Ramachanda Iyer*, for the Respondents.

JUDGMENT.—The question for decision is whether the second proviso to O. XXI, r. 16 of the Code of Civil Procedure applies to a mortgage decree for sale. It applies in terms only to a decree "for the payment of money." The phrase in the old section 232 was "a decree for money." The alteration indicates that emphasis is to be laid on the word "payment" and that unless the decree directs payment of money, the Rule will not apply. This is the view taken in the judgment of the Calcutta High Court in *Laldhari Singh* v. *Manager Bhabatpura Estate* (1). The Culcutta High Court has consistently held the view that this proviso will not apply to mortgage decrees for sale [*vide* the above ruling and also *Lalla Bhagun Pershad* v. *Halloway* (2) and *Jagabandhu Pal* v. *Haladhar Pal* (3)].

Appellant relies on three cases of this Court. Two of these, *Vaidhianathasamy Iyer* v. *Somasundram Pillai* (4) and *Bayyana Ramayya* v. *Nidamarthi Krishnamurthi* (5) are not of much assistance as they do not deal with the language of O. XXI, r. 16 or the corespondding section under the old Civil Procedure Code. In *Sadagopa Aiyengar* v. *Sellammal* (6) language somewhat favourable to appellant's contention has been used, but even in that case it is clear that the decree was a "decree for the payment of money," although in the case of the first defendant, the decree directed the money to be paid out of his family property. None of these cases affects the general principle laid down in the Calcutta cases, and inherent, in our opinion in the Rule itself, that the proviso does not apply to decrees which are in essence decrees, not for the payment of money but for the sale of property. We are of opinion that the order appealed against is correct and we dismiss this appeal with costs.

V. N. V. *Appeal dismissed.*

(1) 12 Ind. Cas. 70; 14 C. L. J. 639 at p. 642; 16 C. W. N. 132.
(2) 11 C. 393; 5 Ind. Dec. (N. S.(1021.
(3) 41 Ind. Cas. 269; 27 C. L. J. 110.
(4) 28 M. 473; 15 M. L. J. 126.
(5) 32 Ind. Cas. 952; 40 M. 296; 3 L. W. 186; 19 M. L. T. 124; (1916) 1 M. W. N. 133.
(6) 72 Ind. Cas. 861; 43 M. L. J. 761; 16 L. W. 758; 31 M. L. T. 463; (1922) A. I. R. (M.) 510.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 630 OF 1922.

June 10, 1924.

Present:—Mr. Justice Chakravarti.

Sheikh SABDI BEPARI AND OTHERS—DEFENDANTS NOS. 1 TO 3—APPELLANTS

versus

Sheikh BUDHAI—PLAINTIFF AND DEFENDANTS NOS. 4 AND 5—RESPONDENTS.

Pleadings—Second appeal—Admissibility or relevancy of evidence, question of—Construction of document—Name given by parties, effect of—Amaldari *lease—Registration.*

The question whether a document is admissible or not for want of registration or irrelevancy, can be raised at any stage of the case. [p. 951, col. 1.]

Ramkishan Das v. *Babu Madho Das*, 19 A. 76; 23 I. A. 106; 7 Sar. P. C. J. 73; 9 Ind. Dec. (N. S.) 50, referred to.

The mere name of a document decides nothing. It is really what the document purports to do that is of importance and the question must be determined on that basis. [*ibid.*]

An *amaldari* lease which contains all the essential terms of a lease requires registration and is not admissible in evidence without registration. The real test is whether the document purports to be a lease or an agreement to lease or not. If it does not amount to a lease, it does not require registration. [p. 951, col. 2.]

Appeal against the decree of the Subordinate Judge, Fourth Court, Dacca, dated the 24th September 1921, reversing that of the Registrar Munsif, Munshiganj, dated the 31st July 1920.

Babus *Pyari Mohan Chatterjee, Haradhan Chatterjee*, for the Appellants.

Babu *Troilakhya Nath Ghosh*, for the Respondents.

JUDGMENT.—This is an appeal by defendants Nos. 1 to 3 and arises out of a suit brought by the plaintiff for a declaration that certain lands appertain to his *jote* from which he was wrongfully dispossessed by the defendants. The plaintiff further alleged that

he was already a tenant under the landlords of the land of *dag* No. 11 and that the landlords during the Record of Rights included a portion of his *jote* within *dag* No. 1 of the Record of Rights which was recorded as *khas patit*. The plaintiff further alleged that although he had an existing tenancy right to a portion of the lands now in dispute he was obliged in order to avoid a dispute with the landlords to take a fresh settlement from the landlords and that an *amaldari* was granted by the landlords in 1322 *B. S.*

The defence of defendant No. 1 was that all these lands formed part of the *zemindar's khas patit* recorded in *dag* No. 1 and that he took settlement from the landlords in 1324, and that, therefore, the lands appertained to the *jote* settled with him by the landlords.

It appears that there was a local investigation by which the Commissioner in his map indicated the situation of the different *dags* and their extent. The report of the Commissioner, however, was found by the lower Appellate Court as not helpful in the matter and that Court decided the case really without any reference to the Commissioner's report.

The Court of first instance held that the plaintiff was not a tenant with reference to the lands now in dispute and that the *amalnama* produced by the plaintiff was forgery and in the view it dismissed the suit. On appeal by the plaintiff the lower Appellate Court has reversed that decision and given a decree to the plaintiff as prayed for.

I must confess that the judgment of the lower Appellate Court is, to say the least of it, very unsatisfactory. As the matter stands a local investigation is necessary for the purpose of ascertaining the dispute between tne parties, at any rate, for ascertaining how much of the land now in dispute was really a part of the *jote* claimed by the plaintiff with reference to *dag* No. 11 in respect of which he was already a tenent under the landlords. The lower Appellate Court really rested his judgment on the finding, so far as I understand, as on the basis of the *amaldari* produced by the plaintiff. As I have already stated the First Court found this document to be not genuine. The lower Appellate Court merely contended itself by saying "There is no reason why these should be suspected". With reference to the question as to whether the *amaldari* was really a genuine document or not and also as to whether it was anti-dated with a view to establish the plaintiff's claim which did not exist before the learned Subordinate Judge refused to go into the question on the ground that no question of limitation did arise in the present case. The lower Appellate Court recorded the following finding. "There is absolutely no reason why they would be even suspected so. As the plaintiffs have proved their alleged settlements they are entitled to get declaration of their respective titles in terms of the *amaldaris*. Although the learned Subordinate Judge found at the beginning of his judgment that the Commissioner's report was not satisfactory he based his decree upon the demarcation made by the Commissioner."

As I have already stated the defendants have appealed and the learned Vakil who appears for them has contended that as the lower Appellate Court based his judgment with reference to the plaintiff's title solely on the *amaldari* the plaintiff's case is not maintainable as the *amaldari* is not admissible in evidence without registration. The learned Vakil further contends that the question of possession was material for the determination of the question as to whether the *amaldari* was really a genuine document or not and that the lower Appellate Court has committed an error in refusing to try that question. In support of the contention that the document was not admissible in evidence the learned Vakil for the appellants has relied upon the Full Bench case of *Syed Sufdar Reza* v. *Amzad Ali* (1) and also upon the case of *Elahi* v. *Hukuni* (2). The learned Vakil for the respondents has contended that the question as to whether the

(1) 7 C. 703; 4 Shome. L. R. 240; 10 C. L. R. 121; 3 Ind. Dec. (N. S.) 1001.

(2) 20 Ind. Cas. 907; 19 C. L. J. 464; 18 C. W. N. 38.

amaldari was admissible in evidence or not was not raised in the Court of first instance and was not raised before the lower Appellate Court, therefore, it can not be raised here. With reference to that objection the learned Vakil for the appellants relied upon the judgment of the Judicial Committee in the case of *Ram Kishen Das* v. *Babu Madho Das* (3). It appears to me that the question whether the *amaldari* is inadmissible in evidence for want of registration is a question which can be raised even if it were not raised in the Court of Appeal below. It has been pointed out that as a matter of fact the document was objected to in the First Court and it was not necessary for the First Court to discuss the admissibility of the document for the simple reason that that Court found the document to be not genuine. It is quite clear that the question was not discussed by the lower Appellate Court. But the question when raised here, I think, must be decided, because the whole of the plaintiff's case depends as tried by the lower Appellate Court upon the *amaldari* produced by him. As pointed out by the Judicial Committee in the case of *Ram Kishen Das* v. *Babu Madho Das* (3) and by a number of decisions of this Court when a question is raised whether a document is admissible or not on the ground of want of registration or on the ground that the document is irrelevant it can be raised at any stage of the case. It is such objections as can only be remedied if taken at the earliest stage that are not allowed to be raised at a later stage. The question, therefore, arises whether this *amaldari* is admissible in evidence or not without registration. Mere name of a document decides nothing. It is really what the document purports to do that is of importance and the question must be determined on that basis. The learned Vakil for the respondents relies upon the cases of *Lukhan Chandra Mondal* v. *Takim Dhali* (4) and *Dwarkanath* v. *Ladu Sikdar* (5) in support of the contention that this *amaldari* is a document which falls within the class of documents discussed in the two cases cited by him. The real test is whether this document really purports to be a mere license to take possession, or in other words whether it is a document which purports to be a lease or an agreement to lease or not. If the document really does not amount to a lease then under the authorities relied upon by the learned Vakil for the respondents it does not require registration. I had the document read to me and I have myself carefully considered its terms. It appears to me that it was really a lease in all its essentials. It contains recital of an application for a lease by the plaintiff. It contains the boundaries of the land to be demised. It further recites that the landlord grants the plaintiff the right to enjoy the land as a tenant on payment of the usual rent payable for such lands. It is difficult to see if it is not a lease what is wanting there to make it a lease. I, therefore, hold that this is a document which requires registration and is not admissible in evidence without registration.

But it is necessary that the lower Appellate Court should try another question which arises if the *amaldari* is excluded. It is quite clear from the plaint that the plaintiff's case was that a part if not the whole of the land now in dispute formed part of his old *jote* and that he was compelled by the landlords to take a fresh settlement as he was unwilling to quarrel with his landlord. The judgment of the lower Appellate Court lends some support to this view when the lower Appellate Court says: "It is alleged that the landlords said that the northern portions of the plots did not appertain to the plaintiff's *jamas* and forced them to take settlements from them of such portions and they accordingly took settlements of such portions together with portion of settlement *dag* No. 1 adjoining such portions to the north." Therefore, it has been contended by the learned Vakil for the respondents that there was an existing *jote* as to which there was no dispute and if the land now in dispute was a part of that *jote* belonging to

(3) 19 A. 76; 23 I. A. 106; 7 Sar. P. C. J. 73; 9 Ind. Dec. (N. S.) 50.
(4) 80 Ind. Cas. 357; 39 C. L. J. 90; 28 C. W. N 1033; (1924) A. I. R. (C.) 558.
(5) 33 C. 502.

the plaintiff or a settlement was already made with the plaintiff before any settlement with the defendants on receipt of *nazar* and on receipt of rent from the plaintiff. the plaintiff will be entitled to rely upon these two questions in support of his claim although the *amaldari* might be excluded from the evidence in this case. I think this contention of the learned Vakil for the respondent is of considerable force. I think the case cannot be finally determined without a determination of these questions.

The result, therefore, is that the decree of the lower Appellate Court should be set aside and the case must go back to the lower Appellate Court and that Court should determine the questions whether the land in suit or any part of it formed part of the existing *jote* of the plaintiff or whether there was any completed tenancy of the plaintiff created by the receipt of rent by the landlords for the disputed area before the *amaldari* was granted.

I may point out that if the lower Appellate Court, when the case goes back to that Court, finds that the Commissioner's report is not satisfactory that Court would have the right to direct a fresh enquiry for the proper determination of the situation of the different *dags* and the claim of the plaintiff with reference to his existing tenancy in any portion of the lands in suit.

The costs of this appeal will abide the result.

M. M. B. *Appeal allowed. Case remanded.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1469 OF 1921.
July 7, 1924.
Present :—Mr. Justice Devadoss.
TUMMALAPALLI ANJANEYULU —PLAINTIFF—APPELLANT
versus
PEDASANGANTI CHINNA SUBBIAH AND ANOTHER—DEFENDANTS Nos. 3 AND 4—RESPONDENTS.

Guardian and minor—Debt due from Hindu father to minor—Pro-note by sons—Suit by guardian on debt—Decree against father—Dismissal against sons—Omission to file pro-note, whether gross negligence—Later suit by minor to re-open first suit, whether maintainable.

Where a suit is brought by the guardian of a minor against a Hindu father and his sons based upon their ordinary liability under the Hindu Law, in respect of a debt borrowed by the father for an alleged necessity, purposely withholding a pro-note executed by the sons in favour of the minor plaintiff undertaking to share their liability, with a view to get a decree against all the members of the joint Hindu family, and the suit is decreed only against the father, the minor cannot on attaining majority re-open the case against the sons on the basis of pro-note on the ground that the guardian in the previous suit had been guilty of gross negligence in keeping back the pro-note. [p. 953, col. 1.]

Gottepati Subbanna v. *Gottepati Narasamma*, 26 Ind. Cas. 16; 27 M. L. J. 486, distinguished.

Second appeal against the decree of the Court of the Subordinate Judge at Masulipatam, in Appeal No. 1 of 1921, preferred against the decree of the Court of the Additional District Munsif, Tanuku, in O. S. No. 31 of 1918 (O. S. No. 151 of 1914 on the file of the Principal District Munsif's Court, Tanuku.)

Mr. *G. Lakshmanna*, for the Appellant.

Mr. *Ch. Raghava Rao*, for the Respondents.

JUDGMENT.—The only point urged in this second appeal is that the guardian of the plaintiff was guilty of gross negligence and that he is, therefore, entitled to re-open the case decided against him. The plaintiff's guardian sued the father and his four sons for a debt due according to her allegation by the whole family. The debt was ostensibly borrowed for the expenses of the marriage of the 4th defendant, one of the sons of the first defendant in the previous suit; she got a decree against the father, the first defendant, and the suit was dismissed against the sons. The plaintiff now wants to re-open the case and get a decree against the defendants Nos. 3 and 4 on the ground that they executed Exhibit A under which they undertook to share the liability. Exhibit A was not produced in the previous suit. Mr. Lakshmanna strongly relies upon

this fact and contends that the omission to produce Exhibit A in the previous suit, amounts to gross negligence. But it must be remembered that the previous suit was based upon the ordinary Hindu Law liability under which the father and sons are liable for a debt borrowed for a purpose such as the expenses of marriage of one of the sons. This omission to produce Exhibit A in his previous suit cannot be considered to be gross negligence. The learned Subordinate Judge has considered the matter and he is of opinion that the document was kept back purposely in order to get a decree against all the defendants, *i. e.*, the father and sons. In the face of that finding, it is impossible to contend that the plaintiff's guardian was guilty of gross negligence. Mr. Lakshmanna very strongly relies upon the case reported in *Gottepati Subbanna* v. *Gottepati Narasamma* (1). There the father set up a right by adoption, while he could very well have set up a title under a Will. The father evidently in order to get the whole property set up the case of adoption, which was false to his knowledge and the finding in that case was that the father was aware of the existence of the Will under which the son would be entitled to half the property. The learned Judges held that the father was guilty of gross negligence inasmuch as he set up a false case to his knowledge and did not set up a case which was true to his knowledge. In *Chunduru Ponnayyah* v. *Rajam Viranna* (2) it was held that a decree could be set aside for the fraud or collusion of the guardian *ad litem* in not defending the suit on behalf of the minor. The facts are different here. The guardian claimed a decree against five persons whereas she could have been satisfied with only a decree against defendants Nos. 3 and 4. It cannot be said in the circumstances that she was guilty of gross negligence which would entitle the plaintiff to have the case re-opened.

The second appeal is dismissed with costs.

V. N. V. *Appeal dismissed.*
N. H.

(1) 26 Ind. Cas. 16; 27 M. L. J. 486.
(2) 70 Ind. Cas. 668; 45 M. 425; 15 L. W. 427; (1922) M. W. N. 213; (1922) A. I. R. (M.) 273; 42 M. L. J. 429.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES Nos. 2562 AND 2563 OF 1921.
May 2, 1924.
Present:—Mr. Justice Walmsley and Mr. Justice Mukerji.

PRASANNA DEB RAIKAT—PLAINTIFF—APPELLANT
versus
ACHHIRUDDIN MAHAMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 105, 106—Application by landlord under s. 105 and by tenant under s. 106—Disposal of application under s. 105 stayed by consent of parties—Decision given in application under s. 105 before final decision in application under s. 106—Decisions under two sections conflicting—Decision under s. 106, whether binding.

A landlord applied for the settlement of fair rent under section 105, Bengal Tenancy Act. Then the tenant made an application under section 106 alleging that he had held his tenancy at a uniform rate of rent for so long that he was entitled to the presumption under section 50 of the Act. The hearing of the application under section 105 was stayed until the disposal of the application under section 106 on the ground, that the case under section 106 would dispose of the question whether the rent was fixed or not and this argument was not challenged on behalf of the landlord. The application under section 106 was dismissed for default and revived and decided eventually in favour of the tenant but between the date of its dismissal for default and the order for restoration the application under section 105 was taken up and a rent higher than that entered in the Record of Rights was fixed as fair rent:

Held, (*Mukerjee, J.*, dissenting).—that as by mutual consent of the landlord and tenant the question whether the rent could be enhanced or not was to be settled in application under section 106, the matter should be looked at from the position which the parties would have occupied had the application under section 106 been not dismissed for default and the application under section 105 not taken up by the Revenue Officer and the parties should be bound by the decision in application under section 106 and not by that in application under section 105. [p. 954, cols. 1 & 2.]

Appeals against the decrees of the Subordinate Judge, Jalpaiguri, dated

the 3rd September 1921, modifying those of the Munsif, First Court at that place dated the 30th June 1920.

Babu *Jitendra Kumar Sen Gupta* for Babu *Upendra Lal Roy*, for the Appellant.

Babus *Brojo Lal Chuckerbutty*, (with him Babus *Susil Kumar Bose* and *Biraj Mohan Majumdar*), for the Respondents.

JUDGMENT.

Walmsley, J.—These two appeals arise from two rent suits which were decided by one judgment. A third appeal from the same judgment has abated. The landlord is the appellant.

The facts are as follows. There was a Record of Rights prepared and finally published. In it the respondents were shown as the owners of separate *jotes*, each *jote* bearing a separate *jama*. The landlord made an application under section 105 of the Tenancy Act for the settlement of fair rents. Then one Osman Ali put in an application under section 106 alleging that his *jote* and the *jotes* of the respondents formed part of a parent *jote*, which had been held at a uniform rate of rent for so long that the holders were entitled to the presumption arising under section 50 of the Act. The respondents did not join in that application or make similar applications, but they were made *pro-forma* defendants. The hearing of the applications under section 105 was stayed until the disposal of the application under section 106, and the reason alleged by the respondents for seeking a stay was that the case under section 106 would dispose of the question whether the rents were fixed or not and this argument, I understand, was not challenged on behalf of the landlord. The application under section 106 was dismissed for default, but later it was revived, and it was decided eventually in favour of Osman Ali. Unfortunately between the date of its dismissal for default and the order for restoration, the applications under section 105 were taken up, and fair rents were fixed, such rents being higher than the rents entered in the Record of Rights. It is for these fair rents that the present suits have been brought. The Court of Appeal below has held that the plaintiff cannot recover more than the old rents The object of the landlord's appeals is to obtain decrees for the fair rents fixed in the proceedings under section 105 of the Act.

It is argued for the plaintiff that these particular respondents made no applications under section 106, that they might have appealed against the orders settling fair rents or applied for revision, and that the Revenue Officer's decision has under section 107 the force and effect of a decree of a Civil Court in a suit between the parties. These criticisms are correct but I think we are entitled to go below the surface to actual position taken up by the parties. To my mind it is clear that by mutual consent the question whether the rents could be enhanced or not was to be settled in Osman Ali's application: and had the Revenue Officer been apprised of the fact that steps had been taken to have that application restored he would not have proceeded with the applications under section 105. The fact that he was not informed is not due to any fraud on the part of the landlord or any negligence on the part of the tenants, but to the confusion which inevitably results from the immense volume of work with which a Revenue Officer has to do deal. Consequently the matter should be looked at from the position which the parties would have occupied if the true facts had been made known to the Revenue Officer.

As the question of enhanceability has been decided in the tenant's favour, I think the reasonable view of the situation is that taken by the learned Judge in the lower Court. This view was taken by another Bench of which I was a member.

I think, therefore, that the appeals should be dismissed, but in the peculiar circumstances I would leave each party to bear its own costs.

My learned brother unfortunately takes a different view and he would allow the appeals. In these cases my opinion must prevail, whether we proceed under the Letters Patent or under the Code.

The result, therefore, is that the appeals are dismissed, each party bearing his own costs.

Mukerji, J.—I have had the advantage of perusing the judgment just now delivered by my learned brother. I regret very much that I have not been able to agree in the orders which he has passed in these two appeals.

My difficulty arises from the clear provision of section 107 of the Bengal Tenancy Act which attaches finality to decisions under section 105 of that Act. I am unable to construe the consent of the plaintiff to the adjournments of the cases under section 105 as an admission on his part, even by implication, that the decision in the case under section 106 would govern those cases.

In one of these cases, *viz.*, Case No. 1702 of 1913 which relates to S. A. No. 2563 of 1921 there was a clear order of the Revenue Officer that the decision in the case under section 106 would not apply to it. The reason for that order was that the case under section 106 was with reference to a different *khatian*. It should be observed that that case related to *Khatian* No. 351 while the three applications under section 105 (two of which relate to the present appeals; and the third one to S. A. No. 2561 of 1921 which has already been dismissed on the ground that it had abated) related to *Khatians* Nos. 328, 334 and 345. This reason, therefore, applies to the other cases as well. It may be, as found by the learned Subordinate Judge, that the *jotes* in the present suits are parts of the same Chemeru Chandura *jote*, to which the *Jote* of Osman Ali belongs. It is true that the respondents were *pro forma* defendants in the case under section 106; but they were impleaded only because portions of the original *jote* were in their occupation. The real point decided in that case, however, was the fixity of rent and the character of Osman Ali's *jote*; and there was no decision with regard to the *jotes* of the respondents. It does not appear that either in the case under section 106 or in the cases under section, 105, the respondents ever pressed their objection that the rents of the *jotes* were not liable to enhancement or took any steps to get them declared *mokarari*. I do not, therefore, see how the decision in the case under section 106 can be of any avail to the respondents so long as the decisions under section 105 stand and so long as they are not found to have been vitiated by fraud. When the decisions have not been set aside by one or other of the modes recognised by law, effect must, in my opinion, be given to them.

Substantial justice perhaps will be done by the orders which my learned brother has passed in these appeals. I am, however, unable to dismiss them in view of the law as it stands. In my judgment these appeals should be allowed, the decrees of the learned Subordinate Judge reversed and those of the learned Munsif restored with costs. In view of the peculiar circumstances of these cases I would make no order as to costs either in this Court or in the Court of Appeal below.

There remains the question as to what should be the result of this difference of opinion. The question is not free from difficulty. On the one hand there is the practice, uniform and unvaried, followed by all the High Courts in India so far as appeals under the Civil Procedure Code are concerned ever since the provision corresponding to section 98 of the Code of Civil Procedure was embodied in the law of Civil Procedure of acting under the said provision; and on the other hand there is the decision of the Judicial Committee in the case of *Bhaidas Shivdas* v. *Bai Gulab* (1) that clause 36 of the Letters Patent should apply, a decision the wording of which does not suggest that the clause should apply only to Original Side Appeals and appeals under the Letters Patent and not to appeals under the Code of Civil Procedure. It would serve no useful purpose to enter upon a discussion of the

(1) 60 Ind. Cas. 822; 25 C. W. N. 605; 40 M. L. J. 519; 33 C. L. J. 488; 19 A. L. J. 409; 23 Bom. L. R. 623; 3 U. P. L. R. (P. C.) 22; 14 L. W. 7; (1921) M. W. N 408; 29 M. L. T. 350; 45 B. 718; 30 M. L. T. 149; 48 I. A. 181 (P. C.).

authorities bearing upon the question. They have been exhaustively and elaborately discussed and all conceivable arguments, *pro* and *con*, have been considered in the judgment of Suhrawardy, J., in Appeals from Orders Nos. 19 and 20 of 1923. Speaking for myself I doubt very much that their Lordships of the Judicial Committee intended their decision to be of such far reaching consequences as to upset the settled practice which has obtained in this country close upon half a century. The fact that only three cases have been referred to in their Lordships' decision as showing that the application of clause 36 of the Letters Patent was not a novel idea and that all the three cases are clearly cases where the provisions as now contained in section 98 of the Civil Procedure Code could not possibly apply confirms me in my doubt. It is well-known, however, that there is a diversity of judicial opinion with regard to this matter. My learned brother, I find, has taken a contrary view in the appeals referred to above.

It is unnecessary, however, to pursue the matter further on the present occasion, because it would make no practical difference in result so far as these appeals are concerned, whether the one or the other view is adopted.

M. M. B. *Appeals dismissed.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2 OF 1921.
March 19, 1924.

Present:—Mr. Justice Krishnan.

NALLULI PANDARATHIL KARNAVAN RAMAN MENON—DEFENDANT No. 1—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL REPRESENTED BY THE COLLECTOR OF MALABAR AND OTHERS—PLAINTIFFS Nos. 1 TO 4 AND DEFENDANTS Nos. 2, 3, 6, 8, 11, 12, 15, 18, 19 AND 20—RESPONDENTS.

Landlord and tenant—Ejectment suit—Notice to quit—Validity of notice whether can be questioned in appeal—Assignment by landlord—Notice before and after assignment.

Where in a suit in ejectment the landlord alleges the termination of tenancy by a proper notice to quit and the tenant raises no objection in his written statement and no issue is framed as to the sufficiency or validity of the notice, it is not open to the tenant in appeal to raise the question. [p. 957, col. 2.]

Abdulla Rawutan v. *Subbarayyar*, 2 M. 346; 3 Ind. Jur. 160; 1 Ind. Dec. (N. S.) 511, *Subba* v. *Nagappa*, 12 M. 353; 13 Ind. Jur. 256; 4 Ind Dec. (N. S.) 595, *Armugam Pillai, In re*, 15 Ind. Cas. 584, *Venkapappier* v. *Ramaswami Aiyar*, 52 Ind. Cas. 517; 10 L. W. 137; (1919) M. W. N. 548, *Muthu Reddi* v. *Muthu Venkatapathi Reddi*, 37 Ind. Cas. 1; (1916) 2 M. W. N. 180; 4 L. W. 168; 31 M. L. J. 354, *Kunhu Kuttan Nair* v. *Govindan Nambuduri*, 62 Ind. Cas. 390; 13 L. W. 397, relied on.

The person who is the landlord and entitled to possession on the date of a notice to quit is the proper person to give the notice and an assignee within the currency of that notice can take advantage of the notice sent by his assignor and rely upon it when he brings a suit for recovering possession. [p. 958, col. 1.]

Wardsley Brewrry Co., v. *Halford*, (1904) 90 L. T. 89, distinguished.

Where the assignor has under the terms of the assignment undertaken to get possession from the tenant and to hand over the property to the assignee, a notice to quit by the assignor, even after the assignment, is valid and effective. [*ibid.*]

Appeal against the decree, dated the 22nd July 1920, of the Court of the Subordinate Judge, South Malabar, at Calicut, in A. S. No. 1 of 1920 (A. S. No. 826 of 1916, on the file of the District Court, South Malabar), preferred against the decree, dated the 4th August 1919, of the Court of the Principal District Munsif, Tirur, in O. S. No. 186 of 1918.

Mr. *K. P. M. Menon*, for the Appellant.

The Government Pleader, Messrs. *K. P. Rama Krishna Iyer* and *P. Govinda Menon*, for the Respondents.

JUDGMENT.—In this case the Secretary of State and the three persons who purchased the lands which were the subject-matter of Second Appeal No. 1025 of 1921, in which judgment has just now been delivered, are the plaintiffs. They sue to recover possession of the lands from the defendant on the ground that the defendant's lease had been terminated by a proper notice to quit and they are entitled to possession. The decree was asked to be given in favour of plaintiffs Nos. 2 to 4. The lower Courts have granted the

decree asked for and the defendant appeals.

It is contended on his behalf that his tenancy has not been properly terminated by a proper notice to quit and that, therefore, he was not bound to surrender possession. The argument is that the notices as issued by the Government, Exhibits O and P, were not issued by the party entitled to issue notices, as by the time they were issued, the Government had parted with all its rights to plaintiffs Nos. 2 to 4 and they were the proper parties to issue notices; it is argued that notices should consequently be held to be bad. Before considering this matter, it must be observed that in the plaint an allegation was made that notices—(Exhibits O and P) dated 14th December 1916 and 21st February 1917 were given by the Government to the defendant and that, as the time fixed under them had expired, the defendant's tenancy had been properly terminated before suit. The defendant raised no objection to this averment in his written statement and no issue was framed as to the sufficiency or the validity of the notices. In the appeal memo, in the lower Appellate Court, the point was, however, taken and the affidavit filed by the learned Vakil for the appellant in that Court says that the point was argued before the Subordinate Judge, but no notice was taken by the Subordinate Judge of this contention possibly because the point had not been raised in the Court of first instance.

The first question then which arises for decision is whether it is open to the defendant now in second appeal to insist upon the point being raised and considered. He has relied upon two cases reported in *Abdullah Rawutan* v. *Subbarayyar* (1) and *Subba* v. *Nagappa* (2) in which questions of notice were allowed to be taken in second appeal when they were not taken in the lower Courts but these decisions were subsequently considered by this Court in several cases which have been brought to my notice and the view taken in the later cases is that though it is open to the Court, to allow such a point to be taken in second appeal, it is not bound to do so; and it seems to me that ordinarily it should not allow it to be taken, because if a point like that is allowed in second appeal, when it was not taken in the First Court, the result will be that the plaintiff will be prejudiced as he would lose the advantage of withdrawing his suit, when he finds that his notice was not a proper notice, and of bringing a fresh suit at once after giving a proper notice. The authorities cited for the respondents are L. P. A. 102 of 1913, *Armugam Pillai, In re* (3), *Muthu Reddi* v. *Muthu Venkatapathi Reddi* (4), *Venkapappier* v. *Ramaswami Aiyar* (5) and *Kunhu Kuttan Nair* v. *Govindan Nambuduri* (6). In all these cases, it was held that the point should not be allowed to be raised for the first time in second appeal. No doubt, as Mr. Menon points out, in the cases of *Venkapappier* v. *Ramaswami Aiyar* (5) and *Kunhu Kuttan Nair* v. *Govindan Nambuduri* (6) some point was made of the fact that the question was not raised even in the lower Appellate Court, but I do not think there is any valid distinction, between a case where the point is taken in the lower Appellate Court, but not in the Court of first instance and a case where the point is taken in neither of the lower Courts. If the point is to be treated as a necessary part of the allegation by the plaintiff (the landlord) which he should prove to obtain a decree in ejectment, it would not matter whether it was not taken in the First Court or in both the lower Courts, but that view has not been adopted and I consider that the proper view is that, when the point is not taken in the lower Courts, it should not be allowed to be taken in second appeal. In this case,

(1) 2 M. 346; 3 Ind. Jur. 160; 1 Ind. Dec. (N. S.) 511.

(2) 12 M. 353; 13 Ind. Jur. 256; 4 Ind. Dec. (N. S.) 595.

(3) 15 Ind. Cas. 584.

(4) 37 Ind. Cas. 1; (1916) 2 M. W. N. 180; 4 L. W. 168; 31 M. L. J. 354.

(5) 52 Ind. Cas. 517; 10 L. W. 137; (1919) M. W. N. 548.

(6) 62 Ind. Cas. 390; 13 L. W. 397 at p. 400.

so far as the property for which *patta* has been given to plaintiffs Nos. 2 and 4 is concerned, proper notice was given to the defendant by the Government before the *pattas* were issued to those plaintiffs. It is clear, therefore, that the principle relied upon by Mr. Menon that, when a landlord parts with the right of possession of his property to a third party by either mortgaging or by selling away the property, he has no longer any right to give notice to quit as the proper person to give the notice is the transferee as held in *Wordsley Brewery Co.* v. *Halford* (7), will not apply, for the English cases recognise that the person who is the landlord and entitled to possession on the date of the notice to quit is the proper person to give the notice and that an assignee within the currency of that notice can take advantage of the notice sent by his assignor and rely upon it when he brings a suit for recovering possession. As regards the third plaintiff it may be that there is some difficulty as the notice regarding his land seems to have been issued after the *patta* was granted to him. It is, however, very doubtful whether the principle laid down in *Wordsley Brewery Co.*, v. *Halford* (7) will apply to this case. That was a case where the owner of a certain property at first gave an oral lease to the defendant and subsequently during the continuance of the tenancy granted to the plaintiffs as period lease of 14 years. After granting this lease a notice to quit in writing addressed to the first tenant signed by the husband of the owner of the premises as her agent to deliver possession of the property was served upon the tenant. The question then was whether that was a proper notice to quit and their Lordships no doubt held that it was not a proper notice, but their reasoning was as follows. They held that, as soon as the second lease was granted, it took effect at once, that the grant of the lease "passed the reversion and not merely the attornment", and that, therefore, the grantor had no longer any right of possession and could not exercise the right of giving notice to quit to terminate the tenancy. The argument turned upon the question whether the granting of the period lease amounted to the passing of the reversion or not, and their Lordships say after discussing about some authorities "it is said that some authorities are inconsistent with that view, that is, the view that it did pass and to some extent they may be, but even if that is so, we have to choose between them all. We must hold that the reversion passed". In the present case the Government granted *pattas* to the plaintiffs. If there was an arrangement, as suggested by the Government Pleader, between the Government and the plaintiffs that the Government's right to recover possession was to continue and that they should get possession from the tenant and hand it over to the *pattadars*, the right to possession for the limited purpose will still remain in the Government, though *pattas* may have been granted. If this is so, I do not see why the Government is not the proper authority to issue the notice to quit.

The point as to notice has not been tried; it was not taken in the First Court and to allow it to be taken now will involve a fresh trial on facts. I do not think I am bound to allow such a point to be taken in second appeal.

The second appeal fails and is dismissed with costs one set.

V. N. V. *Appeal dismissed.*

(7) (1904) 90 L. T. 89.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 685 OF 1923.

May 19, 1924.

Present :—Justice Sir Ewart Greaves, KT., and Mr. Justice Chakravarti.

SREERAM CHUNDER BASU AND ANOTHER—DEFENDANTS—APPELLANTS

versus

NAGENDRA NATH CHATTERJEE AND OTHERS—PLAINTIFFS AND ANOTHER—DEFENDANT—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 87—

SREERAM CHUNDER BASU *v.* NAGENDRA NATH.

Non-transferable tenancy—Sale by tenant, effect of —Transferee, position of.

When a tenant having no transferable interest transfers his interest and puts the transferee in possession, the original tenancy may be treated as abandoned, and when the transferee takes possession of the land he is no better than a trespasser as against the landlord. [p. 960, col. 1.]

Appeal against a decree of the Additional District Judge, Howrah Hooghly, dated the 11th of November 1921, affirming that of the Munsif, Second Court at Howrah, dated the 27th of March 1919.

Babu *Monmotho Nath Ray*, for the Appellants.

Babu *Narendra Kumar Bose*, for the Respondents.

JUDGMENT.

Chakravarti, J.—This is an appeal on behalf of defendants Nos. 1 and 3 and arises out of a suit brought by the plaintiffs for recovery of certain land. Both the first and the lower Appellate Courts have given a decree in favour of the plaintiffs. The facts necessary for the determination of this appeal are shortly these. The plaintiffs claim to be occupancy *raiyats* with reference to the land in suit. The defendants who are called, for the sake of brevity, Koles were under-*raiyats* under the plaintiffs. The under-*raiyats* sold their interest to defendants Nos. 1 and 3. The defence of the defendants was so far as it appears from the judgments of the Courts below and the issues which have been read to us, that the Koles were not under-*raiyats* and also that the Koles had a transferable right in the land and that they had not abandoned their rights. It appears that although the defendants had entered appearance and issues were raised, ultimately at the trial, they did not appear on the ground that certain papers which had been sent for at their instance, were not before the Court at the time of the trial. The result was that the Munsif tried the suit *ex parte* and accepting the plaintiffs' evidence which stood uncontradicted passed a decree in favour of the plaintiffs. The defendants appealed to the lower Appellate Court and the learned District Judge who tried that appeal has dealt with the question whether or not the *ex parte* trial of the suit was justified and come to the conclusion that under the circumstances the Munsif was right in refusing the adjournment at the instance of the defendants. Then the learned District Judge dealt with the question which was raised before him on appeal as to the merits of the case and found that the non-transferable under-*raiyati* of the Koles was transferred to the defendants evidently meaning thereby to defendants Nos. 1 and 3 and the learned Judge further found that the Koles were not in possession of the land as under-*raiyats* as apparently it was contended on behalf of the defendants, the appellants before him that the Koles were still in possession. The learned Judge further found that the Koles were still in possession of a portion of the land because their mother had taken a sub-lease from the defendants Nos. 1 and 3 of a portion of the land which the Koles had transferred to defendants Nos. 1 and 3. On these findings the learned District Judge held that the Koles had abandoned the holding and confirmed the decree of the Munsif.

In this second appeal, against that decree of the learned District Judge the learned Vakil who appeared for the appellants contended that the judgments of the Courts below were not in accordance with law inasmuch as the judgments did not find the facts necessary for passing the decree which has been made. The second contention of the learned Vakil was that upon the facts found by the Courts below there was no abandonment of this land by the Koles. As regards the first contention we are of opinion that there are findings in the judgments of the Courts below necessary for the determination of the question raised before them. The judgment of the learned Munsif no doubt is not very full and this is accounted for by the fact that the suit was tried *ex parte* as the defendants did not appear at the trial but when the matter came before the District Judge on appeal all the questions which were specifically raised by the defendants before him were fully discussed and determined as they appear from his judgment. Therefore, the contention that the judgments are not in accordance with law is not, in our opinion, sound.

As to the second contention that the findings are not sufficient to justify the inference that the land had been abandoned by the Koles I do not think that there is any substance in that contention. Upon the findings the Koles, who held a non-transferable under-*raiyati* right and sold their interest to defendants Nos. 1 and 3 who are in possession as such purchasers and the fact that they had let out a portion of the land to the mother of the Koles, makes no difference as to their possession of the whole. The sub-lessee of a portion of the under-*raiyati* from defendants Nos. 1 and 3 was in possession as tenant under defendants Nos. 1 and 3 and was equally a trespasser as against the landlord as defendants Nos. 1 and 3 were. Under the circumstances it is difficult to say that the landlord had not the right to re-enter when the original tenants after having sold their interest are no longer on the land. The case of a tenant selling a non-transferable tenancy and leaving the land after his transferee has taken possession of the land is not the same as that of a tenant who had left the land without selling it and abandoned it within the meaning of section 87 of the Bengal Tenancy Act. When a tenant having no transferable interest transfers his interest and puts the transferee in possession the original tenancy may be treated as abandoned and when the transferee takes possession of the land he is no better than a trespasser as against the landlord. We might point out here that the only appellants before us are the purchasers and not the Koles who were under-*raiyats* under the plaintiffs.

I think, therefore, that the judgment and decree of the lower Appellate Court are correct and this appeal is dismissed with costs.

Greaves, J.—I agree.

M M. B. *Appeal dismissed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 418 OF 1922.

March 11, 1924.

Present:—Mr. Justice Phillips and Mr. Justice Odgers.

RACHAMADUGU VENKATAPATHU (MINOR) BY NEXT FRIEND LAKSHMAMMA—PETITIONER—APPELLANT

versus

K. RAMADAS RAO—RECEIVER—RESPONDENT.

Assignment (equitable)—Assignment of what is "now owing and hereafter falling due", whether absolute—Lien or charge on monies recovered.

A trust in favour of the assignor whether of the whole debt assigned or of the surplus after retention thereout of a definite sum by the assignee does not prevent the assignment being absolute; in the case of an equitable assignment a deduction to pay a sum of money out of a specified debt or fund constitutes such an assignment though not of the whole debt or fund and it is immaterial that the amount of the debt assigned is not ascertained at the date of the assignment. [p. 961, col. 2.]

Durham Brothers v. *Robertson*, (1898) 1 Q. B. 765; 67 L. J. Q. B. 484; 48 L. T. 438, *Comfort* v. *Betts*, (1891) 1 Q. B. 737; 60 L. J. Q. B. 656; 64 L. T. 685; 39 W. R. 595; 55 J. P. 630, *Palaniappa* v. *Lakshmanan*, 16 M. 429; 5 Ind. Dec. (N. S.) 1005, *Navajee* v. *Administrator-General of Madras*, 22 Ind. Cas. 566; 38 M. 500, relied on.

An assignment to a "person, his heirs, and assignees of the amount owing to the assignor and hereafter falling due" is an absolute one in favour of the assignee and creates in his favour a lien in the nature of a trust or charge on the money recovered thereunder. [*ibid.*]

Appeal against an order of the District Court, Anantpur, dated the 13th September 1922, in I. A. No. 235 of 1922, in I. P. No. 9 of 1920.

Messrs. *B. Sitaram Rao* and *K. Srinivasa Rao*, for the Appellant.

Mr. *B. Somayya*, for the Respondent.

JUDGMENT.

Phillips, J.—I agree with the order proposed by my learned brother and need only say that the decision of the Court of Appeal in *Comfort* v. *Betts* (1) governs this case also. I may also refer to *Planiappa* v. *Lakshmanan* (2) and *Navajee* v. *Administrator-General of Madras* (3) as

(1) (1891) 1 Q. B. 737; 60 L. J. Q. B. 656; 64 L. T. 685; 39 W. R. 595; 55 J. P. 630.
(2) 16 M. 429; 5 Ind. Dec. (N. S.) 1005.
(3) 22 Ind. Cas. 566; 38 M. 500.

supporting this conclusion. The appellant is entitled to the money in Court as the assignment created in the assignors' favour a lien in the nature of a trust or a charge on the money recovered thereunder. The appeal is, therefore, allowed with costs throughout.

Odgers, J.—On 23rd September 1913 the Swami of Ahobilam Mutt assigned to Rangiah and Sanjeeviah the amount due for rent and damages from one Ramappa who had leased certain lands belonging to the *mutt*. The assignees were to collect the arrears of rent due from Ramappa, recover damages from him in respect of cutting trees, pay all the cost themselves in the first instance and pay over half the net proceeds to the Swami after deducting costs. Rangiah is now represented by minor petitioner-appellant and in 1915 Sanjeeviah was adjudicated an insolvent. Certain moneys have been recovered from the lessee and are in deposit in the District Court of Kurnool. The appellant states that he paid the Swami in 1919 Rs. 1,500 and took a deed of relinquishment whereby he acquired the Swami's half shares in the net proceeds provided for by the deed of assignment. The appellant asserts that the insolvent (now represented by the Official Receiver) is entitled only to one-fourth of the amount recovered, himself being entitled to the other one-fourth which together with the half acquired from the Swami amounts to three-fourths of the fund in Court. The Official Receiver contends that he is entitled to half the decree amount and not one-fourth only and that as the Swami would as to his half under the assignment deed be in the position of an ordinary creditor, the appellant, by the transaction in 1919 can acquire no better rights against the insolvent's estate than the Swami and must rank as an ordinary creditor. This contention was upheld by the District Judge and the question is whether it is right and whether under the deed of assignment the assignees were constituted trustees for the Swami as to half the proceeds they recovered. It is further contended that if they were not trustees they were agents for collection or that a charge was created on the fund recovered in favour of the Swami. In my opinion the assignment was an absolute one in favour of the assignees. "I do hereby assign to you, your heirs and assignees the amount now owing and hereafter falling due." It does not signify in this country whether the assignment is one at law by virtue of section 25 of the Judicature Act of 1873 or is only an equitable assignment. A trust in favour of the assignor whether of the whole debt assigned or of the surplus after retention thereout of a definite sum by the assignee does not prevent the assignment being absolute; in the case of an equitable assignment a direction to pay a sum of money out of a specified debt or fund constitutes such an assignment, though not of the whole debt or fund and it is immaterial that the amount of the debt assigned is not ascertained at the date of the assignment. See per Chitty, L. J., in *Durham Brothers* v. *Robertson*, (4). This case appears to me to resemble *Comfort* v. *Betts* (1) where certain persons assigned debts due to them to the assignee to recover the same and on recovery to pay to the assignors respectively out of the aggregate sum recovered such proportionate part of such aggregate sum as should represent or comprise the individual debt due to them respectively or such part thereof as might have been recovered by the assignee.

The Court of Appeal held that what was intended was an absolute assignment of the debts subject to a trust for the payment of the money recovered to the creditors. In my opinion this decision is applicable to this case; the only difference here is the clause with regard to the recovery of damages, but as pointed above that is not a matter which needs consideration in this country. The intention here was to pass the whole of the assignor's interest in the debt due and in the recovery of damages. He was however, entitled to half the net proceeds recovered. The Court of Appeal has held in the case quoted that the intention in such a case imports a trust and following that decision, I have no doubt that it was intended by the parties here to the deed

(4) (1898) 1 Q. B. 765; 67 L. J. Q. B. 484; 48 L. T. 438.

of assignment that the assignees should hold half the proceeds in trust for the assignor. The Swami would, therefore, not be in the position of an ordinary unsecured debtor with regard to the proceeds and the appellant who stands in his shoes will occupy the same position.

V. N. V. *Appeal allowed.*

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

July 29, 1924.

Present :—Lord Shaw, Lord Blanesburgh and Mr. Ameer Ali.

Maharaja KESHO PRASAD SINGH —APPELLANT

versus

SHEO PARGASH OJHA AND OTHERS—RESPONDENTS.

Res judicata—*Alienation by Hindu widow—Declaratory decree by presumptive reversioner—Vendee, whether bound against inheriting reversioner.*

A declaratory decree obtained by the presumptive reversionary heir, against a Hindu widow and an alienee from her, as to the alienation being not binding on the reversionary body after the lifetime of the widow, is binding as between the alienee and any reversioner in whose favour he reversion actually opens. [p. 963, col. 2.]

In a case such as the above the reversionary heir sues in a representative capacity so that the corpus of the estate may pass unimpaired to those entitled to the reversion. [p. 964, col. 1.]

Appeal against a decree of the Allahabad High Court (Justice Sir P. C. Banerji, KT., Mr. Justice Tudball and Mr. Justice Sulaiman) dated the 9th July 1921, and printed as 64 Ind. Cas. 248, affirming that of the Subordinate Judge, Ghazipur, dated the 3rd September 1918.

Messrs. *De Gruyther, K. C.* and *Kenworthy Brown*, for the Appellant.

Dr. *Majid*, for the Respondents.

JUDGMENT.

Lord Blanesburgh.—This is an appeal against a decree of the High Court of Judicature at Allahabad of the 9th of July, 1921, affirming a decree of the Subordinate Judge of Ghazipur of the 3rd September 1918.

The suit was brought by the respondents against the appellant for the possession of certain lands described in he plaint. These lands consisted of a 2 annas 8 pies share in a permanently settled *mouza* called Pachrokh.a: and a grove No. 526 in *Mouza* Balihar.

A decree has been passed substantially as prayed. The defendant appeals.

The facts raising such questions in the suit as remain for their Lordships' consideration may be compendiously stated.

The respondents have been found to be, as they alleged they were, the reversionary heirs of one Manohar Ojha who died without issue in 1856. At his death he was entitled as part of his estate to both properties in suit. In Pachrokhia, the appellant, who is the present Maharaja of Dumraon was also interested as the owner of an eight annas share.

Manohar Ojha left three childless widows surviving him. Oudha Koer was the last survivor of the three. She died in 1914. Thereupon, the succession to the estate of Manohar Ojha opened to the respondents as his reversionary heirs. After Oudha Koer's death exclusive possession of both properties in suit was found to be in the appellant under the following circumstances.

First as to Pachrokhia. That *mouza* was in great part diluviated, and in 1892 Oudha Koer, by the time in possession of her deceased husband's share, failed to pay her proportion of the revenue assessed upon it. The appellant had to pay the whole and he sued Oudha Koer to recover her proper proportion. In January, 1894, a decree for Rs. 564-5-4 and interest was passed in his favour and to meet this debt Oudha Koer borrowed from one Kishan Prasad the amount due, *viz.*, Rs. 587, together with a further sum, making in all Rs. 1,000, and she gave to Kishan Prasad by way of security a mortgage of Manohar Ojha's interest in Pachrokhia, dated the 25th of December, 1899, for the whole sum borrowed.

On the 31st of March 1903, Kishan Prasad obtained a decree for the amount then due on his mortgage, and, in execution, he purchased, on the 16th of November, 1904, Manohar Ojha's two and two-third annas share in Pachrokhia and he was placed in possession.

Later Kishan Prasad, himself made default in payment of his share of revenue of Pachrokhia. The appellant as before was compelled to pay the whole assessment. He then sued Kishan Prasad for his proportion and obtained a decree for Rs. 698-1-9. This decree he executed against the property, which was purchased by him at auction on the 20th June 1912. He was placed in possession, and he so remained at the death of Oudha Koer in 1914.

Such was the title to this property set up by the appellant in the suit.

Their Lordships will deal separately with his claim to the grove.

Now, so far, the question as to Pachrokhia, between the respondents as reversionary heirs of Manohar Ojha and the appellant would depend, primarily at least, upon the question whether the mortgage made by Oudha Koer, a Hindu widow, in favour of Kishan Prasad was for legal necessity so as to be binding on the estate of Manohar Ojha. And this issue was found in favour of the respondents by the Subordinate Judge in the present suit.

In the High Court, however, the decision against the appellant was based upon another ground, dependant upon a further fact which their Lordships now proceed to state.

Immediately upon Kishan Prasad obtaining, on the 31st of March 1903, as above mentioned, his decree for sale on the basis of his mortgage of the 25th of December 1899, Dhanai Ojha, the then presumptive reversioner to the estate of Manohar Ojha sued Kishan Prasad and Oudha Koer for a declaration that the alienation to him by the widow was without legal necessity, that alienation and the decree obtained thereon by Kishan Prasad could not affect Pachrokhia otherwise than for the lifetime of the widow, and that neither was binding upon the reversionary body. And in that suit a decree was passed on 21st June, 1904, in the plaintiff's favour as against both the widow and Kishan Prasad.

This decree affects the appellant's claim, it is said, in two ways. First of all, the purchase by the appellant on the 16th of November, 1904, from Kishan Prasad was subsequent to the decree and it is suggested with great force that all that was then purchased by the appellant consisted of the rights and interests of the widow in Pachrokhia, as these had been declared by the order of the 21st of June, 1904. Their Lordships feel the force of this view but they do not propose to dispose of this part of the case in reliance upon it.

Like the Court of Appeal they will decide this question on the second ground which emerges from the decree of the 21st of June, 1904. In their Lordships' judgment that decree obtained by Dhanai as against the widow and Kishan Prasad is binding as between the parties to the present suit. No Court in India can now, as the Board think, go behind it, and as it was therein held that the transfer to Kishan Prasad was not binding on the estate after the death of the widow, the respondents as the reversionary heirs are now in their Lordships' judgment, by virtue of that decree, entitled to possession. The Board agrees with the High Court in thinking that this result necessarily flows from the judgment of their Lordships in *Venkatanarayana Pillay* v. *Subbammal* (1) delivered by Mr. Ameer Ali. After pointing out that the Indian law permits the institution of suits in the lifetime of the female owner for a declaration that an adoption made by her is invalid or an alienation effected by her is not binding against the inheritance, Mr. Ameer Ali there lays it down that the object of the second class of suit as of the first class "is to remove a common apprehended injury to the interests of all the reversioners, presumptive and contingent alike.....In both 'the right to sue' is based on the danger to the inheritance common to all the reversioners which arises from the nature of their rights." And the law is expounded in the same sense by their Lordships in the later

(1) 29 Ind. Cas. 298; 42 I. A. 125 at p. 129; 17 M. L. T. 435; 28 M. L. J. 535; 17 Bom. L. R. 468; 19 C. W. N. 641; 2 L. W. 596; 38 M. 406; (1915) M. W. N. 555; 21 C. L. J. 515 (P. C.).

case of *Janaki Ammal* v. *Narayanasami Aiyar* (2). They there observe as follows: ".....a reversionary heir.....is recognised by Courts of Law as having a right to demand that the estate be kept free from waste and free from danger during its enjoyment by the widow or other owner for life.....a reversionary heir thus appealing to the Court truly for the conservation and just administration of the property does so in a representative capacity, so that the corpus of the estate may pass unimpaired to those entitled to the reversion." The operation "is justified by the considerations of keeping the estate intact for the persons to whom, as reversioners, it shall ultimately and at the proper time be determined that the estate shall go."

These words, in their Lordships' judgment, accurately describe in relation to this property the suit of Dhanai Ojha which eventuated in the decree of the 21st of June, 1904. That decree is binding on the appellant as the successor-in-interest of Kishan Prassad and of the benefit of it the respondents are now possessed as the heirs of Manohar Ojha in the event "entitled to the reversion." To the present case the application of this principle is obvious and eminently salutory. It would be *pessimi exempli* that the appellant, whose predecessor-in-interest failed on the same issue and was content to accept the adverse judgment against him, should be held entitled, years afterwards, when it might be, much of the relevant evidence was no longer available, to raise the same issue all over again. Their Lordships of course recognise that the principle is less obviously just where it operates to bind the ultimate reversioners by the result of a suit in which a plaintiff had faild whose interest, then merely presumptive, never ultimately matured. The danger of a feigned issue in such a suit is not to be overlooked.

But this danger is mainly serious where the failure of the first suit has been brought about by fraud or collusion where, of course, further and different considerations would arise. In their Lordships' judgment there is no answer either in principle or in fact to the contention of the respondents that the decree of the 21st of June, 1904, is conclusive of their claim to this property.

Their Lordships can dispose very shortly of the appellant's claim to the second property in suit—the grove No. 526. On the death of the widow the appellant wrongfully took possession of it and he now contends that the property within the meaning of the Tenancy Act is "land held for agricultural purposes" and that the period of limitation for a suit to recover it is, under section 79 of that Act six months only. With the High Court their Lordships are of opinion that it is impossible to hold that that section has any application whatever to such a property as the grove in fact is.

In their Lordships' opinion the appeal entirely fails: and they will humbly advise His Majesty that it be dismissed and with costs.

N. H. *Appeal dismissed.*

Solicitors for the Appellant:—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents:—Messrs. *Chapman, Walker* and *Shephard.*

(2) 37 Ind. Cas. 161; 43 I. A. 207; 20 M. L. T. 168; 31 M. L. J. 225; 14 A. L. J. 997; (1916) 2 M. W. N. 188; 20 C. W. N. 1323; 39 M. 634; 18 Bom. L. R. 856; 24 C. L. J. 309; 4 L. W 530 (P C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 177 OF 1922.

May 8, 1924.

Present:—Mr. Justice Pearson and Mr. Justice Graham.

DINANATH SARMA KATAKI—PLAINTIFF—APPELLANT

versus

GOUR NATH SARMA KATAKI AND OTHERS—DEFENDANTS—RESPONDENTS.

Procedure—Party entitled to equitable relief—Court, duty of—Pleadings, amendment of.

DINANATH *v.* GOUR NATH.

When a Court is able to discover an equitable relief to which the plaintiff is entitled, it would be well-advised to allow the plaintiff, where the defendant has been obviously in default, to take advantage of any such equitable relief to which he is entitled under the law, and if necessary, to treat his pleadings as amended for that purpose even at the appellate stage of the suit. [p. 965, col. 2; p. 966, col. 1.]

Appeal against the decree of the District Judge, Assam Valley Districts, dated the 28th September, 1921, reversing that of the Munsif, Gauhati, dated the 23rd of May, 1921.

Dr. *Jadu Nath Kanjilal* and Babu *Binode Lal Mukerji*, for the Appellant.

Moulvi *Nurul Huq Choudhury*, for the Respondents.

JUDGMENT.

Pearson, J.—This is an appeal from a decision of the District Judge of the Assam Valley Districts reversing a judgment of the Munsif at Gouhati. The facts are as follows: A certain *dag* No. 219 belonged to the plaintiff, the first and second defendants and one Krishna Nath. They were all brothers and owned the property in equal shares. The first defendant approached the plaintiff representing to him that he was the owner of ½ of this *dag*, and agreed to sell his half share to the plaintiff for a sum of Rs. 800. The ½ share purported to comprise the ¼th share belonging to the first defendant and the ¼th share belonging to Krishna Nath which, he alleged, had fallen to him by succession. Before the contract was completed, however, it appears that the plaintiff came to know that Krishna Nath's ¼th share had been in fact inherited by Krishna Nath's daughter's son. The plaintiff thereupon sued for specific performance on the footing of being entitled to the ¼th share belonging to the first defendant on a proportionate payment of Rs. 400—Rs. 200 having been already paid as earnest money by the plaintiff.

The First Court decreed the suit. The lower Appellate Court reversing that decision dismissed the suit, the basis of the dismissal being that inasmuch as section 15 of the Sepefic Relief Act applied to the circumstances of the case the plaintiff would only be entitled to a decree upon the footing that he should take over the ¼th share of the first defendant in return for payment of the whole of the consideration money of Rs. 800 agreed upon, and abandoning his claim to further performance and to compensation.

It has been argued before us in appeal first of all that the decision of the Trial Court was correct and that the plaintiff is entitled to a decree for specific performance as regards the ¼th share upon payment of Rs. 400 only. It is argued that the case falls not within section 15 but within section 16 of the Specific Relief Act. Reference is also made to the case of *Krishna Chandra Dey* v. *W. Graham* (1). The facts in that case were undoubtedly very similar to those of the present. But in that case there were two plots of land one belonging to a stranger to the contract, in the present case the property in question was *ijmali* property unpartitioned belonging to the brothers in equal share. Be that as it may, I am unable to distinguish the facts of the case now before us from the facts which are given in Illustration *(a)* to section 15 of the Specific Relief Act, and I think the lower Appellate Court was right in holding that that was the section to be applied in the circumstances of this case.

It appears, however, that the plaintiff who succeeded in his suit in the First Court, finding that the lower Appellate Court was likely to reverse that decision made an offer of the full amount of Rs. 800 in return for a conveyance of the ¼th share belonging to the first defendant. The lower Appellate Court dealt with this offer merely by saying that it was made at too late stage and that the suit was brought upon the footing that the plaintiff was entitled to conveyance of half the land on payment of Rs. 400 only.

It appears to me that when a Court is able to discover, as in this case, an equitable relief to which the party is entitled it would be well advised to allow the plaintiff, where the defendant had been so obviously in default

(1) 75 Ind. Cas. 421; 27 C. W. N. 693; 50 C. 700; (1923) A. I. R. (C.) 691.

to take advantage of any such equitable relief to which he is entitled under the law, and if necessary, to treat his pleadings as amended for that purpose. At most it would be a matter where the defendant ought to be compensated in costs for he could have no grievance except that he might possibly not have come to Court had the offer been made before the commencement of the litigation.

I think, therefore, that the appeal ought to be allowed and that an order should be made that upon the plaintiff's depositing in the First Court the sum of Rs. 600 within one month after the arrival of the record in the lower Court the defendant will execute a conveyance of his ¼th share in the property in question. In the circumstances we think that the justice of the case will be met by making no order as to costs of this appeal or in the Courts below.

In the event of the money not being deposited within the time allowed the appeal will stand dismissed with costs.

Graham, J.—(*May 20, 1924.*)—I agree.

It is stated that an additional sum of Rs. 300 has been already deposited pending the appeal. This was not brought to our attention at the time of the hearing. That being so, it will only be necessary for the plaintiff to deposit a further sum of Rs. 300 instead of six hundred rupees within one month as directed by the judgment already signed.

Let the record be sent down without delay.

M. M. B. *Appeal allowed.*

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

June 19, 1924

Present:—Lord Dunedin, Lord Phillimore, Lord Carson and Sir John Edge.

KENCHAVA KOM SANYELLAPPA HOSMANI AND ANOTHER—APPELLANTS

versus

GIRIMALLAPPA CHANNAPPA SOMASAGAR—RESPONDENT.

*Hindu Law—Succession—Legal and equitable estate, distinction between—Equity, justice and good conscience—Murderer, whether can succeed—Wife, position of—*Bandhus *preference between—Statute, construction of.*

A Hindu murderer is wholly disqualified from succeeding to the estate left by the murdered person; even if there be no such rule in Hindu Law the principles of justice, equity and good conscience exclude the murderer from inheritance. [p. 968, col. 1.]

Vedanayaga Mudaliar v. *Vedammal*, 27 M. 591, not followed.

The murderer is, for the purposes of succession, non-existent and cannot be treated as one who forms the stock for a fresh line of descent. [p. 968, col. 2.]

Gangu v. *Chandrabhagabai*, 32 B. 275; 10 Bom. L. R. 149, distinguished.

The theory of legal and equitable estates is no part of Hindu Law. [p. 968, col. 2.]

Under Hindu family Law, a wife becomes a member of her husband's *gotra*, an actual relation of her husband's relations in her own right. [*ibid.*]

Under Hindu Law *bandhus* of equal degree succeed equally. [p. 969, col. 1; p. 970, col. 1.]

As between *bandhus* of equal nearness to the propositus, a male *bandhu* is entitled to preference over a female. [p. 969, col. 1; p. 970, col. 1.]

Narasimma v. *Mangammal*, 13 M. 10; 4 Ind. Dec. (N. S.) 717, *In re Houghton, Houghton* v. *Houghton*. (1915) 2 Ch. 173; 84 L. J. Ch. 726; 113 L. T. 422; 59 S. J. 562; 31 T. L. R. 427, *Saguna* v. *Sadashiv*, 26 B. 710; 4 Bom. L. R. 527, *Rajah Venkata Narasimha Appa Rao Bahadur* v. *Rajah Surenani Venkata Purushothama Jagannadha Gopala Row Bahadur*, 31 M. 321; 4 M. L. T. 5; 18 M. L. J. 409, *Balkrishna Bhimaji* v. *Ramkrishna Gangadhar*, 59 Ind. Cas. 771; 45 B. 353; 22 Bom. L. R. 1442, referred to.

Statutes regulating heirship or descent, or giving force to Wills and to the devises contained in Wills should be read as not intended to affect paramount questions of public policy or depart from well-settled principles of jurisprudence. [p. 968, col. 1.]

Appeal against a judgment and decree of the Bombay High Court, dated the 1st September 1920 (Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Fawcett), and reported as 61 Ind Cas. 294, against the order of the First Class, Judge, Dharwar.

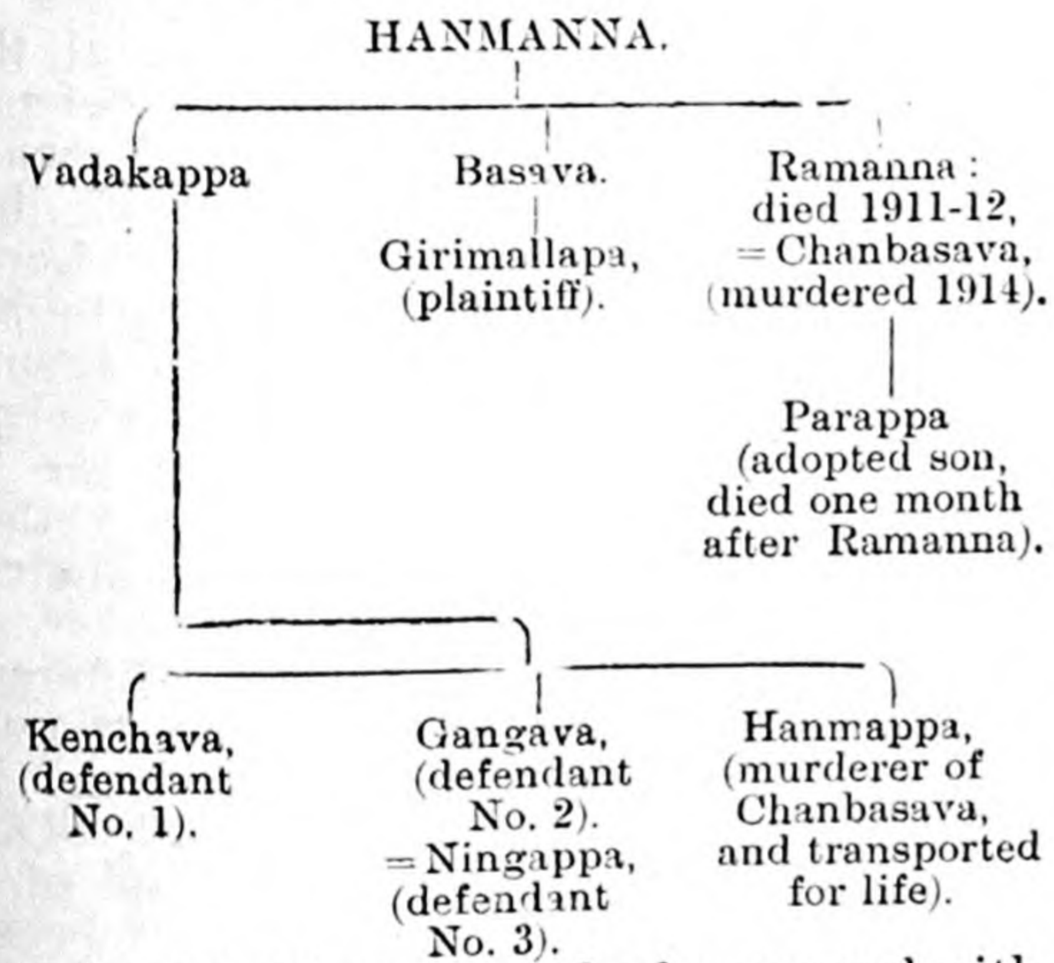
Mr. *Raikes*, for the Appellants.

JUDGMENT.

Lord Phillimore.—This case involves some questions of importance. The parties are all relations, descendants of one Hanmanna. He had three children—a daughter, Basava, whose son Girimallappa Channappa Somasagar is the plaintiff and present respondent; a son Vadakappa who had two daughters, Kenchava and Gangava—who are the

defendants and present appellants —and a son Hanmappa—of whom more hereafter. The third child of Hanmanna was another son, Ramanna since deceased. Ramanna married Chanbasava; they had no children, but they adopted as a son, Parappa. He died a month after Ramanna. Thereupon, his adoptive mother Chanbasava succeeded to the property for the ordinary Hindu woman's estate, and upon her death, descent would have to be traced to Parappa as the propositus; and Hanmappa if he survived Chanbasava would be the natural heir to Parappa.

The relationships can be illustrated on a genealogical table, thus:—



In 1914 Hanmappa had a quarrel with his aunt Chanbasava and murdered her. He was tried and sentenced to transportation for life. The matter to be determined in this case is who, in these circumstances—the Hindu woman's estate of Chanbasava having been brought to an end—is to succeed as heir to Parappa's property.

The defendants, Kenchava and Gangava, the daughters of Parappa's uncle, obtained possession. Thereupon, the plaintiff, as son of Parappa's aunt, sued claiming to have a better title. The defendants being in possession—while averring their better title—also rely as they are entitled to do, upon the contention that the real title is in or through the murderer Hanmappa.

The case, therefore, raises three questions—

Can the murderer succeed?

If not, can title be claimed through him?

If not,—and he is to be wiped out altogether—who are the heirs of Parappa?

And to this last question there are three possible answers: The three cousins may be entitled equally; or the daughters of the uncle may succeed alone: or the son of the aunt may succeed alone.

As to the first two questions the Subordinate Judge held that the matter was provided for by Hindu Law, and that this law disqualified a murderer from succeeding to an estate, the succession to which he had accelerated by killing the woman who had a previous interest during her life. But in compliance as he considered with a decision of the High Court of Madras, he held that nevertheless the murderer did take the legal estate, though he was disqualified from having any beneficial interest. He further held that this disqualification was not confined to a personal disqualification of the murderer, but wiped him out from the line of descent, so that the heirship to the propositus Parappa is to be traced directly and not through him.

The High Court came to the same conclusions, that is to say that the murderer had no title, and that the heirship was not to be traced through him, but on a somewhat different line of reasoning. The learned Judges thought that there was no Hindu Law which governed the matter, so that they had to have recourse in obedience to the Bombay Regulation of 1827, No. 4, section 26, to the principles of equity, justice and good conscience. And while thinking it immaterial whether the murderer had the legal estate vested in him or not because "in either case he must for the purpose of the inheritance be treated as if he were dead when the inheritance opened and as not being a fresh stock of descent," they thought it "simpler to say that the exclusion extends to the legal as well as beneficial estate."

KENCHAVA KOM SANYELLAPPA HOSMANI *v.* GIRIMALLAPPA CHANNAPPA SOMASAGAR.

Before this Board, it has been contended that the matter is governed by Hindu Law, and that the Hindu Law makes no provision disqualifying a murderer from succeeding to the estate of his victim and, therefore, it must be taken that according to this law he can succeed, and he being alive the plaintiff has no title.

Their Lordships do not take this view. There is much to be said for the argument of the Subordinate Judge that the principles of jurispurdence which can be traced in Hindu Law, would warrant an inference that according to that law a man cannot take advantage of his own wrong, and that if this case had come under consideration by the Hindu sages they would have determined it against the murderer. But it is unnecessary so to decide, because the alternative is between the Hindu Law being as above stated or being for this purpose non-existent, and in this latter case the High Court have rightly decided that the principles of equity, justice and good conscience exclude the murderer.

The English Law on this subject is based upon principle and is well settled. It is true that the reported decisions have been in cases where the murderer was a devisee or legatee under the Will of the murdered person, and that Joyce, J., in *In re Houghton, Houghton* v. *Houghton* (1) thought it a matter for consideration whether the same rule would apply in the case of an intestacy, and cited a decision of a Court in the U. S. A. by which it was held that the provisions of the Statute of Distributions were paramount and forbade the consideration of any disqualification. But the actual decision of Joyce, J., was rested upon another ground and a quite satisfactory one; and their Lordships are unable to follow the reasoning of the learned American Judge. Statutes regulating heirship or decent, or giving force to Wills and to the devises contained in Wills should be read as not intended to affect paramount questions of public policy or depart from well-settled principles of jurisprudence.

In their Lordships' view it was rightly held by the two Courts below that the murderer was disqualified; and with regard to the question whether he is disqualified wholly or only as to the beneficial interest which the Subordinate Judge discussed, founding upon the distinction between the beneficial and legal estate which was made by the Subordinate Judge and by the High Court of Madras in the case of *Vadanayaga Mudaliar* v. *Vedammal* (2) their Lordships reject, as did the High Court here, any such distinction. The theory of legal and equitable estates is no part of Hindu Law and should not be introduced into discussion.

The second question to be decided is whether title can be claimed through the murderer. If this were so, the defendants as the murderer's sisters, would take precedence of the plaintiff, his cousin. In this matter also, their Lordships are of opinion that the Courts below were right. The murderer should be treated as non-existent and not as one who forms the stock for a fresh line of descent. It may be pointed out that this view was also taken in the Madras case just cited.

It was contended that a different ruling was to be extracted from the decision of the Bombay High Court in *Gangu* v. *Chandrabhagabai* (3). This is not so. In that case, the wife of a murderer was held entitled to succeed to the estate of the murdered man; but that was not because the wife deduced title through her husband, but because of the principle of Hindu family Law that a wife becomes a member of her husband's *gotra*, an actual relation of her husband's relations in her own right, as it is called in Hindu Law a *gotraja-sapinda*. The decision, therefore, has no bearing on the present case.

It remains to be determined whether as between the appellants and the respondent—all three being first cousins of the propositus—any distinction is to be made by reason of their sex or the sex of their parents. The Subordinate

(1) (1915) 2 Ch. 173; 84 L. J. Ch. 726; 113 L. T. 422; 59 S. J. 562; 31 T. L. R. 427.

(2) 27 M. 591.

(3) 32 B. 275; 10 Bom. L. R. 149.

Judge thought that there was no distinction to be made between *bandhus* of equal nearness, and that all took equally, and so he gave to the plaintiff a third of the property.

Both parties appealed to the High Court, which held that as between *bandhus* of equal nearness to the propositus, male members of the family were preferred to female, and gave judgment that the plaintiff should take the whole.

The case against this decision has been very fully argued before their Lordships by Counsel for the defendants-appellants. He brought a number of authorities before their Lordships for review, all of which have been considered.

In the result, however, for the purposes of this case, the matter can be brought into a short compass. Both the Subordinate Judge and the High Court agreed—indeed the Subordinate Judge said it was conceded in argument on both sides—that the plaintiff and the defendants are *bandhus* (*bhinna gotra spindas*) of an equal degree being *sapindas* within four degrees of the common ancestor. This being so, no reason is shown in their Lordships' opinion why the defendants as daughters of the deceased father's brother should take in preference to the plaintiff who is the son of the deceased father's sister. So far again, both Courts are in agreement, and their Lordships are in agreement with both Courts. That leaves to be determined the point on which the two Courts differ, the Subordinate Judge having held that all three should share alike, and the High Court having given preference to the plaintiff as being a male.

Now it was decided by the High Court of Madras in 1889, in the case of *Narasimma* v. *Mangammal* (4) that a father's sister was postponed to a mother's brother by reason of the general preference given among *bandhus* to male over female heirs. This decision was quoted without disapproval by their Lordships on this Board in the case of *Vedachela Mudaliar* v. *Subramania Mudaliar* (5).

But the High Court of Bombay in 1902 in the case of *Saguna* v. *Sadashiv* (6) came to the conclusion that, however, this might be in Madras it was different in Bombay. The Judges gave preference to the father's half-sister over the mother's brother, and did not follow the case of *Narasimma* v. *Mangammal* (4) which was quoted to them. And it was upon this decision of the High Court of Bombay that the main argument of Counsel for the appellants was founded.

When analysed, however, the decision of the Bombay Court comes to this only. There may or may not be a preference among *bandhus* of males over females, if they are otherwise in the same position, but there is a prior and paramount enquiry whether they are *bandhus* on the father's side or on the mother's side—those on the father side having the precedence.

The question of priority as between *atma bandhus ex parte paterna* and those *ex parte materna* has been the subject of much discussion—the latest word on the subject being found in *Vedachela Mudaliar* v. *Subramania Mudaliar* (5) which decided in 1921, that as between *pitrubandhus* and *matru bandhus* the preference given to the former is settled.

The case now before their Lordships is not affected, however, by these considerations, as both sets of claimants are related on the father's side.

In 1908, the High Court of Madras in *Rajah Venkata Narasimha Appa Rao Bahadur* v. *Rajah Surenani Venkata Purushothama Jagannadha Gopala Row Bahadur* (7) again decided that in that Presidency a male *bandhu* is entitled to preference over a female *bandhu*, even though the latter is nearer in

(4) 13 M. 10; 4 Ind. Dec. (N. S.) 717.

(5) 61 Ind. Cas. 402; 48 I. A. 349; 24 Bom. L. R. 649; 44 M. 753; 14 L. W. 402; (1921) M. W. N. 669; 2 P. L. T. 707; 26 C. W. N. 159; 41 M. L. J. 676; 30 M. L. T. 198; 4 U. P. L. R. (P. C.) 13; (1922) A. I. R. (P. C.) 33 (P. C.).

(6) 26 B. 710; 4 Bom. L. R. 527.

(7) 31 M. 321; 4 M. L. T. 5; 18 M. L. J. 409.

degree. *Saguna* v. *Sadashiv* (6) was not referred to in the judgment, but it was unnecessary because there was no contest between maternal and paternal *bandhus*.

Then in *Balkrishna Bhimaji* v. *Ramkrishna Gangadhar* (8) decided in 1920 by the High Court of Bombay—consisting of the same Judges who decided the case now under appeal—the authority of *Rajah Venkata Narasimha Appa Rao Bahadur* v. *Rajah Surenani Venkata Purushothama Jagannadha Gopala Row Bahadur* (7) was followed. The principle that among *bandhus* the male is entitled to preference over the female —even though the latter is nearer in degree—was accepted as being law for the Bombay Presidency as much as for the Madras Presidency; and preference was given to a mother's sister's son over a brother's daughter. In that particular case the actual decision would appear to conflict with *Saguna* v. *Sadashiv* (6) because it apparently ignored the supposed prior and paramount claim of paternal over maternal *bandhus*; and it would seem that for some unaccountable reason, *Saguna* v. *Sadashiv* (6) was not cited to the Court. Whenever, therefore, the two conflicting principles of preference of the paternal over the maternal line and preference of the male over the female sex, in the Presidency of Bombay, have to be weighed, the Court which weighs them will have to choose between these two decisions of the High Court.

But it will be seen from this summary that there is no case in the Bombay Presidency which decides that some preference is not to be given to male *bandhus* over female. And there is no doubt, indeed the learnded Counsel for the appellants did not contend that there was any doubt, that throughout the rest of India, preference for the male would be certain.

This being so, their Lordships are of opinion that the case was rightly decided by the High Court of Bombay, and that this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

N. H. *Appeal dismissed.*

Solicitors for the Appellants—Messrs. *T. L. Wilson & Co.*

(8) 59 Ind. Cas. 771; 45 B. 353; 22 Bom. L. R. 1442.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 707 OF 1922.

June 11, 1924.

Present:—Mr. Justice Chakravarty.

Maharaja SASI KANTA ACHARJEE BAHADUR—PLAINTIFF—APPELLANT

versus

GENDA SHEIKH AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), s. 29—Amalgamated jama—*Contract, performance of—Benefit taken under contract—Partial repudiation.*

A tenancy created by amalgamating additional land with an existing occupancy holding is not controlled by section 29 of the Bengal Tenancy Act. [p. 971, col. 2.]

Garibulla Sheikh v. *Jnanada Sundari*, 57 Ind. Cas. 998; 32 C. L. J. 134, relied on.

A landlord is entitled to receive consideration for recognising the purchase of a non-transferable occupancy holding. [p. 972, col. 2.]

A party to a contract enjoying the benefit under it cannot, when the right to get either rescission or reformation of the contract is barred, say that he is not bound by one of its terms. [*ibid.*]

Banku Behary Shaha v. *Kristo Gobindo Joardar*, 30 C. 433, *Sanni Bibi* v. *Siddik Hossain*, 49 Ind. Cas. 76; 29 C. L. J. 55; 23 C. W. N. 93, distinguished.

Appeal against a decree of the Subordinate Judge, Second Court, Mymensingh, dated the 29th November 1921, affirming that of the Munsif, Pingna, dated the 31st January 1921.

Babus *Jogesh Chandra Roy* and *Nagendra Chandra Bose*, for the Appellant.

JUDGMENT.—This is an appeal by the plaintiff and arises out of a suit brought by him for recovery of arrears of rent at a rate which was agreed between the parties by a registered *kabuliyat* dated the 23rd of May 1916. The facts which are necessary for the determination of this appeal are as follows. One Samir the predecessor of the

defendants was by a right of inheritance entitled to one-fifth share of an occupancy holding. He purchased also a non-transferable occupancy holding which belonged to somebody else. He approached his landlord and prayed for sub-division of his ancestral holding and also for recognition of his right as a purchaser of the occupancy holding which he had bought. It seems that the parties agreed and the result of that agreement was the *kabuliyat* which I have already mentioned. By that *kabuliyat* the one-fifth share which Samir inherited was amalgamated with the land he had purchased and a new holding was created at a rental of Rs. 15-7-0. In arriving at that sum the *kabuliyat* states that the rent of the old holding was taken to be Rs. 46-12-6 and the rent of the purchased *jote* of Samir was taken to be Rs. 5-8-3. The one-fifth of the rent of the *jote* together with the rent of the purchased *jote* was Rs. 15-7-0 and that is the rent which Samir agreed to pay for the consolidated holding which was created by that *kabuliyat*. The rent due under that *kabuliyat* for the years 1323 to 1326 is the subject-matter of the present suit.

The defence of the defendants who were the representatives of Samir was that the *kabuliyat* was not voluntarily executed by Samir, that he was not cognizant of the terms of the *kabuliyat* and in fact the *kabuliyat* was extorted by force. They further contended that the rent was not realizable because it contravenes the provisions of section 29 of the Bengal Tenancy Act.

This suit was tried along with other suits and we are concerned with Suit No. 530 out of the three suits tried together. The learned Munsif found that the *kabuliyat* was executed voluntarily and with full knowledge of its contents and that it was validly executed. The learned Munsif, however, gave effect to the second defence and reduced the rent from Rs. 15-7-0 to Rs. 12-5-11 per annum and made a modified decree on that basis. On appeal by the landlord plaintiff the learned Subordinate Judge has affirmed the decree of the Munsif and the present appeal is by the plaintiff against the decree of the Subordinate Judge.

It was contended in appeal by Babu Jogesh Chandra Ray, the learned Vakil, for the appellant, first that the *kabuliyat* having been found to have been duly executed and to be valid deed the plaintiff was entitled to a decree at the rate of Rs. 15-7-0 as agreed between the parties and evidenced by the *kabuliyat*. The next contention of the learned Vakil was that as the *kabuliyat* had been allowed to stand unquestioned the defendants were not entitled to object to one of its terms without previously having sought either to rescind or reform the contract and thirdly it was contended that there was really no contravention of section 29 of the Bengal Tenancy Act in the claim by the plaintiff in the present suit.

I think these contentions are sound. It is to be regretted that the respondents do not appear in the present appeal. The *kabuliyat* really is for a consolidated new holding created by the amalgamated of a part of the old occupancy holding with the land of another occupancy holding which was non-transferable but to the transfer of which the landlord gave his consent and agreed to create the tenancy evidenced by the *kabuliyat*. As there was a promise to pay Rs. 15-7-0 as rent of this new holding the defence of the defendants that the contract was not binding on the ground that it was taken by force having failed there is absolutely no reason why the landlord should not be entitled to claim rent as settled by that *kabuliyat*. There is no question of any enhancement here of any existing tenancy. It was really a tenancy created for the first time. It has been held in numerous cases that a tenancy created by amalgamated additional land with an existing occupancy holding is not controlled by section 29 of the Bengal Tenancy Act. In this connection the learned Vakil refers to the case of *Garibulla Sheikh* v. *Jnanada Sundari* (1). The principle laid down in that case

(1) 57 Ind. Cas. 998; 32 C. L J 134.

is ordinarily applicable to the present case. It had been ingeneously suggested, however, for the defence before the lower Courts that although this rent was agreed to be paid for the holding created by amalgamation of lands as stated in the *kabuliyat* but in arriving at the rent payable for the new holding the *jama* of the old holding was increased from Rs. 29 odd to Rs. 46 odd and the proportionate rent payable for the one-fifth share was not taken to be one-fifth of Rs. 29 odd but one-fifth of Rs. 46 odd and, therefore, it was really an enhancement of the rent of the old holding. I do not see that it is so as the rent agreed to be paid for the new holding was Rs. 15-7-0 on whatever basis it is arrived at. It might be, I do not say it was, that the parties agreed to take Rs. 46 odd as the *jama* of the old holding although it was not so. But that did not of itself in any way affect the promise of the tenant to pay Rs. 15-7-0 as rent for the newly created holding. The way in which it was attempted to be shown that the rent was taken to be Rs. 46 odd instead of Rs. 29 odd was this. The learned Subordinate Judge says that the Record of Rights shows that the *jama* of the occupancy holding of which Samir got one-fifth share was recorded as Rs. 29-13-5 and it was for the landlord to show that the rent was really Rs. 46 odd, and having come to the conclusion that the rent was Rs. 29 odd the lower Appellate Court says "the *jama* of Rs. 46-13-6 entered in the *kabuliyat* is either a misrepresentation or a mistake. In either view of the case the contract based on this amount is not enforceable in law." It is somewhat difficult to follow this reasoning. It has been found that the contract was not vitiated either by fraud or coercion as alleged by the defence. If that is so what is the justification for the lower Appellate Court to say that a particular item as mentioned in the contract was either vitiated by misrepresentation or mistake. This was not the defence or such a defence would be inconsistence with the defence that the *kabuliyat* was taken by coercion. It may well be that the rent recorded in the Record of Rights which was published in the year 1915, shortly before this *kabuliyat* was executed was not the true record and until the contrary is established we must take the deliberate statement of the parties as contained in a document which is shown to have been executed voluntarily and properly by the parties as correct. The Court below did not refer to any evidence to that effect. Then again as has been contended by the learned Vakil for the appellant how is it possible for the defendants to refuse to be bound by one of the items of a contract which as I have already stated is of a complex nature. The landlord was not bound to recognize the subdivision of an old holding. He agreed to do so. The landlord was not bound to recognize the transferable occupancy holding but he agreed to do so and he was entitled to receive consideration fore these concessions made by him, and for aught we know the parties made the contract with a full knowledge of the circumstances and Rs. 15-7-0 was agreed to be the true rent payable for the *jama* created. There is no principle upon which a party to a contract allowing the contract to stand and enjoying the benefit of that contract himself can say when he is sued for the enforcement of one of the terms of the contract that he is entitled to retain the benefit of the contract but is not bound by one of its terms at a time when the right to get either rescission or reformation of contract has been barred. The cases in which a party to a contract was held not to be bound by it without setting aside the contract were the cases when the contract was absolutely void *in toto*. See the cases of *Banku Behary Shaha* v. *Kristo Gobindo Jourdar* (2) and *Sanni Bibi* v. *Siddik Hossain* (3). I am, therefore, of opinion that it was not permissible to the defendant to plead that he was not bound by the statement of rent in the contract.

Then again it is difficult to see how

(2) 30 C. 433.
(3) 49 Ind. Cas. 76; 29 C. L. J. 55; 23 C. W. N. 93.

this contract contravenes the terms of section 29 of the Bengal Tenancy Act. In this case a fresh rent was settled for a new tenancy. There is no question of enhancement of the rent of an existing holding here. That tenancy so far as Samir was concerned came to an end. This is not a case of enhancement of rent of an existing holding. The present suit was not for the enhanced rent but for recovery of rent at the rate of Rs. 15-7-0 which the tenant agreed to pay for the new holding created in the circumstances already stated.

On these grounds, I think the judgment of the learned Subordinate Judge cannot be maintained. In the result the plaintiff will be entitled to a decree for rent at the rate mentioned in the *kabuliyat*. The appeal is decreed with costs in all the Courts.

M. M. B. *Appeal allowed.*

RANGOON HIGH COURT.

FIRST CIVIL APPEAL No. 29 OF 1923.
March 26, 1924.
Present :—Mr. Justice Lentaigne and Mr. Justice Carr.
U SHWE MIN AND ANOTHER—APPELLANTS
versus
MAUNG MAUNG GYI AND ANOTHER—RESPONDENTS.

Probate and Administration Act (V of 1881), ss. 70, 71, 83—Civil Procedure Code (Act V of 1908), O. VI, r. 15—Caveat, form of—Procedure in contentious cases.

In contentious cases under the Probate and Administration Act the provisions of that Act read with the Civil Procedure Code should be followed with regard to the filing and the form of caveats and the procedure to be adopted. [p. 974, col. 2.]

Caveats under section 70 of the Probate and Administration Act should be in the form prescribed in section 71 and in contentious cases, the objections to the grant and the reply thereto should be in the form of pleadings properly verified in accordance with the provisions of O. VI, r. 15, Civil Procedure Code. The proceedings thereafter should take the form of a suit in which issues should be framed and parties examined on oath. [p. 974, cols. 1 & 2.]

Appeal against an order of the Original Side, in C. M. No. 4 of 1923.

Mr. *Keith*, for the Appellants.

Mr. *N. N. Sen*, for the Respondents.

JUDGMENT.—This appeal is against an order passed in the Original Jurisdiction of the High Court refusing Letters of Administration to appellants, who claim to be the father and younger sister of one Ma Han who died on the 20th July, 1922. The main objections to the order are that it was passed merely on statements made in Court which have not been deposed to on oath: that appellants being the father and younger sister of the deceased were the natural parties to whom letters should in the ordinary course have been granted and no evidence had been produced to disqualify them: and that as appellants would give security in the event of obtaining Letters of Administration, such security would safeguard any rival claimants.

Apparently Ma Han was living with one Krishunswamy as his wife, or at least the appellants describe Krishunswamy as her husband, and they state that Ma Han jointly carried on business with her husband Krishunswamy and acquired properties as stall-keepers in Surtee Barra Bazar in stalls which were described in their petition as Nos. 249-A, 250, 251 and 205, but in their petition they omitted No. 250.

The objectors are Ma Thuza, an elder sister of the deceased Ma Han, and Maung Aung Gyi, an uncle of the deceased Ma Han. It was pointed out that the latter as uncle had no *locus, standi*, and that objection was accepted by the Court, but I notice that in the original application filed by these objectors in Civil Miscellaneous No. 202 of 1922 in which they had applied that the Administrator General be directed to collect the assets of the deceased and to realize the same under the direction of the Court; Maung Aung Gyi also claimed to be a creditor of the estate to the extent of Rs. 350 and if he can substantiate such claim, he too would have as creditor right to be heard on the question in dispute.

There appears to be a dispute as to what are the assets of the estate of Ma Han. The objectors in the original application referred to some stalls of which only two are referred to against the four in the first application of appellants, and the objectors also referred to such six stalls as completely belonging to the estate. On the other hand Krishunswamy in a petition of opposition stated that the deceased had no property at all and that three of such six stalls did not belong either to him or to the deceased, that two belonged solely to him (Krishunswamy) and that the other two Nos. 250 and 251 were in his name, and it may be that considerable significance should be attached to that differentiation between stalls belonging to him and stalls in his name.

It would seem possible that this unavailing opposition of Krishunswamy in Civil Miscellaneous No. 202 of 1922 was the cause of appellants coming on the scene in the same record where the Advocate for Krishunswamy is recorded as supporting the application as against the Administrator General.

The appellants then filed the application, Civil Miscellaneous No. 4 of 1923, which gave rise to the order which is now appealed against. The respondents filed an unverified petition of opposition and the appellants then filed an unverified petition in reply to such opposition, and it was on the unverified petition that the order appealed against was passed.

The objectors ignored the provisions of sections 70 and 71 of the Probate and Administration Act as to the practice of filing a caveat and the form which such caveat should take. The objectors have also ignored the provisions of section 83 of that Act which prescribed the procedure which should have been adopted in contentious cases: under that provision the grounds of objection should have been in the form of a pleading and properly verified in accordance with the provisions of O. VI, r. 15. Similarly the reply of the appellants should have been properly verified, and the proceedings should then have taken the form of a suit in which an issue should be framed and the parties should be examined on oath.

An objection has been taken to this absence of formality and the failure to prove the allegation on oath. I think that we are bound to remand the case for trial in the ordinary course in accordance with these provisions of the Probate and Administration Act, read with the Code of Civil Procedure. This order does not imply that we are expressing any opinion as to the merits of the case. I would let each party bear his own costs in both Courts up to date.

N. H. *Case remanded.*

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 202 AND 203 OF 1922.

March 25, 1924.

Present:—Mr. Justice Mukerji.

ABDUL SAMAD AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

GUNENDRA KRISHNA ROY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Appeal, second—Finding of fact—Erroneous supposition—Interference—Evidence Act (I of 1872), s. 72—Rent receipt, proof of—Objection to mode of proof, when to be taken.

A finding of fact arrived at upon an erroneous supposition as to matters which are not on the record can be interfered with in second appeal. [p. 975, col. 1.]

Where the genuineness of a rent receipt is sworn to by the tenant by whom the rent has been paid, that is legally sufficient to prove the receipt, notwithstanding that the person whose signature it bears has not been examined. [p. 976, col. 1.]

Objection as to the mode of proof of a particular document should be taken when it is tendered for admission. [p. 976, col. 2.]

Appeals against the decrees of the Subordinate Judge, Second Court, Tipperah, dated the 13th August 1921, modifying those of the Munsif, Fourth Court at Chandpur, dated the 19th of February 1921

Babu *Sarat Chandra Mukherji*, for the Appellants.

Babus *Gunoda Charan Sen* and *Debendra Chandra Pal*, for the Respondents.

JUDGMENT.—Conscious as I am of the restricted powers that we exercise in second appeals I hesitated a good deal before deciding whether I should interfere with the finding of the lower Appellate Court in these cases to the effect that the presumption arising from the entries made in the finally published Record of Rights has not been rebutted. Having regard, however, to the peculiar facts and circumstances of the cases I think I should interfere. If a Court of second appeal can interfere with a finding of fact when that finding is based on no evidence, if it can interfere with a finding of fact when the finding is arrived at without reference to the evidence on the record, if an inference as to facts can be interfered with when it is not warranted by the facts found, I do not see why a Court of second appeal should not interfere with a supposed finding of fact when that finding is arrived at upon an erroneous supposition as to matters which are not to be found on the record.

What has happened in the present cases is this: The plaintiffs instituted the suits out of which these two appeals have arisen for recovery of rent for the years 1323 to 1326 *B. S.* on the basis of the rents mentioned in the finally published Record of Rights. The defendants produced certain *dakhilas* in order to show that the rents which they had been paying were actually less than those which were mentioned in the finally published Record of Rights. The plaintiffs did not produce the collection papers. Whether they did that intentionally or otherwise is a matter which I shall deal with presently. The Court of first instance held that the presumption arising from the entries in the finally published Record of Rights had been rebutted and that the rates of rent which the defendants said were the rates at which they had been paying had been proved and, in that view, that Court gave the plaintiffs decrees in the two suits on the basis of those rates. On appeals being preferred by the plaintiffs, the learned Subordinate Judge has reversed the decision of the Munsif and decreed the two suits on the basis of the rents mentioned in the finally published Record of Rights. His decision is substantially upon these grounds. The first is that no blame attached to the plaintiffs for the non-production of the collection papers. With regard to the collection papers, the learned Judge observed in his judgment as follows: "The learned lower Court has found fault with the plaintiffs for non-production of plaintiffs' collection papers. The papers were, in fact, produced though at a very late stage; but the learned lower Court refused to accept them. The onus of rebutting the Record of Rights is upon the defendants. The defendants should have rather asked the Court to take in these papers instead of objecting to their reception in evidence." From these observations it would seem as if the plaintiffs had produced the collection papers though at a late stage of the case and that the defendants objected to their reception on the ground that they had not been put in proper time and that, therefore, it was the defendants who were to blame for the collection papers not being on the record. The facts, however, are otherwise. It appears from the statements made by the learned Vakils appearing on behalf of the parties before me as also upon an examination of the Records that some of these collection papers were produced by the plaintiffs on the 29th September 1920, and another bach of collection papers was produced by them on the 17th November 1920. Later on, the exact date does not appear, these papers were taken back by the plaintiffs and the plaintiffs' witness No. 1 in his evidence before the Court stated that the collection papers could not be produced inasmuch as there was some litigations pending between the plaintiffs and their co sharers. This being the state of facts, it is curious that the learned Subordinate Judge should assume that it wes the defendants who were responsible for the collection papers not being put in in evidence. So much for the collection papers.

The second ground on which the learned Subordinate Judge's judgment

is based is that, in his opinion the *dakhilas* which the defendants had produced had not been (to use the words of the learned Judge himself) "satisfactorily proved." What he means by this expression, it is difficult to understand for it appears that these *dakhilas* were produced in the Trial Court by the defendants, that they were spoken to by the witnesses examined on behalf of the defendants and that they were marked as Exhibits in the cases without any objection on the side of the plaintiffs. If the learned Subordinate Judge meant that the *dakhilas* were not genuine, there is no reason why he should not have said so expressly in his judgment. If, however, he referred to the fact that the *dakhilas* had not been properly proved, that is to say, proved in accordance with law, in my opinion, he was not right in taking that view. In the first place, the persons who produced these *dakhilas* stated in Court that there were the *dakhilas* which had been received either by them or by others, from whom they had received them, on payment of rent to the plaintiffs and it is well-known that this is one of the ways in which *dakhilas* can be proved in a suit. Reference may, in this connection, be made to the case of *Surja Kanta Acharjee* v. *Baneswar Shaha* (1) wherein, relying upon the cases of *Raj Mahomed* v. *Banoo Rasmah* (2) and *Madhub Chunder Chowdhry* v. *Promotho Nath Roy* (3), this Court held that where the genuineness of a rent receipt is sworn to by the tenant by whom the rent has been paid that is legally sufficient to prove the receipt notwithstanding that the person whose signature it bears has not been examined. To add to this there is the fact which cannot be lost sight of, namely, that no objection was taken on behalf of the plaintiffs to the reception of these *dakhilas* in evidence and to their being marked as exhibits in the cases. As observed in the case of *Rajeswari Dasi* v. *Pulin Behary Mittra* (4) where rent receipts were admitted in evidence without objection in the Court of first instance, no objection could be taken in the Appellate Court that they were not properly proved. In fact this proposition rests upon a well-known principle with regard to the rule of evidence and that is this. Where an objection has got to be taken as to the mode of proof of a particular document, such objection must be taken at the time when the document is tendered for admission, for any *lacunæ* in the mode of proof may then be at once supplied by the party who produces the document and wants to have it proved.

The third ground upon which the learned Subordinate Judge has proceeded is that "the *dakhilas* are of much prior dates." "It seems to me" says the learned Judge, "that they", that is, the defendants, have withheld some *dakhilas*. In making this observation, it seems that the learned Subordinate Judge has wholly misconceived the situation. It appears from an examination of the *dakhilas* themselves that some of them ran quite up to the year 1322 *B. S.* and showed payment of rent for that year, that year being the one immediately preceding the period 1323 to 1326 *B. S.* for which rents have been claimed in these suits. The learned Subordinate Judge, therefore, proceeded entirely upon a misconception with regard to all these matters and the finding arrived at by him based on such misconception. The finding to the effect that the presumption arising from the Record of Rights finally published has not been rebutted on account of these facts cannot be touched as a finding of fact in second appeal. I would, therefore, set aside the decrees passed by the learned Subordinate Judge and remit the two appeals to his Court to be dealt with afresh in the light of the observations that have been made above. Costs will abide the result.

M. M. B. *Appeal allowed.*

(1) 24 C. 251; 12 Ind. Dec. (N. S.) 834.
(2) 12 W. R. 34.
(3) 20 W. R. 264.
(4) 62 Ind. Cas. 647; 25 C. W. N. 881.

VADILAL SARABHAI *v.* MANEKJI PESTONJI.

BOMBAY HIGH COURT.

CIVIL APPEALS NOS. 77 AND 90 OF 1922.
March 15, 1923.

Present:—Sir Norman Macleod, KT., Chief Justice, and Mr. Justice Crump.

VADILAL SARABHAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

MANEKJI PESTONJI BAHARUCHA—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 76—Shares, whether goods—Property in shares, how passes—Delivery of share certificates, effect of—Unpaid vendor, position of—Lien—Suit to recover purchase-money.

Plaintiff sold 129 shares to defendant No. 1. Defendant sold 25 of these to a third party and pledged 104 along with 201 similar shares to defendant No. 2. Defendant No. 2 put forward defendant No. 3 as a party who was willing to advance money. In fact defendant No. 3 was a mere nominee of defendant No. 2. Defendant No. 2 got possession of these 305 shares by fraudulently representing that he would use their shares for the purpose of raising a loan for defendant No. 1 which he did not do and which he did not intend to do, his real object being to secure himself from loss as regards the moneys due to him by defendant No. 1. Plaintiff thereupon sued to recover the shares or their price and by way of damages the difference in the price of those shares on the date on which they were demanded back and the price on the date of decree :

Held, (1) that the plaintiff had no cause of action against defendants Nos. 2 and 3 ; [p. 981, col 2.]

(2) that all that plaintiff was entitled to was a decreee against defendant No. 1 for the unpaid purchase-money as he had no lien for it ; [p. 983, col. 1.]

(3) that the plaintiff had no title either in law or in equity to the shares and could not get back the share certificates or claim damages. [p. 983, col. 1.]

Per *Macleod, C. J.*—Shares are goods within the meaning of section 76 of the Contract Act. They are, however, a peculiar kind of moveable property which cannot pass from hand to hand. The property in these shares belongs to the registered share-holder and cannot be transferred to another except according to the articles of the Company. [p. 980, col. 2.]

Colonial Bank v. *Cady*, (1890) 15 A. C. 267 at p. 277; 60 L. J. Ch. 131; 63 L. T. 27; 39 W. R. 17, referred to.

The only inquiry which a holder of shares can be put to by reason of the nature or character of the documents which come into his possession is with regard to the action of the registered holder. He cannot be put to enquiry with regard to the rights and liabilities of intermediate holders. [p. 983, col. 1.]

Per *Crump, J.*—Delivery of the transfers and share certificates passes not the property in the shares but a title legal and equitable which will enable the holder to vest himself with the shares. [p. 984, col. 1.]

Colonial Bank v. *Cady*, (1890) 15 A. C. 267; 60 L. J. Ch. 131; 63 L. T. 27; 39 W. R. 17, followed.

Consolidated appeals from a decision of Mr. Justice Kajiji.

Sir *Thomas Strangman*, with him Messrs. *B. J. Desai* and *K. M. Munshi*, for the Appellant (defendant No. 2) in Appeal No. 77 of 1922.

Mr. *Jinnah*, (with him Mr. *Setalvad*), for the Appellant (defendant No. 3) in Appeal No. 90 of 1922.

Mr. *Kanga*, Advocate-General, and Mr. *Taraporevalla*, for the Respondents (plaintiffs) in both the Appeals.

JUDGMENT.

Macleod, C. J.—This is an appeal from the decision of Kajiji, J. who passed a decree in favour of the plaintiffs against all the three defendants.

The principal facts are not in dispute. Plaintiff No. 1 is a certified broker. Plaintiff No. 2 is said to be a sub-broker working under him. It is not clear what the term 'sub-broker' implies. There appears to have been some sort of arrangement between plaintiff No. 1 and plaintiff No. 2 that plaintiff No. 2 should induce business on behalf of plaintiff No. 1 and should obtain remuneration in the shape of a share in the brokerage for such business, but it is not disputed that in this case plaintiff No. 2 conducted the business in his own name. In my opinion the term 'sub-broker' should not be used as it has no legal significance and may only lead to confusion of ideas. The learned Judge says that it is a fact of which even judicial notice can be taken that where a sub-broker issues contracts in his own name and the head-broker allows him to do so, the party dealing with the sub-broker always looks to the sub-broker for the performance of

the contract. With due respect I cannot agree. The terms 'head-broker' and 'sub-broker' may or may not be a convenient method of expressing the relationship between plaintiff No. 1 and plaintiff No. 2, but it is inadvisable to introduce into legal language terms which require explanation when the ordinary terms will suffice. Plaintiff No. 2 may have been the agent of plaintiff No. 1 to enter into contract in his behalf, or he may have been an employee of plaintiff No. 1 so that the law of principal and agent, or master and servant, respectively, would be applicable. As the plaintiff No. 2 entered into contracts in his own name, it would depend upon evidence whether he was acting on his own behalf or on behalf of an undisclosed principal, or on behalf of a principal whose name was given to the other contracting party, and consequently on the facts proved the rights and liabilities of the various parties would have to be decided. I cannot see myself what interest plaintiff No. 1 had in this suit except to sue on Gora's cheque unless it can be said that plaintiff No. 2 was acting as the agent of plaintiff No. 1. It was plaintiff No. 2 who contracted in March 1920 to sell 150 shares in Alcock Ashdown & Co., Ltd., to the first defendant Esmail Gora, a certified broker. Plaintiff No. 2 was not a certified broker and so we are not concerned with any terms which may be implied in a contract between certified brokers. In all the transactions in suit the parties acted as principals and not on behalf of clients. In pursuance of his contract plaintiff No. 2 handed over to Gora, on April 14, being payment day, certificates for 129 shares with their respective transfer forms signed in blank by the registered share-holders. The amount to be paid according to the rules, on that day was Rs. 1,54,800 and at about 8 P. M. Gora handed to plaintiff No. 2 a cheque for that amount drawn in favour of plaintiff No. 1. The cheque was dishonoured on presentation the next day.

It will now be necessary to consider what were the dealings of Gora in shares in Alcock Ashdown & Co. for the April settlement. He had been bulling the market, buying largely from defendant No. 2 and others. Exhibit 5 at page 2, Part III, is his account with defendant No. 2. Between February 13 and March 9, he had bought 460 shares, though Manilal said he had bought 463, at prices ranging from Rs. 1,305 to 1,505 of which thirty-one were sold before April 14. He took delivery on the 14th of 368 shares, and gave a cheque for Rs. 4,41,600 at Rs. 1,200 per share, the rate fixed by the Association on payment day. The final adjustment was to take place on April 17 when a very considerable amount more would have to be paid to defendant No. 2 on the 368 shares, apart from what was due for differences on the shares of which delivery was not taken and on other accounts. In addition to the 368 shares, Gora had obtained 129 from the plaintiff No. 2, 56 from one Dave to whom he had given a cheque for Rs. 67,200, and 16 from other sources making a total of 569 shares. He delivered 264 to one Nemchand, receiving a cheque from him for Rs. 3,16,800 at Rs. 1,200 per share. Out of the 264 shares 25 shares were part of the 129 he had received from plaintiff No. 2. Gora thus had 305 shares left with him of which 104 had come from plaintiff No. 2. His position was then desperate. Apart from other liabilities he had issued cheques on the 14th for Rs. 4,41,600, Rs. 1,54,800 and Rs. 67,200 a total of Rs. 6,63,600 which he could not hope to meet unless he realised the full value on the 305 shares. His own story is as follows. On April 15, he went with Nemchand's cheque for Rs. 3,16,800 and the 305 shares to the Bank of India. Whilst waiting to receive payment for the cheque he saw Manilal a partner in defendant No. 2's firm. He explained his difficulties to Manilal, who said he had a friend who would advance money on the 305 shares at Rs. 1,200. Gora gave Manilal the 3,16,800 rupees which he got for the cheque of Nemchand, and the 305 shares, in order that he might arrange the loan. Manilal knew the amounts of the cheques given to plaintiff No. 2 and Dave which had to be met. Gora met Manilal again in the evening at Manilal's residence when according to him he was asked to sign two documents which he

did without reading them. One was a document of pledge, the other a promissory note for Rs. 3,50,000, Exhibits M and N. Both were made out in the name of Maganlal C. Ghia whom up to that time Gora had neither seen nor heard of. The pledge document referred to three cheques for Rs. 1,24,800, Rs. 75,200 and Rs. 1,50,000 as having been received by Gora but as a matter of fact no cheques were given to him. It certainly seems extraordinary that Gora should have left without receiving any of the money, of which he was so urgently in need, in exchange for the 305 shares. On the 17th he received a letter dated the 16th, Exhibit V, from Mr. Kanga, a Pleader practising at the Police Courts, purporting to act on behalf of Ghia. It alleged that Gora had already received two chequs from Ghia aggregating Rs. 2,00,000 but as his client had then received information which made him apprehensive that there would be a difficulty in getting the pledged shares transferred to his name, he had told Gora he would not pay the balance of Rs. 1,50,000 until the shares were transferred to his name. Gora was, therefore, to co-operate in getting the shares transferred. On the 19th Messrs. Soonderdas & Co., wrote a reply on behalf of Gora, Exhibit 5, stating that the transaction referred to had not been correctly represented and asked for inspection of the writing and the two cheques. On the 16th Gora had written two letters for plaintiff No. 2 and Dave to deliver to Manilal, asking him to give cheques to plaintiff No. 2 and Dave for sums of Rs. 1,54,800 and Rs. 67,200 respectively, Exhibit D is the letter in respect of the cheque to be given to plaintiff No. 2. Manilal admitted he had received these letters asking for cheques: see page 94. Plaintiff No. 2 and Dave told Gora that Manilal had promised to pay them when the Bazar closed, but eventually when he heard the cheques had not been given he went to the office of defendant No. 2 where there was a meeting, at which Mr. Devidas, a partner in the firm of Motichand and Devidas who had acted generally as Gora's solicitors, was present. After a long discussion no arrangement was arrived at. The following is the note in Mr. Devidas's diary :

"16th April. Attending with Esmail Gora at the residence of Mr. Mohanlal, having a long interview. Matter could not be amicably settled. Engaged three hours at night."

It is not necessarry to detail further what happened thereafter. The 305 shares remained with defendant No. 2, and Gora received nothing for the document of pledge whch he had signed. He was declared a defaulter on April 19. Sometime after August he left India from Porebunder for South Africa where his evidence was taken on commission. With regard to defendant No. 2 his main complaint is that Manilal promised to give him cheques for Rs. 1,54,800, and Rs. 67,200 to pay plaintiff No. 2 and Dave on pledge of the 305 shares and he did not do so. Before dealing with Manilal's evidence as to what happened between him and Gora with regard to the pledge of the 305 shares, it is necessary to dispose of the third defendant who Manilal had finally to admit, was his nominee. The case as first presented was that Ghia was the friend whom Manilal had induced to advance three and-a-half lacs on pledge of the 305 shares out of which Rs. 2, 00,000 were paid by Gora to defendant No. 2 towards the amount due to him. Ghia had an account with the Bank of Morvi into which Manilal paid Rs. 2,00,000 on April 16 against which Ghia drew two cheques for Rs. 1,24,000 and Rs. 75,200 in favour of Esmail Gora dated April 15. He also drew a third cheque for Rs. 1,50,000 which was never used. We have here the old story of the money-lender who has no money to advance himself but has a friend who will oblige the borrower.

Manilal in his evidence endeavoured to maintain the defence set up in the written statement, but the whole of his evidence may be discarded as an elaborate tissue of falsehoods. It is certain that he knew what Gora's position was on April 14 and 15. Whether or not he actually promised to enable Gora to pay the plaintiff No. 2 and Dave, he was solely concerned to secure himself

and obtain possession of the 305 shares without paying Gora anything. Ghia had in fact no concern with any of the transactions and his name was only used by Manilal to cloak his own dealings. Reference may here be made to Exhibit V, which was a letter written by Motichand and Devidas on behalf of defendant No. 2 to the agents of Alcock Ashdown & Co, asking them not to transfer any of the 368 shares which they had sold to Gora, on the ground that the cheque for Rs. 4,41,600 had been dishonoured. The learned Judge came to the conclusion that instructions were given for that letter on the 15th though it is not quite clear why they could not have been given on the 16th. However that may be, defendant No. 2 had already received Rs. 3,16,800 on account of those shares on the 15th together with the certificates for the 305 shares on which a loan was to be obtained, so that the object in writing that letter could only have been a dishonest one. On the facts, therefore, I am entirely in accord with the conclusion of the learned Judge.

I now come to the actual terms of the decree passed by him:—

1. The plaintiffs were held entitled to the 129 shares the numbers of which were annexed in Schedule A to the decree.

2. Gora was ordered to deliver to the plaintiffs 129 shares or to pay Rs. 1,54,000 and costs.

3. 104 shares out of the 129 were declared to be in the possession of defendants Nos. 2 and 3, defendant No. 3 being a nominee of the defendant No. 2.

4. Defendants Nos. 2 and 3 were ordered to deliver to the plaintiffs the 104 shares.

5. Defendants Nos. 2 and 3 were ordered to pay to the plaintiffs by way of damages Rs. 71,500 being the difference between the rate of Rs. 1,200 and the rate of Rs. 512-8 their value at the date of the decree.

6. Defendants Nos. 2 and 3 were to account for all dividends recovered by them on the 104 shares after April 20, 1920.

The grounds in law for this decree are to be found in the following passage in the judgment:—

"Gora was only an ostensible owner and the plaintiffs who were the unpaid vendors had the equity in them and they could have stopped Gora from getting these shares transferred in his name in the books of the Company but if Gora had passed on these shares either by way of sale or by way of pledge to any third person who acted *bona fide* and without notice then I certainly think that such a person would have had a better title to these shares than the plaintiffs. But in this case it is abundantly clear that Gora himself felt that he was not the owner. Manilal had notice that these shares were not paid for and Ghia being a mere nominee of Manilal, was in no better position than Manilal himself. They took these shares with this infirmity from Gora and, therefore, they cannot claim these shares in priority to the plaintiffs."

Sir Thomas Stangman for the appellant, defendant No. 2, began his argument by contending that as shares were goods, section 121 of the Indian Contract Act applied so that if the vendor of the shares sold them on credit his only remedy, if the purchaser defaulted, was to sue for the price, and he could not follow the goods into the hands of third parties. Admitting that shares are goods, the first question is how are they delivered in pursuance of a contract for sale? Shares are a peculiar kind of moveable property which cannot pass from hand to hand like bales of cotton. The property in these shares belonged to the registered share-holder and could not be transferred to another except according to the Articles of the Company. Article 42 is as follows:

"The instrument of transfer of any share in the Company shall be executed by the transferor and transferee, and the transferor shall be deemed to remain the holder of the said share until the name of the transferee is entered in the register of members in respect thereof."

Lord Watson said in *Colonial Bank* v. *Cady* (p. 277) (1).

"The appellants' witnesses say that delivery of the certificate, with the transfer executed in blank, 'passes the property' of the shares, but that statement must be accepted subject to the explanations by which it is qualified. The right of the holder appears from these explanations to be in the nature of a *jus ad rem* and not of a *jus in re*. Delivery does not invest him with the ownership of the shares in the sense that no further act is required in order to perfect his right. Notwithstanding his having parted with the certificate and transfer, the original transferor who is entered as owner in the certificate and register, continues to be the only share-holder recognised by the Company as entitled to vote and draw dividends in respect of the shares, until the transferee or holder for the time being obtains registration in his own name. It would, therefore, be more accurate to say that such delivery passes, not the property of the shares, but a title, legal and equitable, which will enable the holder to vest himself with the shares without risk of his right being defeated by any other person deriving title from the registered owner."

As that case has been relied on for other purposes it is necessary to consider the facts in order to realise what is actually decided. The registered owner of shares in a New York Company died. His executors obtained Probate and in order that the shares might be registered in their own names signed as executors the transfers on the back of the certificates and without filling in the blank handed them to their brokers, who fraudulently deposited them with a Bank which took them *bona fide* and without notice as security for advances. The Bank took no steps to get themselves registered in the books of the Company. It was held that the conduct of the executors in delivering the transfers was consistent either with an intention to sell or pledge the shares or to have themselves registered as the owners and, therefore, did not estop them from setting up their title as against the Bank.

As Lord Watson said, the only question in the case was whether the respondents were estopped from saying that Blakeway (the broker) had not then authority to dispose of the certificates in question. That his Lordship answered in the negative because the documents were not 'in order', or in other words were not accepted in commercial circles as sufficient vouchers of title, unless they were accompanied by an extract of the Probate and an attestation of the genuineness of the executor's signature by the United States Consul or other competent officer. When, therefore, plaintiff No. 2 parted with the certificates and blank transfers he was not the registered holder, nor had he any title left in him to enable him to vest himself with the shares. Having no title to anything it is thus difficult to see what cause of action he had against defendants Nos. 2 and 3. He had done all he could to deliver the shares, and if the blank for the transferee's name was filled in that person alone would have the right to apply to the Company to recognise him as the registered holder. As the blanks in the transfers for the said shares were never filled in it is not necessary to consider what the legal rights of the transferee would be against the registered holder if the Company refused to recognise the transfer. Now the legal position as between the plaintiff No. 2 and Gora was entirely different from the legal position as between plaintiff No. 2 and defendants Nos. 2 and 3, and the failure to recognise that vitiates the whole of the Advocate-General's argument before us. The plaintiff No. 2 could have filed a suit against Gora for the price, and by way of attachment before judgment would probably have been able to prevent him from dealing with the shares if he still held the certificates and transfers. The Advocate-General argued that there were contesting equities be-

(1) (1890) 15 A. C. 267 at p. 277; 60 L. J. Ch. 131; 63 L. T. 27; 39 W. R. 17.

tween plaintiffs, Gora, and defendants Nos. 2 and 3, but the plaintiff No. 2 had no equity against the others, he had only a remedy against Gora on the contract for failure to pay the price. If he had asked the Company not to recognise a transferee who asked to be placed on the Company's register as a share-holder, he would have been told that the only person the Company recognised was the registered holder, and they had no concern with the various persons through whose hands the blank transfers passed before they were filled in.

The case of *France* v. *Clark* (2) was relied upon by the Advocate-General. There the registered holder of shares in a Company deposited the certificate with *C* as security for £150, and gave him a blank transfer signed by *F*. *C* deposited the certificate and the blank transfer with *Q* as security for £ 250. *C* died insolvent after which *Q* filled in his own name as transferee and sent in the transfer for registration. *F* gave notice to the Company but whether before or after the transfer was registered was doubtful on the evidence. It was held that *Q* had no title against *F* except to the extent of what was due from *F* to *C*. Lord Selborne said (page 262):—

"The defence of purchaser for valuable consideration without notice, by any one who takes from another without inquiry an instrument signed in blank by a third party, and then himself fills up the blanks, appears to us to be altogether untenable.....The person who has signed a negotiable instrument in blank, or with blank spaces, is (on account of the negotiable character of that instrument) estopped by the law merchant from disputing any alteration made in the document, after it has left his hands, by filling up blanks (or otherwise in a way not *ex facie* fraudulent) as against the *bona fide* holder for value without notice; but it has been repeatedly explained that this estoppel is in favour only of such a *bona fide* holder; and a man who, after taking it in blank, has himself filled up the blanks in his own favour without the consent or knowledge of the person to be bound, has never been treated in English Courts as entitled to the benefit of that doctrine."

And at page 263:

"It was said that when a man, in a transaction for value, does what this plaintiff did, and delivers a blank form of transfer to a creditor by way of security, together with the certificate of shares, his meaning must necessarily be that the creditor may complete his security by obtaining registration of the shares, either in his own or (possibly) in some other name; and that he, therefore, entrusts him with the requisite authority for that purpose. Granting this, what follows? Only that the creditor to whom such an authority is given may execute it or not, for the purpose of giving effect to the contract in his own favour, as he pleases; but not that, if he does not execute it, he can delegate the like authority to a stranger for purposes foreign to and possibly (as in this case) in fraud of that contract .....

"But it was pressed on us that the plaintiff had, by the blank transfer and certificate, enabled *Clark* to represent himself as the true owner of the shares, or as having power to deal with the shares as owner. The documents themselves showed that *Clark* was not the owner. Nor was there any evidence of any mercantile usage to the effect that holders of such documents as *Clark* handed over to *Quihampton* are treated as having the right to transfer shares referred to in the documents, as if such holders were the owners of such shares. In other words, there is no evidence that, as a matter of fact, blank transfers, accompanied by certificates of shares registered in the names of transferors, pass from hand to hand like negotiable instruments."

It appears to have been suggested in *Fox* v. *Martin* (3) that *France* v. *Clark* (2) had been overruled by *Colonial Bank* v. *Cady* (1) but Kekewich, J., was of

(2) (1884) 26 Ch. D 257; 53 L J. Ch. 585; 50 L. T. 1; 32 W. R. 466.

(3) (1885) 64 L. J. Ch. 473.

opinion that that was not the case, and although there may be one or two passages in the judgments of Lord Watson and Lord Herschell which may be said to countenance such a suggestion, I cannot see any inconsistency in the law as laid down in the two cases as appropriate to their respective facts. In both cases the holders of the documents were held to have been put on inquiry and, therefore, there was no estoppel against the true owner. The important point to notice is that the only representation which is made and can be made on the facts of the documents in such cases is by the true owner who signs the transfer as transferor. The various parties through whose hands the documents may pass before they come to the last holder, have made no representations. Sir Thomas was right in saying that the only inquiry that a holder can be put to, by reason of the nature or character of the documents which come into his possession, is with regard to the action of the registered holder. Did he intend to transfer, and had he authority to transfer? He could not possibly be put to inquiry with regard to the rights and liabilities of intermediate holders.

But it has been contended by the respondents that Manilal knew that Gora had not paid plaintiff No. 2 for the shares, and, therefore, took the documents with notice of plaintiff No. 2's rights.

That is correct, but all that the plaintiff No. 2 was entitled to as against Gora was to receive the price. He had no title either in law or in equity to the shares, which was the proposition with which I started. The learned Judge thought that the plaintiffs as unpaid vendors had the equity in them, but as between the plaintiffs and Gora it was a matter of contract which could only be regulated by the provisions of the Contract Act. Assuming for the purposes of argument that delivery of the documents constituted the delivery of the goods, once they parted with the documents, they had no right to have them returned. If Gora had stolen the documents the case would be entirely different. But Gora's statement in his evidence that he did not think he was the owner because he had not paid for the shares cannot alter the legal position.

The defendants Nos. 2 and 3 rightly admit that they are not entitled to hold the shares except for what may be found due to them by Gora on a proper account being taken. As Gora has absconded and has made no attempt to have that account taken nothing can be done unless Gora is adjudicated insolvent.

On the question of costs defendants Nos. 2 and 3 have both filed false written statements. Defendant No. 2 persisted in maintaining what he had said in his written statement until he was forced to admit that Ghia was his nominee.

Ghia did not appear at the hearing, although he instructed Counsel to argue the appeal. The appeal must be allowed and the suit dismissed as against defendants Nos. 2 and 3, but having regard to their conduct I think they should pay their own costs throughout.

Crump, J.—I have had the benefit of reading the judgment of the learned Chief Justice in this case. I agree entirely with his conclusions, but as we are reversing the judgment of the learned Trial Judge I desire to state my reasons briefly.

It is unnecessary for me to recapitulate the facts. The position may be summed up shortly as follows:—Plaintiffs sold 129 shares to defendant No. 1. Defendant sold 25 of these to a third party and pledged 104 along with 201 similar shares to defendant No. 2. Defendant No. 2 put forward defendant No. 3 as a party who was willing to advance money. In fact defendant No. 3 was a mere nominee of defendant No. 2. Defendant No. 2 got possession of these 305 shares fraudulently. The fraud was that he deceived defendant No. 1 by false pretences that he would use these shares for the purpose of raising a loan for the benefit of defendant No. 1 which he did not do and which he did not intend to do, his real object being to secure himself from loss as regards the moneys due to him by defendant No. 1.

On these facts it is not disupted that plaintiffs are entitled to a decree as against defendant No. 1 for their unpaid

purchase-money. They seek, however, to recover the documents and also damages as against defendants Nos. 2 and 3. The question is whether they can do this.

As regards the position of plaintiffs *inter se* I agree with what is stated in the judgment of my Lord the Chief Justice. It appears that plaintiff No. 2 and defendant No. 1 dealt as principals. Plaintiff No. 2 was not the registered holder of these shares.

It is not perhaps strictly accurate to speak of these transactions as sales of shares. Plaintiff No. 2 as vendor agreed to sell and deliver transfers and certificates with the interests and rights which they convey [*London Founder's Association* v. *Clarke* (4)]. Such delivery passes not the property in the shares but a title legal and equitable which will enable the holder to vest himself with the shares [Per Lord Watson in *Colonial Bank* v. *Cady* (1)]. On delivery of the documents there was no interest left in plaintiff No. 2 on which any equity can be founded. As between him and defendant No. 1 there was no fraud or misrepresentation which can vitiate the transaction. Plaintiff No. 2 had thus no lien for his unpaid purchase-money and without such lien he cannot seek to follow the documents. He could not do so were they still in possession of defendant No. 1 and, therefore, the further history of these documents is not material. The same result follows from the Statute law of this country. Whatever be the exact nature of the property sold it must be "moveable property" for the purpose of Chapter VII of the Indian Contract Act. The definition in the General Clauses Act (Act I of 1868) is applicable. The property is not "immoveable" property within that definition, therefore, it is "moveable" property. It follows from section 76 of the Indian Contract Act that this property is "goods." The case therefore, falls within section 121 of the same Act. Plaintiff No. 2 delivered all that he had. He cannot, therefore, rescind the contract on the buyer's failing to pay the price unless it was stipulated by the contract that he should be so entitled. I agree that no special condition to this effect is proved. The statement of defendant No. 1 that he did not regard himself as owner until he had paid the purchase-money cannot alter the legal relations of the parties.

K. S. D. *Appeal allowed.*

(4) (1888) 20 Q. B. D. 576; 57 L. J. Q. B. 291; 59 L. T. 93; 36 W. R. 489.

PATNA HIGH COURT.

SECOND CIVIL APPEALS NOS. 1859 AND 1860 OF 1921.

June 26, 1924.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Foster.

Maharaja Bahadur KESHO PRASAD SINGH—PLAINTIFF—APPELLANT

versus

Babu NARAYAN DAYAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 33—Appellate Court's power to interfere in matter not appealed against.

The object of O. XLI, r. 33 of the Civil Procedure Code is to enable the Appellate Court, where its decision interferes with or modifies or extends the decision of the lower Court, to give effect to that decision by interfering, if necessary, even with the rights and liabilities of those who were not in fact appealing from that decision of the Trial Court. Unless it is necessary in the interests of justice to give effect to the Appellate Court's decision by interfering in some way or other with the rights of those parties which are not the subject of appeal before the Appellate Court, the Appellate Court has no right whatever to interfere. [p. 986, col. 2.]

Rule 33 of O. XLI, Civil Procedure Code, has no application to a case in which a plaintiff whose claim is decreed in part prefers an appeal with regard to the part not decreed and the defendant files neither an appeal nor a cross-objection. In such a case it is not open to the Court of Appeal to enter into the question whether the plaintiff is entitled or not to any decree at all and to dismiss his suit *in toto*. [p. 986, col. 1.]

Second Appeals from the decision of the Subordinate Judge, Shahabad, dated the 19th May 1921, confirming that of the Munsif, Buxar, dated the 10th June 1920.

Messrs. *L. N. Singh* and *N. N. Sinha*, for the Appellant.

Mr. *P. Dayal*, for the Respondents.

JUDGMENT.

Miller, C. J.—These two appeals arise out of two suits which were in

stituted by the plaintiff for rent against the tenants of certain holdings. They were two suits numbered 1102 and 1107. The questions arising for determination in both these cases are similar. Although the rent claimed and the area of the holdings is different the facts in other respects relating to both these suits are quite similar and the appeals have been heard together. It appears from the first suit of which alone it is necessary to give any details of the facts that there was a holding consisting originally of 9·62 acres the rent for which was Rs. 41-5-6. This holding was presumed to lie within the ambit of *Mouza* Dumri the proprietor of which is the present plaintiff, the Maharaja of Dumraon. During the Survey and Settlement proceedings the proprietors of a neighbouring village, Sheopur Diara, who included the present plaintiff, contended that a portion of the land which compromised these two holdings was within Sheopur Diara and not within Dumri. After a dispute before the Settlement Authorities it was finally determined that of the 9·62 acres of the holding in question in the first of these suits 6·94 acres alone were within village Dumri the balance being within Sheopur Diara. In the Survey *khatian* the area of this holding was recorded as 6·94 acres but the old rent of Rs. 41-5-6 was also recorded as the rent of that holding. Similarly with regard to the other holding in the other suit the original rent was Rs. 34-15-6 and that also was recorded as the rent of the diminished holding in *Mouza* Dumri. The plaintiff then brought the present suit claiming in the one case Rs. 41-5-6, and in the other Rs. 34-15-6 describing the area of the holdings not as the original area but as 6·94 acres in the first case and similarly a diminished area in the second case.

The defendants raised various objections in their written statements and amongst other pleas they contended that the plaintiff had instituted the suit after splitting up the holding and that in such circumstances it could not be entertained. By that I take it they meant that it was not permissible to the plaintiff to sue for rent in respect of a portion of the holding only. If he sued at all he must sue for rent for the whole holding. The defendants in a later part of their written statement give certain measurements and point out that according to the proportionate rate Rs. 31-5-6 should be the rent of the lands whereof rent is demanded and they contend that the plaintiff was not entitled to get any more. They further entered a plea of payment which, however, they failed to sustain. Similar pleas were also raised in the case of the other suit.

When the matter came before the Munsif he came to the conclusion that the plaintiff in the circumstances which had arisen was entitled only to the smaller rent, that is to say, the rent proportionate to the smaller area which still remained within *Mouza* Dumri and he arrived at this conclusion upon the finding that there had in fact been a splitting up of these holdings at or about the time of the settlement. He says after stating certain facts: 'It is, therefore, clear that portions of the holdings as they stood just before Survey were cut away in *Mouza* Sheopur Diara and were formed into separate holding having no connection with the present holdings.' In these circumstances he awarded the plaintiff Rs. 31-5-6 in the one case and Rs. 25-1-6 in the other which in the first case was the sum admitted as the proportionate sum by the defendants and in the other case was a sum which he found to be the proper sum proportionate to the area of the holding.

From that decision the plaintiff appealed to the Subordinate Judge. The Subordinate Judge after considering the facts dismissed the appeal, but he went further although the defendants had not appealed from the decision of the Munsif which decreed that they were liable to pay rent at the smaller rate, found that the plaintiff had in fact right to sue for rent in the circumstances which had been disclosed and he dismissed the case. The reason apparently why he arrived at the conclusion that the plaintiff was not entitl-

ed to sue in the form in which he did sue was that it had been shown that at the time of the suit the plaintiff was in fact the sole proprietor not only of *Mouza* Dumri but also of *Mouza* Sheopur Diara. He also found that the holdings had not in fact been split up into two. Therefore, it followed in his view that the plaintiff being the sole proprietor of the whole of the holdings ought to have brought his suit for rent in respect of the whole of each holding and not merely in respect of a part. He, therefore, considered that the suit was bad and he dismissed it.

The only question which we have to determine is whether in the circumstances found he was entitled under O. XLI, r. 33 of the Civil Procedure Code to pass a decree in favour of the respondents who had not appealed dismissing the whole of the suit. In my opinion O. XLI, r. 33 has no application to a case like this. The plaintiff succeeded in that suit in part, that is to say, although he claimed a higher rent, he in fact succeeded in obtaining the smaller rent. He obtained a part of that which he claimed and that was the result of certain findings of the Munsif that the holdings had in fact been split up and that the plaintiff was entitled to sue for rent in the one case in respect of a holding of 6·94 *acres*, and although he had claimed a greater rent than he was entitled to he was certainly entitled to the rent proportionate to that area. The defendants after that decision was given and the decree passed against them were content and remained satisfied with that decree. They made no attempt to appeal and even when the plaintiff appealed they entered no cross-appeal or cross-objection and in my opinion it was not competent to the learned Judge, when the only question before him was whether the plaintiff was entitled to the extra rent which had been refused him, to enter into the question whether or not he was entitled to any rent. This matter was not before the learned Judge and although the wording of O. XLI, r. 33 may be very wide and give a large discretion to the Court it is in my view clearly not meant to apply to a case like the present. The object of that Order is, speaking generally, to enable the Appellate Court where its decision interferes with or modifies or extends the decision of the lower Court to give effect to that decision by interfering, if necessary, even with the rights and liabilities of those who are not in fact appealing from the decision of the Trial Court. Unless it is necessary in the interests of justice to give effect to the Appellate Court's decision by interfering in some way or other with the rights of those parties which are not the subject of appeal before us then it seems to me that the Appellate Court has no right whatever to interfere. The illustration given to that rule is a very good instance of the cases in which a Court may well interfere. Again in the case of *Rangam Lal* v. *Jhandu* (1) the very question which arises in the present case had to be considered and it was decided by the Allahabad High Court that the Court in such circumstances had no right to interfere under O. XLI, r. 33. The head-note is this: "The plaintiff sued the defendant for rent and obtained a decree for a portion of his claim. The plaintiff then appealed against the disallowance of the balance of the amount claimed (exactly as here) but the defendants submitted to the decree" (again exactly as here) "and neither filed a cross-appeal nor took objections under O. XLI, r. 22 of the Code of Civil Procedure, 1908: *Held*, that it was not competent to the Appellate Court acting under O. XLI, r. 33 to interfere with the decree obtained by the plaintiff in so far as it had not been challenged by the defendants," and in support of that decision the Court, consisting of the Chief Justice Mr. Justice Bannerji and Mr. Justice Tudball referred to the case of the *Attorney-General* v. *Simpson* (2) which points out certain principles which ought to

(1) 11 Ind. Cas. 640; 34 A. 32; 8 A. L. J. 1111.
(2) (1901) 2 Ch. D. 671; 70 L. J. Ch. 828; 85 L. T. 325; 17 T. L. R. 768.

govern the Court in acting under powers conferred by rule 33. In my opinion that case was perfectly properly decided and it seems to me to govern the present case. I think, therefore, that this appeal should be decreed with costs, the decision of the learned Subordinate Judge will be set aside and the decree of the Munsif will be restored.

Foster, J.—I agree.

P. D. *Appeal allowed.*
S. D.

LAHORE HIGH COURT.

SECOND CIVIL APPEAL NO. 776 OF 1921.

January 31, 1923.

Present:—Mr. Justice Le Rossignol and Mr. Justice Harrison.

BAJRANG DAS—DEFENDANT—APPELLANT

versus

GHANI RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Punjab Alienation of Land Act (XIII of 1900), s. 9—Mortgage by conditional sale—Suit for foreclosure—Year of grace expiring after passing of Act—Act, whether applicable—Widow of agriculturist—Decree, ex parte, *for possession against widow—Interest of reversioners not protected—Reversioners, whether bound.*

The Punjab Alienation of Land Act applies to a suit for foreclosure of a mortgage by conditional sale in which the year of grace expires after the passing of the Act. The proceedings in such a suit remain pending until the year of grace has expired and the mortgagor has debarred himself from tendering the mortgage money either to the Court which issued the notice or to the mortgagee himself.

If the widow of an agriculturist refuses to accept a modification of the mortgage-deed executed by her husband before the passing of the Punjab Alienation of Land Act, in the terms of the Act, and allows a decree for foreclosure of mortgage by conditional sale to be passed against her *ex parte*, she does not do all in her power to protect the estate, and the reversioners of her husband, after her death, are not bound by that *ex parte* decree.

Second appeal from the order of the District Judge, Hissar, dated the 23rd December 1920.

Mr. *Manohar Lal*, for the Appellant.

Mr. *H. D. Bhalla*, for the Respondents.

JUDGMENT.—The land in suit was transferred by one Rupa in 1895 to the defendant's father by a mortgage containing a stipulation for conditional sale. Rupa on his demise was succeeded by his widow *Musammat* Goran, and on the 8th June 1900 the mortgagee applied for issue of notice of foreclosure to *Musammat* Goran. That notice was served on the 16th June 1900, but a few days before the year of grace expired, the Punjab Land Alienation Act came into force on the 8th June 1901. In July 1904 the mortgagee recognising that Land Alienation Act applied to his mortgage made a prayer to the Deputy Commissioner under section 9 of the Land Alienation Act for possession of the land as mortgagee, but *Musammat* Goran refused to admit the validity of the mortgage and the Deputy Commissioner declined to interfere and referred the mortgagee to the Civil Court; thereupon the mortgagee in 1904 instituted a suit for possession as full owner on the ground that the year of grace had expired and the mortgage had ripened into a sale. The quondam mortgagee obtained an *ex parte* decree and took possession in April 1905. The present suit has been brought by the reversioners of the mortgagor on the death of *Musammat* Goran to redeem the land. Originally they prayed also to avoid the mortgage but that prayer was subsequently withdrawn. The First Court dismissed the plaintiffs' suit on the ground that the plaintiffs had not established their relationship with the mortgagor. The learned District Judge held the relationship established but found that the foreclosure proceedings instituted in 1900 by the mortgagee were not in order and that the reversioners are not bound by the *ex parte* decree for possession passed in 1904 against *Musammat* Goran, and he accepted the appeal and remanded the case to the Trial Court in order that the Deputy Commissioner might be moved to take action under section 9 (3) of the Land Alienation Act.

In second appeal it is contended first that the Land Alienation Act does not apply to this case inasmuch as the service of notice of foreclosure had been made upon *Musammat* Goran before

the Act came into operation. This contention, however, we are unable to accept because we must hold that the proceedings for the enforcement of foreclosure of mortgage comprising a stipulation of conditional sale remain pending until the year of grace has expired and the mortgagor has debarred himself from tendering the mortgage money either to the Court which issued the notice or to the mortgagee himself. The point, however, appears to be of little importance for the mortgagee recognised in 1901 that the Punjab Land Alienation Act applied to his mortgage and he consequently moved the Deputy Commissioner to take action under that Act. The Deputy Commissioner, however, refused to take any action and again failed to take action by way of revision, when the fact that the mortgagee had been given a decree for possession as full owner was brought to his notice in execution proceedings.

There remains the further point whether those proceedings are binding on the reversioners and we answer the question in the negative for there is some evidence that *Musammat* Goran was under the influence of the mortgagee. There is, moreover, clear evidence that she refused to accept a modification of the mortgage-deed in the terms of the Punjab Land Alienation Act a modification which would have satisfied the mortgagee and would, at the same time, have protected the reversionary rights of the reversioners.

The only question remaining is whether the matter should now be referred to the Deputy Commissioner; but as already pointed out, he has already refused to intervene. Nor, since the plaintiffs' prayer is to redeem, is there any necessity for the cancellation of the clause of conditional sale. The suit was brought within a few years of the death of *Musammat* Goran when succession opened out to the plaintiffs and they are entitled to ignore the foreclosure proceedings, which would be binding on *Musammat* Goran on the ground that *Musammat* Goran did not defend their interests and do all in her power to protect the estate.

We accordingly accept the appeal and modify the order of the Court below by cancelling the direction for a reference to the Collector and substituting the direction that the Trial Court shall determine the sum to be paid by the plaintiffs for the redemption of the mortgage. Costs shall follow the final event.

N. H. *Appeal accepted.*

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1463 OF 1921.
August 7, 1924.
Present:—Mr. Justice Ross and Mr. Justice Sen.

BHOLA NATH MAJHI—DEFENDANT—APPELLANT
versus
SHIVA PRASAD SINHA—PLAINTIFF—RESPONDENT.

Chota Nagpur Tenancy Act (VI of 1908), ss. 26 (a), 74—S. 74, whether retrospective—Function of s. 26 (a)—Validation of agreements.

Section 74 of the Chota Nagpur Tenancy Act has no retrospective effect inasmuch as it affects the substantive rights of parties. [p. 989, col. 2.]

Section 26 (*a*) of the Chota Nagpur Tenancy Act was not contemplated to invalidate agreements which were valid in their inception but to validate agreements in special cases out of such agreements as would otherwise have been invalid owing to the provision of section 21 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879. [p. 990, col. 1.]

Appeal from the decision of the District Judge, Manbhum, dated the 17th May 1921, confirming that of the Deputy Collector, Dhanbad, dated the 9th February 1921.

Mr. *A. B. Mukharji*, for the Appellant.

Messrs. *N. C. Sinha* and *B. B. Ghosh*, for the Respondent.

JUDGMENT.

Sen, J.—This appeal arises out of a suit for realization of rent by the plaintiff landlord against the defendant-appellant for the years 1323 to 1325 and three quarters of 1326. The First Court disallowed the claim for rent for 1323 and passed a decree for rent for the remaining period. This decree has been affirmed by the Appellate Court.

The case of the plaintiff is that the

father of the defendant Ramdhan Majhi executed a *kabuliyat* in favour of the plaintiff agreeing to an annual rental of Rs. 75 and 32½ seers of paddy worth Rs. 1-10-9 and also to pay road-cess at Rs. 2-5-6.

The case for the defence is that the tenancy in question was acquired by Ramdhan Majhi father of the defendant and one Mohit Majhi father of Jahlu Majhi in 1892 (1298 to 1299 B. S.) when they obtained the land in two instalments by two documents, namely, a registered sale-deed (Exhibit D) and a registered *mokarrari patta* (Exhibit E); that since then Ramdhan and Mohit jointly cultivated the holding and paid rent to the *ijaradar* Gangu Majhi and after their death their sons Bhola (the defendant) and Jhalu as well as their cousins Kartik and Tiku are cultivating the lands. As regards the *kabuliyat* (Exhibit 1), executed by the father of the defendant, the defendant denies all knowledge of it and contends that even if executed it was never operative. The plaintiff was unable to produce before the Court the original registered *kabuliyat* executed by Ramdhan Majhi. He alleged that the original had been lost and the question arose whether secondary evidence of the *kabuliyat* could be admitted. The Court of first instance as well as the Court of Appeal after going into the evidence came to the conclusion that the *kabuliyat* had been in the record-room of the plaintiff up to 1911 when it was taken out and filed in a criminal case in the Dhanbad Court and that owing to the negligence of the clerks concerned the document was never taken back from the Court and returned to the record-room. The execution of the *kabuliyat* was proved by the writer of it, Jagabandhu Sarcar. It appears that the *kabuliyat* was also proved by means of an admission by Ramdhan himself made in his deposition in a Civil suit in the Munsif's Court in 1910; this deposition is Exhibit 7 in this case. On these grounds both the Courts found as a fact that Ramdhan the father of the defendant did execute the *kabuliyat* as alleged and admitted the secondary evidence offered for proving it.

On the question as to whether Mohit had anything to do with the tenancy in question both the Courts have come to a finding that neither Mohit nor Mohit's descendants had anything to do with it and that they were not necessary parties to the suit. Moreover, according to their case they had taken the holdings from the *ijaradar* Gangu Majhi. The Courts have held that there is no evidence that Mohit was ever recognized by the present plaintiff, who is the *zemindar*, as tenant; that all along since the *kabuliyat* the plaintiff had been dealing with Ramdhan and his son the defendant in respect of the tenancy in suit and that the defendant himself had been describing the lands as "his" lands and depositing the rent in his own name.

This appeal seems to be concluded by these findings of fact but the learned Vakil for the appellant contends that the Court below erred in not considering the effect of section 74 of the Chota Nagpur Tenancy Act on the decision of this case. Section 74 of the Chota Nagpur Tenancy Act apparently cannot possibly have retrospective effect inasmuch as it affects the substantive rights of parties. The *kabuliyat* in this case was executed before the Chota Nagpur Tenancy Act came into force. Therefore, all agreements entered into prior to the date when the Chota Nagpur Tenancy Act came into operation would obviously be beyond the scope of section 74. The *kabuliyat* in question was executed in 1905. The objection, therefore, that is now urged that in view of the provisions of section 74 of the Chota Nagpur Tenancy Act the *kabuliyat* would be void and of no effect, has no force whatsoever. Moreover, on the findings of the Courts below this case does not come within the scope of section 74, inasmuch as the section contemplates the case of a lease executed "with a view to the continuance of such occupation"; whereas in the present case there is no question of continuance, the previous tenancy having been under the *ijaradar* which was not subsequently recognized by the landlord and, therefore, the lease must be

regarded as marking the very inception of the tenancy.

It is next urged that in view of the provisions of section 26 (*a*) of the Chota Nagpur Tenancy Act the *kabuliyat* in question does not satisfy the requirement of law and hence must be deemed to be inoperative. Now it has been held that section 26 of Act VI of 1908 was not contemplated to invalidate agreements which were valid in their inception, as in the present case, but to validate agreements in special cases out of such agreements as would otherwise have been invalid owing to the provisions of section 21 of the Chota Nagpur Landlord and Tenancy Procedure Act (I of 1879). The observations of Mookerjee, J. in the case of *Gaju Mahto* v. *G. P. Cooke* (1) are in support of this view. The contentions of law urged by the learned Vakil for the appellant are, therefore, without any substance.

The appeal is dismissed with costs.

Ross, J.—I agree.

P. D. *Appeal dismissed.*

(1) 16 Ind. Cas. 929; 16 C. L. J. 422 at pp. 424, 426; 17 C. W. N. 430.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 183 OF 1922.

April 24, 1924.

Present:—Mr. Justice Devadoss.

SOWCAR LODD GOVINDOSS KRISHNADOSS—PLAINTIFF—PETITIONER

versus

POLEGAR MANIKYANAYANIM VARU AND OTHERS—DEFENDANTS NOS. 6 TO 9—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Ex parte *decision*—Res judicata—*Decision in rent suit.*

An *ex parte* decision can operate as *res judicata*. *Raj Kumar Roy Chowdhury* v. *Alimaddi*, 16 Ind. Cas. 911; 17 C. W. N. 627, *Hara Chandra Bairagi* v. *Bepin Behary Das*, 6 Ind. Cas. 860; 13 C. L. J. 38, *Shyama Charan Banerji* v *Mrinmayi Debi*, 31 C. 79, relied on.

In the case of rent suits, the decision as regards the rent for one year is *res judicata* as regards the rate of rent for the following years.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif, Tirupati, in Small Cause Suit No. 136 of 1921.

Mr. *A. C. Sompath Iyengar*, for the Petitioner.

Mr. *V. Ramadoss*, for the Respondents.

JUDGMENT.—This is an application to revise the decree of the District Munsif of Tirupati in Small Cause Suit No. 136 of 1921. The District Munsif dismissed the suit mainly on the ground that no *jodi* is claimable from the tenants. It is urged on behalf of the petitioner that the question whether the defendants are liable to pay *jodi* is *res judicata* by reason of two previous decisions, one in Original Suit No. 79 of 1904, Exhibit C and the other in Original Suit No. 439 of 1908, Exhibit G. In Exhibit G the question was specifically raised in issue 1 whether no *jodi* at all is payable. An additional issue was raised whether the defendants therein were not barred by *res judicata* from raising the plea that they were not liable to pay *jodi* to the plaintiff. The District Munsif held that the decision in the Original Suit No. 79 of 1904 was *res judicata* between the parties. It is now urged on the respondents' side that the defendants were *ex parte* and, therefore, the judgment is not binding on the *ex parte* defendants. The defendants placed reliance upon the decision of *Modhusudun Shaha Mondul* v. *Brae* (1) in which it was held that in a rent suit if the defendants are *ex parte* the decision could not be *res judicata* in subsequent suits. When a question is specifically raised and decided, a decision on the question is *res judicata* between the parties in subsequent cases. The case in *Modhusudun Shaha Mondul* v. *Brae* (1) was considered and distinguished in two cases of the Calcutta High Court reported as *Raj Kumar Roy Chowdhury* v. *Alimuddi* (2) and *Hara*

(1) 16 C. 300; 8 Ind. Dec. (N. S.) 197 (F. B.).
(2) 16 Ind. Cas. 911; 17 C. W. N. 627.

Chandra Bairagi v. *Bepin Behary Das* (3). In *Shyama Charan Banerji* v. *Mrinmayi Debi* (4) it was held that an *ex parte* decision could be *res judicata* between the parties in subsequent suit. The real question is whether a certain contention was raised or a contention should have been raised or could have been raised or not. If a contention which could have been raised was not raised by the defendants, that would not take away the force of the judgment which decided the point against the defendants. In that view I think the decision in No. 439 of 1908, Exhibit G is *res judicata* between the parties. It is argued by Mr. Ramdoss who appears for two of the respondents that Exhibit I which is a deed of gift by the land-holder, exempts the defendants from paying *jodi*; and he contends that only the question of landlord and tenant is *res judicata* between the parties. No doubt in the case of rent suits the decision as regards the rent for one year would be *res judicata* as regards the rate of rent for any of the following years. Exhibit I merely refers to the liability of the defendant to pay *jodi*. The contention that the defendants were not liable to pay *jodi* should have been put forward in the suits of 1904 and 1908, and that contention not having been put forward in these suits, it is not open now to the defendants to put forward the contention. I find this point in favour of the petitioner.

As regards the next point which relates to road-cess, Mr. Ramdoss very candidly concedes that the defendants are liable to pay road-cess. I allow this petition with costs and the plaintiff will have a decree for the suit amount with costs of the lower Court. Petitioner's Vakil admits that defendants No. 8 and 9 have paid road-cess. So far as that amount is concerned they will be exonerated.

V. N. V.
S. D. *Petition allowed.*

(3) 6 Ind. Cas. 860; 13 C. L. J. 38.
(4) 31 C. 79.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 238 OF 1922.

May 30, 1924.

Present:—Mr. Justice Suhrawardy and Mr. Justice Duval.

PROKASH CHANDRA DAS GUPTA—APPELLANT

versus

SHAMA CHARAN DUTT AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 3, 4, 10—Two devolutions—Assignment and death—Assignee's rights.

Where there are two devolutions—the death of a party and the transfer by him of his interest in the suit—the transferee has the right to be brought on the record in place of the deceased transferor. Therefore, the death of a plaintiff after the assignment of his interest does not take away the assignee's right to be substituted in the suit. [p. 992, col. 2.]

Appeal against an order of the Subordinate Judge, First Court, Jessore, dated the 21st of March 1922.

Babu *Bhupendra Kumar Ghose*, for the Appellant.

Babus *Satya Charan Sinha* and *Bon Behari Sarkar*, for the Respondents.

JUDGMENT.—This is an appeal against an order of the Subordinate Judge of Jessore, dated the 21st March 1922, setting aside his previous order of the 7th November 1921, and rejecting the appellant's application for substitution in place of the plaintiff in the suit. The facts are that, one Giridhari Lal Sarowgi brought the present suit on the allegation that the mortgage executed by defendant No. 2 in favour of defendant No. 1 was collusive, fraudulent and *benami* and could not affect the plaintiff's mortgage. He further prayed that it might be declared that the mortgage decree obtained by defendant No. 1 on the said mortgage against defendant No. 2 and him (plaintiff) was fraudulent and collusive and inoperative against him (plaintiff). In the said suit brought by defendant No. 1 he claimed to be the first mortgagee while Giridhari Lal was described as a puisne mortgagee. During the pendency of this suit on the 16th June 1921, Giridhari Lal sold his interest in the mortgage and in other properties to the present plaintiff. On the 4th

October 1921 Giridhari died, on the 7th November 1921 the appellant filed an application under O. XXII, r. 10 for substitution in place of Giridhari Lal on the allegation that he had purchased his interest in the mortgage the subject-matter of the suit. It was not disallowed on that date that Giridhari was dead. On the other hand, the Pleader for Giridhari Lal in the suit consented to the appellant being substituted in place of his client and the petition was granted by the Court. Subsequently, the defendants made an application that on the 7th November 1921—the date on which the plaintiff applied for substitution—Giridhari was dead and, therefore, the order substituting the plaintiff in place of Giridhari passed under O. XXII, r. 10, should be set aside. The learned Subordinate Judge has given effect to this contention. He has held that where two devolutions take place, namely, where there has been an assignment by a party to the suit and before the assignee has been brought on the record the party dies the substitution of the legal representatives of the deceased party ought to be made. He formulates this view on the language of O. XXII, r. 3. Under that rule, according to the Judge, if the right to sue survives, as it does in the present case, the Court can only bring on the record the legal representatives of the plaintiff. The Court is, therefore, entitled to bring on the record only the legal representatives of the plaintiff; and, if there is an assignee of the plaintiff, he shall not be substituted in place of the deceased plaintiff. The provision of the law as contained in O. XXII, r. 3 should be given effect to whenever the contingency thus contemplated happens; and the assignee of the plaintiff should not be entitled to come in in preference to the legal representatives of the deceased plaintiff. In this view of the law the learned Judge has vacated his order passed on the 7th November 1922 and dismissed the plaintiff's application for substitution; and as within the time prescribed by law no application was made by the legal representatives of Giridhari Lal to cause substitution he ordered that the suit should abate. In our judgment the view taken by the lower Court is erroneous. It is not necessary to enter into the question whether the consent given by the Pleader on the 7th November 1921 was given in ignorance of the fact of Giridhari's death or whether the appellant was aware that Giridhari was dead at the time a fact which he denies. The simple question of law that arises in this case irrespective of those facts, is whether when there are two devolutions—the death of a party and the transfer by him of his interest in the suit—the transferee has the right to be brought on the record in place of the deceased transferor. It seems to us on going through the several sections of the Code, dealing with this matter, that the two devolutions which have occurred in this case are distinct and are governed by different considerations. The death of the plaintiff after the assignment of his interest should not take away the assignee's right to be substituted in the suit. If effect is given to the contrary contention the result will be that if a plaintiff after selling his interest in the subject-matter of the suit dies, before the assignee could make an application for substitution under O. XXII, r. 10, the assignee will have no right to be brought on the record and the legal representative of the deceased plaintiff having no interest in the subject-matter there will be no representation in the suit, and the assignee will be deprived of the benefit of his purchase through no fault of his. The true view is what was taken in the case of *Rajaram Bhagwat* v. *Jibai* (1). West, J., has lucidly dealt with this point in the following passage: "The case being one of an assignment or creation of an interest pending the appeal *plus* the death of the assignor, is one embracing a fact more than that contemplated by section 368". (O. XXII, r. 4, the case there being one of death of a respondent). "The rule in section

(1) 9 B. 151; 5 Ind. Dec. (N. S.) 101.

372 (O. XXII, r. 10) on the other hand must be admitted to apply to it; and being alone sufficiently inclusive, if not the more specific, as dealing with 'other cases' than the ones previously provided for, must prevail over those rules. The double event of a transfer of the decree-holder's title and of his death was probably not distinctly conceived by the draftsman of the Code; but we can give effect to the apparent intention, not only in a literal application of the words to the cases exactly provided for but also by a logical extension of them to the composite cases involving circumstances that fall separately under distinct rules, and yet must have been meant to be dealt with in a consistent and uniform manner." We think that this is the correct view of the law. We must, therefore, set aside the order of the Court below dated the 21st March 1922. But the learned Judge has not inquired into the *bona fides* of the transfer to the plaintiff-appellant and as the respondent wishes that the case should be sent back for an enquiry we think that this appeal should be sent back. In the case of *Lakshan Chunder Dey* v. *Nikunji Moni Dassi* (2) it was held that an applicant who invokes the aid of O. XXII, r. 10 is not entitled for a mattar of right to an order in his favour. This case will go back to the learned Subordinate Judge for a proper order of the appellant's application filed on the 7th November 1921—the order passed by that Court on that date as also the order of the 21st March 1922 being disallowed. As the case has taken a very long time we express a hope that the Court below will see to the expeditious termination of the suit.

Each party will bear his costs of this appeal.

Let the record be sent down as early as possible.

Case sent back.

S. D.

(2) 80 Ind. Cas. 538; 27 C. W. N. 755; (1924) A. I. R. (C.) 188.

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

June 19, 1924.

Present:—Lord Atkinson, Lord Shaw, Lord Blanesburgh, Sir John Edge and Mr. Ameer Ali.

Raja Bahadur NARASINGERJI GYANAGERJI, SINCE DECEASED (NOW REPRESENTED BY *Raja* DHANARAJAGIRJI)—APPELLANT

versus

Raja PANUGANTI PARTHASARADHI RAYANIM GARU AND OTHERS—RESPONDENTS.

Construction of document—Sale or mortgage—Surrounding circumstances.

In construing a document, surrounding circumstances may be taken into consideration in order to show in what manner the language of the document is related to existing facts. [p. 997, col. 2.]

In August, 1908, *A.*, a judgment-debtor, in order to prevent a Court sale of his property, consisting of several villages, executed a document by which he purported to sell the property absolutely to *B*, with a condition of reconveyance. *A*, however, reserved his rights to the minerals in the land. The rents were to be enjoyed by *B*, from the date of purchase. The price paid was absurdly small, and the property would have fetched a larger sum even at public auction. Under a separate document expressed to be entered into for reconveyance of the property, *B* agreed to sell and *A* to purchase the villages for the amount paid for them on 31st August 1912, 31st August 1913, or 31st August 1914, and not earlier. In case *A* paid the sum to *B*, and a conveyance in due form was executed, he was to become entitled to the rents of the villages as from the date of payment. If before the deed of conveyance was executed, any portion of the land was acquired by Government, the compensation awarded was to be deemed equivalent to 20 years' rent of the land acquired, and both *A* and *B* were to be entitled each to his proportionate share, the share of money due to *A* being, if needed, given credit for towards the sale price:

Held, that the transaction though ostensibly a sale with a right of repurchase in the vendor was in reality merely a mortgage by conditional sale. [p. 997, col. 2.]

Appeal from a decree of the High Court of Judicature, Madras, dated the 24th February 1921, modifying a decree of the Subordinate Judge, Nellore, dated the 5th October 1918.

Messrs. *A. C. Clauson, K. C.*, and *Narasimham*, for the Appellant.

Messrs. *W. H. Upjohn, K. C.*, and *Kenworty Brown*, for the Respondents.

JUDGMENT.

Lord Blanesburgh.—This is an

appeal from a decree of the High Court of Judicature at Madras, dated the 24th of February 1921, modifying a decree of the Subordinate Judge of Nellore, dated the 5th of October 1918, and made in the Original Suit No. 1 of 1917.

Issues raised by the appellant necessitated in the Courts below, and particularly in the Court of the Subordinate Judge, whose judgment their Lordships would at once observe is conspicuous for its ability, care and completeness, a prolonged investigation and examination of conflicting evidence. Concurrent findings against the appellant on every issue of fact raised by him have, however, greatly narrowed the ambit of the dispute as presented to the Board, and no more than two questions —difficult and important questions it is true—have survived for discussion before their Lordships.

Of these one only has so far been argued. But it raises the fundamental dispute between the parties, which may be described as an issue as to the true nature of the transaction of the 4th of August 1908, between the appellant and the late Rajah of Kalahasti (now represented by the respondents his assignees) as a result of which the properties in suit passed to the appellant. The transaction is evidenced by two documents referred to throughout the proceedings as Exhibits X and U. Did it effect as contended for by the respondents merely a mortgage by conditional sale of the properties in suit, or was it as contended by the appellant, an absolute sale of these properties to himself, with an agreement on his part to reconvey on the strict performance by the Rajah of certain defined conditions?

In this suit the respondents, who as already indicated had succeed as auction-purchasers to the outstanding rights in the properties of the Rajah, claimed to redeem them on the footing that the transaction in question was a mortgage. Alternatively, they claimed to have the properties reconveyed to them upon payment of the purchase price on the ground, that if, contrary to their main contention, the transaction did amount to an out and out sale, the conditions entitling the Rajah to a reconveyance had been all complied with by him, and in his shoes they now stood.

In the Trial Court, the respondents succeeded on their main case. In the Court of Appeal they succeeded on their alternative case. The learned Subordinate Judge held that the transaction amounted to a mortgage by conditional sale. The High Court on appeal felt themselves constrained upon the authorities to hold that, in view of the terms of Exhibits X and U, the transaction must be held to have been an absolute sale of the properties to the appellant. But they found also, agreeing in this with the learned Subordinate Judge, that the conditions entitling the Rajah to a reconveyance on that footing had been performed and that the respondents, as his successors-in-interest, were entitled to have the properties assured to them on payment of the prescribed price.

From that order of the High Court the present appeal is brought. Mr. Clauson for the appellant did not ask their Lordships to review the conclusion of the High Court that all the conditions entitling the Rajah to a reconveyance had been performed. That conclusion—strenuously contested in the Courts below—now rested on concurrent findings of fact which he could not before the Board seek to displace. The appellant's sole ground of appeal, indeed, was that the right to a reconveyance reserved by Exhibit U was personal to the Rajah and did not pass to any assignee. As, however, the appellant's views on this matter raised very difficult questions of law, and as Counsel recognised that no success with them would avail him anything if the respondents were to establish before the Board as they had done before the Subordinate Judge, that the transaction with the appellant did in truth amount to a mortgage, Mr. Clauson with the approval of the Board, confined his argument to that question on the understanding that, if their Lordships ultimalely accepted upon it the view in his favour taken by the High Court, the substantive issue raised by the appellant in his appeal would become the subject

of subsequent discussion before the Board.

In accordance with that arrangement the vital question whether the transaction in question did or did not amount to a mortgage has been fully argued before their Lordships, and with that problem alone they now propose to deal.

It seems to their Lordships that they can dispose of the present case with no reference to any oral evidence, other than that of surrounding circumstances such as in Lord Davey's words in *Balkishen Das* v. *W. F. Legge* (1) are clearly required to show in what manner the language of the documents was related to existing facts.

To a consideration of these circumstances their Lordships now proceed.

The Rajah of Kalahasti—party to the transaction in question—succeeded in 1905 to the *Taluk* of Pamur. The *taluk* consisted of 223 villages, and at the succession of the Rajah it was in a state of the utmost embarrassment.

It had been for some time in the hands of the Court of Wards but earlier in the same year that Court had handed it back to the Rajah's nephew and predecessor. The property was heavily encumbered. It was subject to a mortgage of the 20th of June 1893 in favour of Rajah Venugopal, who in 1899 had obtained a mortgage-decree in respect of his debt amounting then to about 6 lakhs. In March, 1908, in pursuance of his decree, he had proceeded to a Court sale of 27 villages part of the *taluk*, and had realised thereby a sum of about 3½ lakhs, but that price was being challenged by the Rajah for inadequacy, and inadequate it seems to have been. Nor was the decree-holder content with his partial realization, and his purpose was to bring the remaining 196 villages to sale for the balance of his debt which, with interest, then amounted to nearly 6 lakhs, and he had actually obtained an order fixing that sale for the 8th of August 1908.

Such was the position when the transaction now in question was entered into. It was carried out four days earlier—on the 4th of August 1908. Six lakhs were required by the Rajah to avert a Court sale. The appellant, a rich money-lender of Allahabad, provided that sum. It was provided after very slight, if any, inquiry. The transaction, whatever it was properly called, was not the result either of any bargaining as to the value of the property conveyed or as to the price to be paid. The six lakhs were required and they were found. That was all.

That sum had no relation to the value of the 196 villages comprised in the deed of assurance. On this matter the Board are in full agreement with both Courts below. As the learned Chief Justice points out, the 27 villages had in the previous March, fetched as much as Rs. 3,46,000 and that price was being challenged for inadequacy. There was no evidence and no reason to suppose that the 27 villages differed materially from the 196 villages still remaining unsold, still less that they differed to such an extent as to make the value of these 27 villages equal to two-thirds of the value of the 196. The evidence as to the gross income of the 196 villages led to the same conclusion. It was the view of the learned Subordinate Judge that the value of these 196 villages amounted in 1908 to 15 or 16 lakhs at the least. The learned Chief Justice had no hesitation in concurring so far in that view as to hold that in August, 1908, 6 lakhs would have been a most grossly inadequate price and much less than could have been realised by private sale or even by a Court sale. Their Lordships have examined the evidence on this subject for themselves and they are in entire agreement with the learned Chief Justice as to its result. And that is sufficient. They desire to add, however, that had it been necessary they would have been prepared to endorse in its entirety the finding of the learned Subordinate Judge on this point.

(1) 27 I. A. 58; 22 A. 149; 4 C. W. N. 153; 2 Bom. L. R. 523; 7 Sar. P. C. J. 601; 9 Ind. Dec. (N. S.) 1130 (P. C.).

Thus informed of the circumstances surrounding the execution of X and U, their Lordships are now in a position to examine these documents so as to ascertain from their provisions and necessary implications the real nature of the transaction to which they give effect.

Exhibit X, described as an indenture made by way of conveyance—their Lordships will refer to it as the conveyance—describes the Rajah as vendor and the appellant as purchaser. It begins with a recital of the title of the Rajah to the 196 villages in question; it goes on to recite the mortgage of June, 1893; the decree for sale and the sale of the 27 villages; and the fact that the remaining villages are proclaimed for sale on the 8th of August then current. The final recital is as follows:—

"And whereas the vendor has, in order to prevent the property being sold in public auction and realising much less than what they are actually worth, agreed to convey by private sale the said villages to the said purchaser for Rs. 6,00,000".

Their Lordships will return to this recital in due course. The conveyance then witnesses that in consideration of Rs. 5,60,445 paid to the decree-holder in satisfaction of his debt and Rs. 39,554-7 paid to the vendor, the vendor as beneficial owner grants and conveys the properties, "subject to the conditions and reservations mentioned below," to the purchaser, "his heirs, executors, administrators and assigns in fee simple absolutely." Then follow covenants for right to convey, quiet enjoyment, and further assurance and for indemnifying the purchaser, etc.

"Against all losses, damages, expenses, claims and liabilities whatsoever if any which he or they may pay, sustain, incur, or be put to by reason or in respect of the purchase thereof."

The principal conditions and reservations are:—

1. All rents are to belong to and be enjoyed by the purchaser as from 1st July 1908.

2. The vendor reserves to himself the sole right to the minerals and mineral rights including marble in villages and the right

"To re-purchase the said villages as per the agreement of this day's date executed by the purchaser to the vendor, the said right to be exercised only on or after the 31st August 1912, and on or before the 31st August 1914, and to be in strict accordance with the terms set forth in the document above referred to."

In Exhibit U, the agreement just referred to, the appellant appears as vendor and the Rajah as purchaser. It is expressed to be made for the reconveyance of the 196 villages specified in the schedule attached to the conveyance, and clause 1 provides that

"The vendor agrees to sell and the purchaser to purchase the villages mentioned in the conveyance for Rs. 6,00,000, the said sum to be paid by the purchaser to the vendor on the 31st August 1912, the 31st August 1913, or the 31st August 1914, and not earlier."

By clause 2 the vendor is to execute a deed of sale in favour of the purchaser as soon thereafter as the said sum of Rs. 6,00,000 is paid to the vendor, and the vendor is to be entitled solely to the possession and enjoyment of the village . . . till such sum is paid and a conveyance in due form executed.

By clause 3 it is provided that if the purchaser fails to pay the amount mentioned in clause 2 *before* the 31st August 1914, as above-mentioned, the purchaser shall lose all his right of re-purchase and that agreement shall then cease to be operative and vaild. In case the purchaser pays to the vendor the said sum of Rs. 6,00,000 *on* the 31st August 1912, 1913 or 1914, as above set forth, and a conveyance in due form is executed, the purchaser is to become entitled to all the rents and profits derivable from the villages as from the 1st day of July 1912, 1913 or 1914 respectively.

Clause 4 is very important. Its terms are these :—

"If after the date of this agreement and before the sale-deed is executed, the Government take up any portion of the land hereunder agreed to be conveyed under the Land Acquisition Act and award compensation therefor, any compensation

so awarded shall, unless Government otherwise expressly provides, be deemed to be equivalent to 20 years' rent of the land acquired, and the vendor and the purchaser shall be entitled each to his proportionate share of the purchase money. The share of the money due to the purchaser being, if need be, given credit for towards the sale price of Rs. 6,00,000 already mentioned and agreed upon."

Their Lordships do not conceal from themselves the fact that the transaction as phrased in these documents is ostensibly a sale, with a right of re-purchase in the vendor. This appearance, indeed, is laboriously maintained. The words of conveyance needlessly iterate the description of an absolute interest, and the rights of re-purchase bear the appearance of rights in relation to the exercise of which time is of the essence.

But a closer examination of the documents discloses their real character. Take for example the final recital of the conveyance to which reference has already been made. What is its true implication? A consideration of the facts known to both parties makes it, their Lordships think, reasonably plain. The parties knew two things quite well. First, that 6 lakhs was an absurd purchase price. Secondly, that even at public auction the properties could be expected to realise a larger sum than that. What then was the implication? Surely that the transaction in which they were engaging was not a sale but a loan. For notice how that principle is worked out. The Rajah has not only an option to re-purchase. He is put under an obligation to buy if the appellant thinks fit to require him so to do. The appellant's 6 lakhs can be recovered by him if he chooses to sue upon the Rajah's contract to re-purchase, he remaining in possession and enjoyment of the rents and profits of the properties until that price is paid.

Again, is time of the essence of the exercise by the Rajah of his rights in this matter? Clause 4 of the agreement already set forth indicates to their Lordships that it is not. That clause seems also to be clear enough although it describes an arrangement very unsual in character. The clause is providing for the possiblity of the appellant being compulsorily expropriated by Government from some part of the property in suit, and the receipt by him of the compensation in respect thereof. The compensation is to be treated as the equivalent of 20 years' rent; it is to be treated as belonging to the appellant and the Rajah according to what would have been their rights *inter se* to possession of the expropriated lands during these years; the money is to be received by the appellant as being in possession, but, *if need be*—these are the critical words—credit is to be given to the Rajah for his share by a deduction from the 6 lakhs otherwise payable by him on re-purchase.

These words show that in certain circumstances such credit will not be his. But what must these circumstances be. There can only be a re-purchase more than 20 years after the expropriation. But if time was of the essence for such re-purchase it could in no circumstances be postponed beyond six years from the date of the conveyance. Clearly, therefore, and within the intendment of the documents themselves time is not of the essence in this matter; and so soon as that is etablished all pretence for holding this ostensible sale and re-purchase to be anything else than a mortgage by conditional sale disappears, and its establishment reinforces several other considerations leading to the same conclusion such as the reservatian of the right in the conveyance itself; the reservation of minerals which is directed, in their Lordships' view, to a restriction on the appellant's usufructuary privileges; the strange covenant of indemnity and the inconsistent and almost unintelligible provisions as to the actual time limited for the exercise of the Rajah's so-called right of re-purchase. When all these provisions of the documents are viewed in the light of the surrounding circumstances, the inference is, in their Lordships' view, irresistible that here a mortgage and a mortgage only was in the direct contemplation and intention of both parties to the transaction.

Such was the conclusion of the Subordinate Judge. Such was apparently the belief of the learned Judges of the High Court, but they felt themselves precluded from giving effect to that belief by their hesitation to attribute, what their Lordships hold to be their real result, to the considerations emerging from the terms of the documents to which attention has here been drawn.

In these circumstances their Lordships find it unnecessary to deal with the numerous authorities upon this subject which they have examined. The case in their view is abundantly clear. They would only observe before parting with it that, as at present advised, they must not be taken to subscribe to the view that there has been introduced into the law of India such a radical change in the laws of evidence as is suggested by the learned Chief Justice, a change which would have the effect of excluding from the class of mortgages by conditional sale many transactions which before the Evidence Act would have been held to be within that class.

The present case with the shifts and devices, to which the appellant resorted to deprive the respondents of all their rights in the property, if the character of a mortgage could not be attached to the transaction, show how serious such a conclusion would be.

Without most careful consideration their Lordships would hesitate to accept a view which would bear so hardly on many mortgagers expressing their contracts of borrowing in long accepted Indian forms.

The respondents in their Lordships' judgment are entitled to a redemption decree. They are chargeable with interest at the rate of 6 per cent. per annum from the 1st of September 1914, down to the date when the six lakhs were paid into Court. The appellant will be entitled to the interest earned by that sum since it was so paid in.

On the other hand, the appellant must account to the respondents for mesne profits of the properties as from the 1st of July 1914 until actual delivery of possession to the respondents. The order of the High Court should be discharged and with these variations the decree of the learned Subordinate Judge should, in their Lordships' opinion be restored.

Their Lordships will humbly advise His Majesty accordingly.

The appellant must pay all the costs of the respondents in the High Court and their costs of this appeal.

N. H. *Appeal rejected.*

Solicitor for the Appellant :—Mr. *H. Polak.*

Solicitor for the Respondents :--Mr. *Douglas Grant.*

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 1 OF 1921.
July 5, 1923.
Present:—Mr. Kennedy, J. C., and Mr. Raymond, A. J. C.

THE KARACHI BANK—DEFENDANTS —APPELLANTS

versus

KODUMAL KALUMAL—PLAINTIFFS —RESPONDENTS.

Contract Act (IX of 1872), ss. 178, proviso—Negotiable Instruments Act (XXVI of 1881), ss. 58, 85—Forged endorsement, whether confers title—Pledge—Pawnor's possession—Juridical possession—Custody.

The proviso to section 178 of the Contract Act applies to a case where a person in possession of a document, even though he has obtained it lawfully in the first instance, creates a right to it in his favour by forging the endorsement and after doing so pledges it. [p. 1000, col. 2.]

R. D. Sethna v. *The National Bank of India*, 8 Ind. Cas. 183; 12 Bom. L. R. 870, distinguished.

To create a valid pledge the pledger must be in juridical possession of the goods as distinguished from a bare custody. [*ibid.*]

Ramkishendas v. *Jasumal*, 61 Ind. Cas. 305; 14 S. L. R. 175, followed.

No person can claim title to any negotiable instrument through a forged endorsement except in cases mentioned in section 85 of the Negotiable Instruments Act. Such an instrument is a nullity and must be taken as if no such endorsement was on the instrument. [*ibid.*]

Banku Behari Sikdar v. *Secretary of State for India*, 1 Ind. Cas. 929; 36 C. 239, *Jai Narain* v. *Mahbub Bakhsh*, 28 A. 428, *Hunsraj Purmanand* v. *Ruttonji Walji*, 24 B. 65; 1 Bom. L. R. 734; 12 Ind. Dec. (N. S.) 581, followed.

Section 58 of the Negotiable Instruments Act deals with cases of defective title only. [p. 1001, col. 1.]

KARACHI BANK *v.* KODUMAL KALUMAL.

Appeal from the judgment and decree of the Mr. Kemp, A. J. C., dated the 13th December 1920, reported as 82 Ind. Cas. 730.

Mr. *E. Castilleno*, for the Appellants.

Mr. *Srikishendas H. Lulla*, for the Respondents.

JUDGMENT.—There are two points that have been taken up in this appeal: (1) that the endorsements on the two War Bonds in suit in favour of C. S. Advani are not forgeries, at any rate were not forged by him and (2) that C. S. Advani by virtue of his possession of these two War Bonds as a share and Stock broker could convey to the appellant—Bank a title to them which would prevail against that of the respondents.

With regard to the first point, we have no hesitation in coming to the conclusion that the endorsements on both the Bonds in suit which are as follows:—

"Pay C. S. Advani or order
Kodumal Kalumal,"

are forgeries and we think there can be no reasonable doubt that both these endorsements were forged by C. S. Advani he being the person that pledged them with the appellant Bank—Respondents had advanced Advani a sum of Rs. 2,500 for the purchase of War Bonds on their behalf. The purchase was negotiated through the Bombay Bank and three War Bonds were purchased, two for Rs. 1,000 each and one for Rs. 500 All the three War Bonds were payable to order and were endorsed by the Bombay Bank (now the Imperial Bank) in favour of the respondents Kodumal Kalumal. As it was C. S. Advani that had paid the sum of Rs. 2,500 in the Bombay Bank for the purchase of these War Bonds, he received them from the Bombay Bank on or about 23rd of October 1918, some time having elapsed since the deposit as apparently War Bonds were not available and had to be supplied from Bombay. It appears that on the very day Advani received thes War Bonds from the Bombay Bank, he pledged two of Rs. 1,000 each along with some other Bonds with the Karachi Bank in consideretion of a loan to himself of the sum of Rs. 9,000 and the Bond of Rs. 500 which it may be observed did not bear on it the forged endorsement as on the two Bonds of Rs. 1,000 each, Advani pledged with the Punjab Bank.

The appellant-Bank contends that the respondents authorised Advani to pledge these Bonds. But this appears to us an argument without any substance in it for the respondents have successfully established by their account books and other documentary evidence that they were not in need of any loan. It was argued that the endorsement "pay to C. S. Advani" over the signature purporting to be that of the respondents was written by their Manager, Parsram. Specimens of his signature with two other local Banks were shown to us and on examination they appear to us very dissimilar to the signature on the Bonds. And further if the Manager, Parsram endorsed the two Bonds of Rs. 1,000 each why did he not make a similar endorsement on the Bond of Rs. 500 which was pledged with the Punjab Bank. To this question we received no reply from the appellants' Pleader. Advani has undoubtedly absconded and there is no trace of him for considerable time. There is positive evidence on the record which clearly goes to prove that the endorsements on the two Bonds were forgeries and in view of all the circumstances of the case we cannot but conclude that both the endorsements were forged by C. S. Advani.

The more important question for consideration and which has been argued by the appellants' Pleader at considerable length is the second. It was first contended that even on the assumption that the endorsements on the Bonds had been forged yet as the initial possession of them by Advani was honest and lawful, he being entrusted with them in his capacity as a Share and Stock broker and the forgery was committed only subsequently, the proviso to section 178 of the Indian Contract Act is not applicable and the appellants' title to the War Bonds should, therefore, prevail as against the respondents. In support of this contention, considerable reliance was placed on the case of *R. D. Sethna* v. *The National*

Bank of India (1) where the head-note is as follows:—

"For a transaction to fall within the proviso to section 178 it must be established that the fraud or offence was committed by the *pawnor* against the lawful owner and that the pawnor *obtained* the goods or documents pledged by means of an offence or fraud perpetrated by him against the lawful owner."

The judgment in this case must be read before the head-note can be appreciated and when read it will soon be found to have no application to the present case. For in the case referred to one Chunilal Pitamber as the sole surviving executor under the Will of his testator was the lawful owner of the shares (which he afterwards transferred to himself fraudulently) and was a person in lawful possession thereof as contemplated by the proviso to section 178. It was held that his possession of the shares was not mere custody but he was in juridical possession thereof inasmuch as the High Court by the grant of Probate clothed the executor with power and authority to deal with and dispose of all the property belonging to the testator's estate. And it was further remarked "Under the proviso to section 178 of the Indian Contract Act, before the Bank's claim to hold the shares as security for their loans is defeated, it must be established that the shares had been obtained by Chunilal the pawnor from their lawful owner or custodian, Chunilal, the executor by means of an offence or fraud." And it was on that ground that it was held that no offence had been committed by Chunilal the pawnor as against Chunilal the executor. This case is no authority for the proposition put before us that it is necessary before the proviso to section 178 can be made applicable that the goods or document should be obtained dishonestly in the first instance, and that a subsequent misappropriation of them or any offence connected with them after they had been lawfully acquired cannot prevent the possessor from making a vaild pledge of them. It must be remembered that after the War Bonds came into the possession of Advani, he created a right to them in his favour by forging the endorsements and after doing so pledged them. It appears to us that the proviso to section 178 would be clearly applicable to a case of this description.

But further it should not be overlooked that to create a valid pledge the pledger must be in juridical possession of the goods as distinguished from a bare custody. No doubt C. S. Advani at the time when the sum of Rs. 2,500 was paid to him for the purpose of War Bonds may have been asked to negotiate the purchase as a Share and Stock broker, but when he received these Bonds from the Bombay Bank endorsed by the Bank in favour of Kodumal Kalumal, he received them for a specific purpose and not as a merantile agent for sale. He was the channel for the purpose of delivering the Bonds to the person rightly entitled to them. It was not juridical possession of the War Bonds, therefore, that he had but he was the custodian of them in order that he may hand them over to Kodumal Kalumal.

The question as to the nature of the possession required under section 178 of the Indian Contract Act has been dealt with by this Bench in the case of *Ramkishendas* v. *Jasumal* (2) and there is nothing that we can usefully add to it.

Much argument was addressed to us based on section 58 of the Negotiable Instruments Act and it was argued that even if the endorsements were forged, the appellant-Bank were holders in due course as they took the War Bonds in good faith and for value. But no person can claim title to any negotiable instrument through a forged endorsement except in cases mentioned in section 85 of the Negotiable Instruments Act. Such an instrument is a nullity and must be taken as if no such endorsement was on the instrument. *Cf. Banku Behari Sikdar* v. *Secretary of State for India* (3). In *Jai Narain* v. *Mahbub Bakhsh* (4) the plaintiff had employed a broker for the sale of certain *hundis* and the defendant became the purchaser of those

(1) 8 Ind Cas 183; 12 Bom. L. R. 870.

(2) 61 Ind. Cas. 305; 14 S. L. R. 175.
(3) 1 Ind. Cas. 929; 36 C. 239.
(4) 28 A. 428.

hundies through endorsements forged by the broker. It was held that the plaintiff was entitled to succeed in a suit for money although the defendants were purchasers in good faith because a forged endorsment created no title at all. To the same effect is the decision in *Hunsraj Purmanand* v. *Rattanji Walji* (5). Section 58 of the Negotiable Instruments Act appears to us to deal with cases of defective title. But the possession of the person with a defective title is different from that of the person that has no title at all. As said in Chalmers' Negotiable Instruments Act the endorsements through which the holder in due course can claim must be genuine. In the present case Advani had no title whatever to the War Bonds by reason of the forgery. No doubt we have no reason to question the good faith of the appellant—Bank but though the pledgee may be ignorant of the fact that the endorsements on the two War Bonds had been forged he takes the pledge at his peril, and, therefore, the appellants acquired no title whatever to the War Bonds, which had been pledged with them by C. S. Advani.

We do not find on the record that there was any negligence whatever on the part of the respondents. Nor is there any estoppel or any adoption of the endorsements. Under these circumstances though no doubt the position of the appellant-Bank is one of considerable hardship, we cannot but give effect to the law as it stands. We, therefore, think that the Trial Court is correct in its judgment and this appeal must, therefore, be dismissed with costs.

P. B. A. *Appeal dismissed.*

(5) 24 B. 65; 1 Bom. L. R. 734; 12 Ind. Dec. (N. S.) 581.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 216 OF 1921.

March 19, 1924.

Present:—Mr. Justice Newbould and Mr. Justice B. B. Ghose.

Srimati DAYAMOYEE RAY CHOUDHURANI—PLAINTIFF—APPELLANT

versus

LALIT MOHAL PAL RAY AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Woman's estate—Suit for recovery of debt—Decree whether binds reversionary interest.

A Hindu female heir represents the entire estate in respect of her own as well as the reversionary interest. Therefore, a creditor suing such a female should so frame his suit as to make it clear that he intends to bind the entire estate and not merely the limited or personal interest of the female, so as to put the other persons interested on their guard and to enable them to protect the estate if they care to do so; consequently, if the decree is a mere personal decree against the female, it binds only her personal and not the reversionary interest. [p. 1005, col. 2.]

Appeal against a decree of the Subordinate Judge, Sixth Court, Dacca, dated the 13th August 1921.

Dr. *Sarat Chandra Basak* (with him Babus *Suresh Chandra Taluqdar*, *Mohendra Kumar Ghose* and *Jatish Chandra Guha*), for the Appellant.—The plaintiff is the appellant here. The facts are these: the properties under dispute '*ka*' and '*kha*' as described in the Schedule belonged to one Bharat. Bharat died leaving two daughters, the plaintiff who was married at the time and Mon Mohini an unmarried daughter. Bharat had also three nephews one of whom Krishna was appointed guardian of Mon Mohini during her minority, she having inherited a Hindu woman's estate in the properties left by Bharat. Bharat left some debts as well. A decree was obtained against both the daughters for a sum of Rs. 88 odd on the 13th July 1883 on the basis of one of those debts. In order to pay that debt Krishna as guardian of the minor Mon Mohini borrowed a sum of Rs. 100 from one Kali Kumar Pal on his personal liability on 31st May 1884 without charging any of the properties left by Bharat. Instead of paying that debt Krishna executed a fresh bond in favour of the creditor for a sum of Rs. 160 in his capacity as the

guardian of the minor. Kali Kumar instituted a suit against Mon Mohini and Krishna on the basis of that bond and got an *ex parte* decree against Mon Mohini personally for a sum of Rs. 226-8 on 14th February 1890. In execution of that decree the property of Schedule '*ka*' was sold and it was purchased by the decree-holder. The sale-certificate bears the date 26th November 1891 and the property is in the possession of the defendant No. 1 who is the heir of the purchaser. This is the case of the defendant No. 1 with respect to property '*ka*.'

With respect to property '*kha*' the case of defendants Nos. 9 and 10 is that it was transferred by Bharat in his lifetime by oral gift in favour of his nephews of whom Krishna is one. The nephews mortgaged it and the defendants Nos. 9 and 10 who are possessing it now, purchased it at auction sale held in execution of the decree on that mortgage.

After Mon Mohini's death in 1908 the present plaintiff instituted this suit for the recovery of those properties as the next heir of Bharat. Her case with respect to property '*ka*' is that Bharat had no debts, that the defendant No. 1's father was the real guardian of Mon Mohini and that the auction sale was a fraudulent and collusive one and that no interest was conveyed by that auction sale and that if it conveyed any interest at all it did not convey the entire estate but only the limited interest of Mon Mohini. With regard to property '*kha*' her case is that there was no gift by Bharat to his nephews. But her suit has been entirely dismissed by the Court below.

While relying on all the pleas resorted to by my client with respect to property '*ka*' I want to lay greatest stress upon the point that the auction sale passed only the limited interest of Mon Mohini if it passed any interest at all. The bond of 31st May 1884 was a personal bond of the guardian of the minor. The renewal of the bond took place on the 17th October 1887 *i.e.*, after the first one had been barred. Therefore, any decree on the basis of the second bond would be ineffectual. Even the second bond was merely a personal one. No property left by Bharat was charged by it. Then again, the suit of the father of defendant No. 1 against Mon Mohini and her guardian was simply to have a personal decree against them. It was not for recovering the debt from the estate left by Bharat. The bond, however, was executed by the guardian while the decree was against the minor alone. This was neither lawful nor valid. The decree too was a personal one and not against the estate. The sale-certificate granted to the father of defendant No. 1 does not show that any interest beyond what the lady passed in her woman's estate was sold. The Privy Council case *Baijun Doobey* v. *Brij Bhookun Lall Awasti* (1) exactly fits in with the present case and the principles laid down in that case govern the present one.

With regard to property '*kha*' my case is that there is absolutely no reliable evidence about the gift by Bharat and that the evidence adduced on behalf of defendants Nos. 9 and 10 has been sufficiently contradicted by my client.

Babu *Dwaraka Nath Chakrabutty* (with him Babus *Gunada Chandra Sen*, *Rajendra Chandra Guha*, *Priya Nath Dutt* and *Charu Chandra Chaudhury*), for the Respondents.—What are the circumstances with regard to properry '*kha*'? There is sufficient evidence that there was an oral gift by Bharat in favour of his nephews. It is also in evidence that Bharat had affection for his brother's sons and also that those brother's sons had nursed him during his old age. Again the plaintiff's own evidence shows that Krishna was very affectionate towards his cousins, the plaintiff and Mon Mohini and acted for the purpose of preservation of their interest. What, again is the value of the property? Its income is only Rs. 3 realised as rent and about 12 maunds of *paddy* per year. I think under these circumstances there is absolutely no reason for disbelieving the gift.

With regard to property '*ka*' it has not been disproved that it was originally for a debt of Bharat that the decree against

(1) 2 A. 275; 1 C. 133; 24 W. R. 306; 3 Suth. P. C. J. 207; 3 Sar. P. C. J. 541; 1 Ind. Dec. (N. s.) 86 (P. C.).

Mon Mohini was obtained and it was in order to pay off that debt that the money was borrowed and the bond was executed. It is, of course, true that no charge was created upon any property by the renewed bond. But the original debt having been for lawful purposes the creditor may very well recover his debt from the estate left by Bharat. Again it has been said that the decree in execution of which the sale took place was personally against the minor alone and it was merely her own interest in the property which passed by the sale. But the female heir represents the entire estate. Therefore, the decree was virtually against the entire estate and what was sold was also the entire estate. The Privy Council case of *Jugal Kishore* v *Jatindra Mohan Tagore* (2), relied on by the Court below, is my authority. My client's case is supported not only by law but by justice and equity as well.

It has been urged that the renewal of the bond in October 1887 took place when the original bond of 1884 was barred. This point was not raised in the Court below. If it were raised there I would have proved that the bond was kept alive by acknowledgment as also by payment of interest. It has also been urged that the decree against the minor passed in 1890 was unlawful and invalid. I think it is too late in the day to raise that point now and here in this case.

Dr. *Sarat Chandra Basak* replied in brief:—I do not think it is necessary to add anything further with regard to property '*kha*.' There is no reliable evidence about the gift and whatever evidence was adduced has been sufficiently contradicted.

With respect to the other property, the female heir no doubt represents the entire estate in respect of her own as well as the reversionary interest. But for that very reason if the creditor seeks not only the woman's interest but the entire estate he is bound to give notice so as to put the other persons interested on their guard and to enable them to protect the estate if they so desire. In the case cited by the other side their Lordships in the Privy Council looked into the judgment of the case and ascertained from it that the entire interest was sold. In the present case this cannot be ascertained from the judgment.

JUDGMENT.—The suit giving rise to this appeal was brought by the plaintiff to recover certain properties as heir of her father one Bharat Chandra Basu. The properties had been placed in two Schedules *ka* and *kha* of the plaint. Bharat obtained the properties described in Schedule *ka* as heir of his son who had predeceased him, the son having inherited the properties from his maternal grandfather. The properties in Schedule *kha* were the ancestral properties of Bharat. Bharat died leaving two daughters, the plaintiff who was married at the time and Mon Mohini a maiden daughter. Mon Mohini, therefore, succeeded to the property left by Bharat obtaining a Hindu woman's estate. Bharat had also three nephews, his brother's sons. One of them Krishna was appointed guardian of Mon Mohini during her minority. It appears that Bharat died leaving some debts and a decree was obtained by the creditor one Ram Kumar Nag in a suit in which he made both the daughters of Bharat defendants. The decree was for Rs. 88 odd and was dated 13th July 1883. In order to pay off this debt Krishna as guardian of Mon Mohini borrowed a sum of Rs. 100 from one Kali Kumar Pal by a simple bond dated 31st May 1884. He executed this bond as the certificated guardian of Mon Mohini, and under that bond there was only the personal liability of the executant, no property left by Bharat being charged for the debt. No money was paid for that bond but a fresh bond was executed in favour of the creditor on the 17th October 1887 by Krishna purporting to act as guardian on behalf of Mon Mohini. This bond was for Rs. 160. The creditor, Kali Kumar Pal, brought a suit on the renewed bond in 1890 making both the minor Mon Mohini and her guardian Krishna defendants in the suit. The suit was decreed on the 14th February 1890, and the ordering portion of the decree runs thus: It is ordered

(2) 10 C. 985; 11 I. A. 86; 8 Ind. Jur. 455; 4 Sar. P. C. J. 553; 5 Ind. Dec. (N. S.) 657 (P. C.).

that an *ex parte* decree be passed as against the defendant No. 1 for the claim in suit with costs together with interest...and that the defendant No. 1 do pay to the plaintiff the sum of Rs. 226-8. The defendant No. 1 was the lady Mon Mohini. This decree was put in execution and the properties mentioned in Schedule *ka* of the plaint were sold and purchased by the decree-holder. The date of the sale-certificate is 27th November 1891 and the properties in Schedule *ka* are now in the possession of his heir, the defendant No. 1. The properties described in Schedule *kha* were said to have been transferred by Bharat in his lifetime by oral gift in favour of his brother's sons one of whom was Krishna aforesaid. Those donees had executed mortgages in favour of certain persons with regard to these properties and the defendants Nos. 9 and 10 purchased those properties on being sold in execution of the mortgage decree by the creditors and they are now in possession of those properties.

Mon Mohini died sometime in 1908 and the plaintiff brings this suit for the recovery of the properties on the allegation that she is entitled to those properties as the next heir of Bharat. The Court below has dismissed the suit entirely. The plaintiff claimed the properties in various grounds. She impeached the auction sales as fraudulent and collusive and also alleged that defendant No. 1's father was actually acting as the guardian of Mon Mohini, and also denied that Bharat had any debts. The real question, however, and that is the point which has been urged before us, is whether the sale in 1891 of the properties in Schedule *ka* conveyed the entire interest in the properties or only the limited interest of the minor Mon Mohini. With regard to the properties in Schedule *kha* it was urged that there was no reliable evidence of the gift and the lower Court was wrong in holding that the evidence of the gift had not been contradicted by the plaintiff.

The claim with regard to the properties in Schedule *kha* may be disposed of at once. We find from the evidence that the properties were of very small value, the income only being Rs. 3 realised as rent and about 12 maunds of paddy per year. It is in evidence that Bharat had affection for his brother's sons and also that those brother's sons had nursed him during his old age. It also appears from the evidence on the plaintiff's side that Krishna was very affectionate towards his cousins the plaintiff and Mon Mohini, and had acted for the purpose of preservation of their interest. It does not appear to us that there is any good ground for disbelieving the evidence that there was an oral gift by Bharat in favour of his nephews. If that is so the plaintiff cannot lay any claim to those properties. The appeal, therefore, with regard to the properties in Schedule *kha* is dismissed.

The decision of the right as regards the properties in Schedule *ka* depends upon the fact as to whether the sale in 1891 conveyed the entire interest in the properties to the father of defendant No. 1. It is no doubt true that a decree was obtained against Mon Mohini for the debts owed by Bharat and that money was borrowed upon the bond of 31st May 1884 in order to pay off that decree. The guardian could certainly under the law have created a valid charge on the property for that debt, but apparently the creditor was satisfied with having only the personal undertaking of the guardian to pay that amount. This bond was renewed on the 17th October 1887. One objection was made on behalf of the appellant that this renewal was after the date when the previous bond had been barred by limitation. This point was, however, not raised in the Court below, and although from the dates of the two bonds it would appear that the debt was barred on the 17th October 1887 it may be that that it was kept alive by acknowledgment or payment of interest. However that may be, by the second bond of 1887 the creditor was satisfied by taking a simple money bond, as it is called, without any charge having been created on the property. It is possible that although

no charge was created the original debt having been for lawful purposes the creditor might have recovered his debt from the estate left by Bharat if he had chosen to do so. But in order to make the estate liable he ought to have framed his suit in a proper manner. What he asked for was simply to have a personal decree against Mon Mohini and the guardian who was made the second defendant. The Court passed a decree against the minor alone. It does not appear any where that the minor was made a party to the suit as representing her father'sestate.

It has been contended on behalf of the appellant that a decree against the minor ought not to have been passed on the bond executed by the guardian. But it is not open to us to decide whether the decree of 1890 was wrongly made against the minor. Besides having regard to the question urged that the sale only transferred the interest of Mon Mohini in the property the question is immaterial. The sale certificate which was granted to the father of defendant No. 1 does not show that the entire interest in the property was sold as is contended on behalf of the defendant No. 1. What was sold was all rights and interest of the judgment-debtor in the property which does not of itself show that any interest beyond what the lady possessed in her woman's estate was sold. No doubt if the proceedings in the suit and the sale notification had contained any materials from which it could have been held that the decree-holder had intended to sell the entire interest in the property and not merely the limited interest of the daughter, the statement that only the rights and interest of the judgment-debtor was sold would not have been of value in representing what interest in the property had been purchased. The decree itself shows that it was only a personal decree and, therefore, we must hold even if the foundation of the decree be a liability which might bind the reversioner this is not sufficient. The suit ought to have been so framed that it would show that it was intended to bind the entire estate and not merely to enforce a personal liability against the daughter. The female heir, no doubt, represents the entire estate in respect of her own as well as the reversionary interest, and for that very reason the creditor is bound to give notice that he is seeking a larger remedy so as to put the other persons interested on their guard and to enable them to protect the estate if they had thought fit. Here the bond did not charge the property as it might have done. The decree was not against the lady as representing the estate but a mere personal decree and the proceedings leading up to the sale have not been produced and, therefore, under these circumstances we hold that the case is governed by the principles laid down by the Privy Council in *Baijun Dubey* v. *Brij Bhookun Lall Awasti* (1). The Court below has relied on the Privy Council case of *Jugul Kishore* v. *Jatindra Mohan Tagore* (2). But in that case their Lordships held that the entire interest was sold after looking into the judgment in the case in order to asceratain what was sold.

We must, therefore, hold that the plaintiff is entitled to the property in Schedule *ka* after the death of her sister Mon Mohini. Having regard to the fact that the plaintiff by stating various untrue facts in the lower Court unnecessarily complicated the matter, we are of opinion that she is not entitled to the costs in the Court below.

The decree of the lower Court is varied to this extent that the plaintiff will get a decree for the property described in Schedule *ka* except property No. 3 about which there was a compromise and her suit with regard to property in Schedule *kha* will be dismissed. She will get 2/3rds of her costs of this appeal from defendant No. 1. The defendants Nos. 9 and 10 who are respondents in this Court will get 1/3rd of their costs of this appeal from the plaintiff-appellant and they will also get their costs in the First Court. The defendant No. 1 will bear his own costs in both Courts. The plaintiff will also get a decree for mesne

profits to be assessed by the Court below against defendant No. 1.

S. D. *Decree varied.*

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1079 OF 1921.
April 14, 1924.

Present:—Mr. Justice Madhavan Nair.

PERAKAM DEVASWAM URALERS, VATAKKEPAT KAVILAKATH *alias* KUTTIYIL KOVILAKATH RAVI VARMA THIRUMALPAD AND OTHERS—DEFENDANTS NOS. 2 AND 3 AND LEGAL REPRESENTATIVE OF DEFENDANT NO. 3—APPELLANTS

versus

THIRUVATHURA PISHARATH RAMA PISHARODY AND OTHERS—PLAINTIFFS NOS. 2 TO 9 AND DEFENDANTS NOS. 1 AND 4—RESPONDENTS.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 18—Suit for recovery of money from trustees personally and from trust estate, nature of.

A suit for recovery of money from the trustees of a temple personally and from out of the temple funds is not one "relating to a trust" within the meaning of Art. 18 of Sch. II to the Provincial Small Cause Courts Act and is, therefore, one of a small cause nature.

Krishnayyar v. *Soundararaja Ayyengar*, 21 M. 215; 7 Ind. Dec. (N. S.) 529, relied on.

Sri Venkatachallapathy Sahaya Vyavasaya v. *Kanagasabhapattia Pillai*, 5 Ind. Cas. 912; 33 M. 494; 20 M. L. J. 146; 8 M. L. T. 67; (1910) M. W. N. 503, distinguished.

The fact that it may be necessary to determine in a suit whether the trust property is liable cannot make the suit one relating to a trust.

Second appeal against the decree of the Court of the Subordinate Judge, Ottapalam, in Appeal Suit No. 17 of 1920 (A. S. No. 224 of 1920 on the file of the District Court, South Malabar) preferred against the decree of the Court of the District Munsif, Ponani, in O. S. No. 549 of 1918 (O. S. No. 855 of 1917 on the file of the Court of the District Munsif, Chowghat).

Mr. *T. R. Ramachandra Iyer*, for the Appellants.

Mr. *P. S. Narayana Swami Iyer*, for the Respondents.

JUDGMENT.—The deceased first plaintiff and Ichikutti Pisharasiar are the assignees of Exhibit A. Exhibit A is a *kazhaka kanom* document executed in favour of Gopal Pisharody and Narayani Pisharasiar by the ancestors of defendants Nos. 1 and 2 and the 3rd defendant who are the trustees of a *devaswom*. The document recites that a sum of Rs. 100 was received by the trustees from Gopal Pisharody and Narayani Pisharasiar. It was while these two were performing the *kazhakam* service in the temple as deputies of one Chovallor Variar under some arrangement made with him that the trustees of the *devaswom* persuaded them to advance a *kanom* of Rs. 100 as security for the due performance of the *kazhakam* and executed *kazhaka kanom* deed, Exhibit A, in their favour. The deceased first plaintiff and his sister obtaining the assignment of the *kazhakam* service as mentioned above carried on their duties in the temple for about 16 years. In the meanwhile, the rights of the family of Chovallor Variar to perform the *kazahakam* service in the temple were established in a litigation between the Variar and the trustees. In that litigation it was found that the entrustment of the *kazhakam* service to the assignors of the present plaintiffs was a fraudulent one intended to defeat the rights of Chovallor Variar. After establishing his rights Chovallor Variar obtained a decree against the deceased first plaintiff and Ichikutti Pisharasiar and in execution of that decree, the *kazhakam* service was surrendered and the plaintiffs were deprived possession of the building they were in occupation. In consequence of this, they have instituted the suit out of which this second appeal arises praying that a decree may be passed directing the defendants personally and by means of the *devaswom* properties to pay them the amount which was received as *kazhaka kanom* on behalf of the *devaswom* under Exhibit A. It has been found by the Courts below that the plaintiffs are *bona fide* transferees who have paid consideration for the assignment, Exhibit C, of the right to perform the *kazhakam* service which

their predecessors obtained under Exhibit A from the trustees of the *devaswom*. Both the lower Courts have decreed the plaintiffs' claim.

The learned Vakil for the respondents takes a preliminary objection that the plaintiffs' suit is one of a small cause nature for the recovery of a sum below Rs. 500 and hence no second appeal would lie to the High Court; Mr. Ramachandra Iyer on behalf of the appellants contends that, under Art. 18, Schedule II of the Provincial Small Cause Courts Act, IX, of 1887, the present suit is exempted from the cognizance of a Court of Small Causes. Under Art. 18, a suit relating to a trust including a suit to make good out of the general estate of a deceased trustee the loss occasioned by a breach of the trust, and a suit by a co-trustee to enforce against the estate of the deceased trustee a claim for contribution are excepted from the jurisdiction of the Court of Small Causes. The last part of the Article is admittedly inapplicable to the facts of the present case. The question, therefore, for consideration is whether the present suit is a suit relating to a trust, or a suit to make good out of the general estate of a deceased trustee the loss occasioned by a breach of the trust. From the summary given above of the essential facts of the case, it seems clear that the suit is one for the recovery of money against the defendants personally and from the *devaswom* properties. In order to decide the question raised in the suit, it may be necessary to determine whether the trust property is liable, but this cannot make the suit one relating to a trust. [See *Sri Venkatachallapathy Sahaya Viyavasaya* v. *Kanagasabhapathia Pillai* (1)]. That was a suit, as pointed out in *Krishnayyar* v. *Soundararaja Ayyangar* (2), by a trustee against his predecessor-in-office for loss to the *cestui que trust* by the defendant's negligence for breach of trust. It may be that Exhibit A was executed fraudulently by the trustees to defeat the rights of Chovallor Variar, but on account of that finding in a suit to which the present plaintiff were not parties, I do not think it can be said that the cause of the action for the present suit is a breach of trust by the trustees. The present plaintiffs have paid consideration for the assignment of the *kazhakam* service, and since they were deprived of their rights, they are asking for a refund of the money from the defendants personally and from the *devaswom* funds. I do not think that the fraudulent motive of the trustee in executing the document under which the present plaintiffs now claim the refund of the money can make the present suit one relating to a trust. If it is a suit not relating to a trust, it is argued that this must be considered as a suit to make good out of the general estate of the deceased trustee the loss occasioned by a breach of trust. The allegations in the plaint clearly show that the suit is against the trust and for the recovery of the money from the trust funds, not against the general estate of the deceased trustee for loss occasioned by a breach of trust. The plaintiffs' suit is one for the recovery of a sum of money below Rs. 500 from the defendants personally and from out of the *devaswom* funds. In my opinion, this is clearly a suit of a small cause nature and is not excluded from the cognizance of the Small Cause Courts under Art. 18 of the Second Schedule. I allow the preliminary objection.

After the close of the arguments it was stated by the learned Vakil for the appellants that his second appeal might be treated as a civil revision petition. No alternative civil revision petition has been filed and obviously no question of jurisdiction arises in this case.

I dismiss the second appeal with costs.

V. N. V.
S. D. *Appeal dismissed.*

(1) 5 Ind. Cas. 912; 33 M. 494; 20 M. L. J. 146; 8 M. L. T. 67; (1910) M. W. N. 503.
(2) 21 M. 215; 7 Ind. Dec. (N. S.) 529.

CALCUTTA HIGH COURT.

CIVIL RULE No. 1256 OF 1923.
June 17, 1924.

Present:—Mr. Justice Pearson and Mr. Justice Graham.

Srimati SARAJU BALA DEBI AND OTHERS—PLAINTIFFS—PETITIONERS

versus

MOHINI MOHAN GHOSE AND OTHERS—DEFENDANTS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), s. 115—Interlocutory orders, revision of—High Court, if and when can interfere.

The settled practice of the High Court is to interfere as little as possible with interlocutory orders where an alternative remedy exists. But it cannot be laid down as a hard and fast rule that the Court will under no circumstances interfere. The High Court can and will interfere with such orders when they may lead to a failure of justice or to irreparable injury. [p. 1009, col. 2; p. 1010, col. 1.]

Dhopi v. *Ram Pershad*, 14 C. 768; 12 Ind. Jur. 97; 7 Ind. Dec. (N. S.) 509, *Gobind Mohan Das* v. *Kunja Behary Dass*, 4 Ind. Cas. 364; 14 C. W. N. 147; 10 C. L. J. 407, *Amjad Ali* v. *Ali Hussain Johar*, 6 Ind. Cas. 574; 15 C. W. N. 353; 12 C. L. J. 519, *Siva Prosad Ram* v. *Tricomdas Coverji Bhoja*, 27 Ind. Cas. 917; 42 C. 926, referred to.

Rule against the order of the Sub-Judge, Fifth Court, Dacca, dated the 25th September 1923, in Title Suit No. 15 of 1922 (former T. S. No. 103 of 1921).

Mr. *S.R. Das*, Advocate-General, (with him Babus *Surendra Nath Guha* and *Prafulla Chandra Chakravarty*), for the Petitioners.

Babus *Provash Chandra Mitra* and *Asita Ranjan Ghose*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order of the Subordinate Judge, Fifth Court, at Dacca refusing to expunge two issues which have been framed in an account suit brought by the petitioners *Srimati* Saraju Bala Debi and others through Mr. F. W. Needham, representing the Court of Wards against the opposite party (defendant No. 1) Mohini Mohan Ghose and others.

The facts which have given rise to the application as stated therein, are as follows:

The claim made in the suit covered the period from *Ashar* 1314, when the defendant Mohini Mohan was appointed *Naib*, of Debi Kuromitola of the Bhawal Estate, up to the time when he was suspended in *Ashar* 1325 *B. S.* At the date when he was appointed Kumar Ranendra Narayan Rai, Kumar Romendra Narayan Rai, and Kumar Robindra Narayan Rai were the proprietors of the Bhawal Estate in equal shares. On the 15th *Jaist* 1314 the defendant No. 1 executed a *jaminnama* or service security bond in favour of three Kumars stating therein that, as he had no immoveable property, his father would execute another bond as his surety and would pledge some immoveable property. That bond was in due course executed on the 19th *Jaista* 1315, and as there was a mistake in it, and as the second Kumar Romendra Narayan Rai died on the 8th May 1909 (*Bysak* 1316), a rectified deed was executed on the 29th *Ashar* 1316 in favour of the two surviving Kumars and the widow of the second Kumar as his heir.

The first and third Kumars died on the 14th September 1910 and 13th September 1913 respectively leaving their widows, the plaintiffs Nos. 1 and 4 as heirs, and subsequent thereto the Court of Wards declared all the three widows to be disqualified proprietors, and assumed charge of the properties.

In the year 1920 an individual dressed in the garb of a Sanayasi appeared on the scene and claimed to be the second Kumar, but the Board of Revenue after making an enquiry found that the second Kumar was dead and that the claimant was an imposter. In the meanwhile the defendant No. 1 had been dismissed from his post and had been called upon to explain and adjust his accounts, and on his failing to do so the suit, out of which the present application has arisen, was filed on the 25th June 1921.

In his written statement filed on the 18th November 1922 the defendant No. 1 raised *inter alia* the plea that, as the second Kumar was alive, his widow the plaintiff No. 2 had no right or title in the estate, and that, therefore, neither she nor the Court of Wards on her behalf could sue for accounts in respect of those properties, and an Issue (No. 3

was accordingly framed in these terms:

"Can plaintiff No. 2 maintain this suit? Is her husband alive ?"

Upon the plaintiffs raising objection the Subordinate Judge held that, as the suit was based on *kabuliyats* executed by the defendant No. 1 in favour of plaintiff No. 2 and the Court of Wards, and as the validity of the *kabuliyats* was not questioned, the issue suggested did not arise, and it was accordingly struck off. The defendant No. 1 then on the 14th July 1921 filed an additional written statement alleging that he had been induced to execute the *kabuliyats* on misrepresentation as to the death of the second Kumar, and in consequence of coercion and threats that he would be dismissed, if he did not execute them. They were not, therefore, it was urged, binding upon him, and he asked that issues might be framed upon his additional written statement. The plaintiffs objected, but the Court yielding to the defendant's prayer accepted the additional written statement and framed thereon Issues Nos. 9 and 10 in the following terms:

"9. Were the documents mentioned in the plaint executed under undue influence misrepresentation, and a mistake of facts as alleged in the written statement ?

10. Is the second Kumar Romendra Narayan Rai alive? If so, is the suit maintainable at the instance of plaintiff No. 2?"

The plaintiffs then filed a petition stating that the suit was maintainable even assuming that the second Kumar was alive, and praying that Issue No. 10 might be tried on that supposition, and the Court on the 13th January 1923 held that, if the Kumar was alive, the suit was not maintainable and refused to expunge Issue No. 10.

Subsequently the plaintiffs by another petition gave up so much of the claim as related to the defendant's service prior to the death of the second Kumar on the 8th May 1909, and prayed that in the circumstances Issues Nos. 9 and 10 might be expunged, but the Court by its order of the 25th September 1923 refused to expunge them, and the plaintiffs thereupon moved this Court and obtained the present Rule.

A preliminary objection was taken on behalf of the opposite party to the hearing of the Rule on the ground that the application was not properly stamped, and it was submitted that upon the affidavit filed by the petitioners no case has been made out for the exercise of the discretion vested in us to allow the Court-fee to be put in after the due time. We do not think there is any substance in this objection, and on the facts stated in the affidavit we are of opinion that the explanation ought to be accepted and the Court-fee allowed to be put in, and we order accordingly.

Coming to the merits it is urged on behalf of the petitioners that the two issues referred to above are unnecessary for the decision of the suit, which is based upon a contract for service, and in which no question of title to immoveable property is involved ; that, if the question of title is allowed to be raised, the scope of the suit will be unnecessarily widened resulting in serious delay and expense out of all proportion to the real issue involved and that in fact the entire character of the suit will be changed. It was further suggested that the defendant No. 1 having made common cause with the *sanyasi* claimant has sought to raise these issues with the ulterior object to helping him in his campaign against the plaintiffs, it being pointed out that any finding arrived at in this case would not be binding upon the claimant, who is not a party to the litigation, though it would be upon the plaintiffs.

On behalf of the opposite party it is urged that the long established parctice of this Court has been not to interfere in the exercise of its revisional jurisdiction with interlocutory orders where another and an adequate remedy is open to the applicant, that that remedy will be available by means of an appeal after the suit has been decided and that no case has been made out for our interference.

We are not much impressed with this *non possumus* argument. No doubt it has been the settled practice of this

SARAJU BALA DEBI *v.* MOHINI MOHAN GHOSE.

Court to interfere as little as possible with interlocutory orders where an alternative remedy exists. It cannot, however, be laid down as a hard and fast rule that the Court will under no circumstances interfere. On the contrary there is ample authority for the view that this Court can and will interfere with such orders where they may lead to a failure of justice, or to irreparable injury, see *Dhapi* v. *Ram Pershad* (1), *Gobind Mohan Das* v. *Kunjo Behary Das* (2), *Amjad Ali* v. *Ali Hussain Johar* (3) and *Siva Prosad Ram* v. *Tricomdas Coverji Bhoja* (4). The question is whether the conditions referred to above are present here so as to justify us in interfering. The decision of the matter appears to depend upon two considerations, *viz.*, first, whether the proposed additional issues are relevant and necessary; and secondly, whether, if they are not so, the trying of them is likely to lead to a failure of justice, or to irreparable injury to the petitioners. The first of these is the really crucial point because, if the issues are necessary and proper, it could hardly be urged with logic or propriety that they may involve a failure of justice or irreparable injury, since, if they are material and necessary issues, the defendant is entitled to go to trial upon them, however great the expenditure of time and money may be. But are they necessary? *Prima facie* one would be inclined to say that the trial of such an issue as to title involving the mass of evidence documentary and otherwise necessary to the decision thereon, is wholly outside the scope of a suit for accounts, especially in view of the fact that the claim for the period prior to May 1909 was withdrawn. Whatever may have been the legal position in regard to the period up to May 1909, it would seem that after July 1909, when the father of the defendant No. 1 executed the deed of rectification in favour of the two Kumars and the widow of the second Kumar, it was no longer upon to the defendant No. 1 to refuse to account to the widow. There can be no question that subsequent to July 1909 the defendant No. 1 was permitted to make his collections by virtue of that deed executed by his father indemnifying the two Kumars and the widow in respect of acts done by the defendant No. 1 and that all collections made after that date were made on account of the two Kumars and the widow. In view of those facts it appears to us that the defendant cannot be allowed to raise the question whether he is liable to account to the widow, and to set up the title of a third party.

There can be no doubt that under section 51 of the Court of Wards Act (IX of 1879) the Court of Wards alone was legally competent to institute the suit. The second Kumar had been held by competent authority after due inquiry to have died in 1909, and unless and until it is established in a Court of law that he is alive and that his title subsists, the Manager under the Court of Wards was the only person legally competent to institute the suit on behalf the estate.

Having regard to these facts and considerations we hold that the trial of these two issues in the present suit is unnecessary.

The next question is whether, assuming them to be unnecessary and irrelevant, the trial of them is likely to lead to a failure of justice, or to irreparable injury to the petitioners. We think that both possibilities undoubtedly exist, indeed that there is something more than a bare possibility that one or both of these consequences may ensue. It is clear from the materials before us that, if the issue of title is tried, it will involve the importation of mass of evidence both documentary and oral. Applications have already been made for the examination on commission of a number of witnesses. It seems to us to be eminently undesirable that all this evidence should be gone into in a simple account suit. It is plain, moreover, that very great delay in the disposal of the suit would necessarily result. The value

(1) 14 C. 768; 12 Ind. Jur. 97; 7 Ind. Dec. (N. S.) 509.

(2) 4 Ind. Cas. 364; 14 C. W. N. 147; 10 C. L. J. 407.

(3) 6 Ind. Cas. 574; 15 C. W. N. 353; 12 C. L. J. 519.

(4) 27 Ind. Cas. 917; 42 C. 926.

of the suit is stated to be Rs. 6,926 odd, and it has been suggested before us that, if these issues are included, the cost of the litigation may amount to something like a lac of rupees. That may be an exaggerated estimate. The fact, however, remains that the trial of these issues will undoubtedly entail an expenditure both of time and money wholly out of proportion to the matter in dispute, and the delay consequent upon the scope of the suit being thus widened might be extremely prejudicial to the plaintiffs and result in their failing to obtain justice. Nor can there be any doubt that, if the issues are unnecessary, as we hold they are, the trial upon them is likely to cause irreparable injury to the plaintiffs since they will be put to the enormous extra expense involved, and as far as can be seen, with little prospect of recovering those expenses, even if they succeed in the suit. It may be true that the plaintiffs are persons of substance and well able to bear the extra expense. That, however, is beside the point and cannot alter the fact that the plaintiffs may suffer irreparable loss. It is plain from the materials before us that the defendant No. 1 is not a person of any substance, and in fact it was on that account that the second *jamminnama* was taken from his father. That being so, it becomes problematical whether in the event of their success in the litigation, the plaintiffs would be able to recover the costs from the defendant.

The suggestion that these issues should be added is presumably due to an apprehension in the mind of the defendant No. 1 that after the suit has been decided, and if the decision be adverse to him, he may hereafter still find that he is accountable to the *sanyasi* claimant in the event of his succeeding in establishing that he is the second Kumar. Assuming that such an apprehension exists the object in view would seem to be to secure a speedy decision of the account suit without in any way prejudicing the defendant, and we suggested subsequent to the hearing of the Rule that the parties should consult together with a view to arriving at a solution of the difficulty satisfactory to both sides. In the result the learned Advocate-General intimated on behalf of the petitioners that both the Manager under the Court of Wards and the widow (plaintiff No. 2) were prepared to execute bonds of indemnity in favour of the defendant No. 1 indemnifying him against any loss whatsoever. It seems to us that that is a fair offer, and that the defendant No. 1 can have no reasonable excuse for refusing to accept it.

Upon a careful consideration of all the facts and circumstances we are of opinion that the trial of the suit ought not to be complicated by dragging in these issues which are outside its scope and wholly irrelevant and unnecessary and the trial of which would inevitably prolong the litigation to the serious prejudice of the plaintiffs. We accordingly make the Rule, direct that the issues in questions Nos. 9 and 10 be expunged and that the suit be now proceeded with according to law on the indemnity bonds being executed by the Manager under the Court of Wards and by the plaintiff No. 2 in accordance with the offer made by them.

The costs of this Rule will be paid by the opposite party to the petitioners. We assess the hearing fee at three gold *mohurs*.

M. B. *Order accordingly.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 62 OF 1924.
June 24, 1924.
Present:—Mr. Justice Boys.
MOHAMMAD NAQI—DEFENDANT—APPLICANT
versus
HARGU LAL—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Limitation.

The High Court will not interfere in revision upon a technical question of limitation where substantial justice has been done.

MOHAMMAD NAQI *v.* HARGU LAL.

Yinke Supaya v. *Maung Kin*, 60 Ind. Cas. 23; 3 U. B. R. (1920) 261, followed.

Raghu Nath Sahai v. *The Official Liquidator of the Himalaya Bank, Limited*, 15 A. 139; A. W. N. (1893) 59; 7 Ind. Dec. (N. s.) 807, referred to.

Sarman Lal v. *Khuban*, 17 A. 422; A. W. N. (1895) 112; 8 Ind. Dec. (N. s.) 592, distinguished.

Where it was open to argument whether limitation in a suit for recovery of debt should run from one date or another but the debt was really due, the High Court refused to interfere in revision and upheld the decree in favour of the creditor.

In a suit brought against the defendant by one *K*, plaintiff stood surety for the defendant that the latter would pay the price of coal sold to him by *K*. *K* obtained a decree against the plaintiff as surety. In order to obtain a review of judgment plaintiff deposited the amount of the decree in Court on the 5th September 1919 but the application for review was dismissed and *K*. withdrew the amount on 21st April 1920. The plaintiff then brought his suit on the 20th April 1923 to recover the money from the defendant his principal. It was contended that the date of payment to the creditor was the date of deposit; and, therefore, the suit was barred by limitation under Art. 81 of the Limitation Act:

Held, that as the creditor was not entitled to withdraw the money immediately it was deposited by the plaintiff in Court and before the application for review was dismissed, the date of deposit in Court was not the date of payment to the creditor.

Civil revision from an order of the Judge, Small Cause Court, Roorki, dated the 12th December 1923.

Mr. *Kumuda Prasad*, for the Applicant.

Mr. *Nehal Chand*, for the Opposite Party.

JUDGMENT.—In this case one Kamal-ud-din brought a suit against Mohammad Naqi on behalf of whom the present plaintiff, Lala Hargu Lal, stood security for Mohammad Naqi, that the latter would pay the price of the coal sold to him by Kamal-ud-din. Kamal-ud-din obtained a decree against the present plaintiff as surety. In order to obtain a review the plaintiff deposited the amount of the decree under section 17 of the Provincial Small Cause Courts Act. He made the deposit on the 5th of September 1919. The application for review was dismissed and the creditor withdrew the money on the 21st of April 1920. Subsequently the plaintiff brought the present suit to recover the money from his principal filing his suit on the 20th of April 1923. A plea was taken in the Court of Small Causes that the suit was barred by limitation under Art. 81 of the Limitation Act. That Article allows a period of three years from the date "when the surety pays the creditor." It is urged that the date of the payment to the creditor was the 5th of September 1919 *i. e.*, the date of the deposit, and the defendant has relied on the case reported as *Yinke Supay* v. *Maung Kin* (1). The plaintiff urged and the lower Court accepted the plea that limitation commenced to run from the 21st of April 1920 and held that the suit was within time. It is open to argument that the date on which the creditor was paid was the date on which the application for review was actually dismissed because from that date the creditor was entitled to withdraw the money but this at least is quite certain that he was not entitled to withdraw the money immediately it was deposited and before the application for review had been dismissed. The plea, therefore, as urged by the defendant could certainly not be sustained. Neither party can tell me on what date the application for review was dismissed and, failing to make good his plea that the date of deposit was the date from which limitation commenced to run, the defendant applicant here asks me to send for the record in order to ascertain the date on which the application for review was dismissed. On the other hand, the plaintiff opposite party here urges that this Court should not interfere in civil revision upon a question of limitation and has referred me to *Raghu Nath Sahai* v. *The Official Liquidator of the Himalaya Bank, Limited* (2) and *Sarman Lal* v. *Khuban* (3). The latter case is not so clearly in point as the former, for it is not clear that in the latter case the question of limitation did not depend upon a question of fact as well as upon a question of law. The earlier case is, however, directly in point. For the opposite

(1) 60 Ind. Cas. 23; 3 U. B. R (1920) 261.

(2) 15 A. 139; A. W. N. (1893) 59; 7 Ind. Dec. (N. s.) 807.

(3) 17 A. 422; A. W. N. (1895) 112; 8 Ind. Dec. (N. s.) 592.

party I am referred to *Lt., Col. J. G. Turner* v. *Jagmohan Singh* (4). Whatever else that case may have decided it certainly did not decide that the Court should interfere on a technical ground where substantial justice had been done. It is perfectly clear in this case that whether the period of limitation should be held to run from the date when the application for review was dismissed or from the date when the creditor withdrew the money, the debt which has been sued for in this case was undoubtedly due from the principal to the surety and unless this Court was to hold that it has no discretion whatever it is indubitably a case in which a discretion should be exercised in favour of the opposite party in this case. I, therefore, decline to interfere and dismiss this application.

S. D. *Application dismissed.*

(4) 27 A. 531; 2 A. L. J. 297; A. W. N. (1905) 77.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 643 OF 1922.

May 15, 1924.

Present:—Justice Sir William Ewart Greaves, KT., and Mr. Justice Chakravarti.

Munshi ALI MIYAN—PLAINTIFF—APPELLANT

versus

WAJADDIN SIKDAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Public Demands Recovery Act (Beng. Act III of 1913), s. 4—Form of certificate—Compliance with provision, whether essential.

The form of a certificate under section 4 of the Bengal Public Demands Recovery Act should be strictly complied with, and a certificate which contains no entry in that part of it, which is really the certificate in the prescribed form, giving any of the particulars in the handwriting of the officer competent to issue such a certificate, is invalid. [p. 1014, col. 1.]

Baijnath Sahai v. *Ramgut Singh*, 23 C. 775; 23 I. A. 45; 7 Sar. P. C. J. 1; 12 Ind. Dec. (N. S.) 514 (P. C.), relied upon.

Appeal against the decree of the District Judge, Chittagong, dated the 12th July 1921, affirming that of the Additional Subordinate Judge of that District, dated the 31st May 1920.

Babus *Ram Chandra Majumdar* and *Chandra Sekhar Sen*, for the Appellant.

Babu *Surendra Nath Guha*, Moulvi *Nuruddin Ahamed* and Babu *Narendra Kumar Das*, for the Respondents.

JUDGMENT.

Chakravarti, J.—The question which arises for decision in this appeal by the plaintiff is:—Was the certificate which was issued under Act III of 1913 under which the sale of the holding in question took place, a valid and binding one? The facts which are relevant for this appeal may be shortly stated thus. The plaintiff Munshi Ali Miyan and the defendant No. 2 Asgar were the owners of a holding under the *khas mehal* in Chittagong and a certificate, dated the 19th February 1917, was filed by the Certificate Officer and the holding in arrears was sold on the 11th June 1917 and purchased by the defendant No. 1 for Rs. 46.

The plaintiff instituted this suit for a declaration that the sale was not binding on him and in the alternative prayed for a re-conveyance of his 8-annas share on payment of half the purchase-money. Among other matters which are not material, the plaintiff contended that the certificate was not a certificate, signed and made, under the provisions of section 4 of the Act, and, therefore, the sale was without jurisdiction.

The plaintiff further alleged that a property worth Rs. 3,000 was sold for Rs. 46 and in consequence he suffered substantial injury.

The Secretary of State for India was defendant No. 3 in the suit.

All the defendants contested the suit and contended that the certificate did comply with the provisions of the law and they traversed the other allegations of the plaintiff.

Both the Courts have dismissed the suit and the plaintiff appeals and four points were taken by the learned Vakil on his behalf in support of the appeal and the first of those was the point which we have indicated as the point which calls for decision in this case

VITHOBA v. BHIMAI.

In the view that we take of the first point it is unnecessary to say anything as regards the other points.

The point now in issue with respect to a certificate issued under Act III of 1913, was raised in a case before a Divisional Bench of this Court consisting of the Hon'ble Justice C. C. Ghose and the Hon'ble Justice Panton in Second Appeal No. 1352 of 1921 and was decided on the 28th February 1923. In that case also the certificate was of a similar nature, and their Lordships held that the certificate was invalid. The certificate in the present case contained no entry in that part of it which is really the certificate in the prescribed form, giving any of the particulars in the handwriting of the office competent to issue such a certificate. In view of the fact that the case cited is in all fours with this case and the principles upon which the decision of the question depends have been laid down by the Judicial Committee in *Baijnath Sahai* v. *Ramgut Singh* (1) we do not think it necessary to discuss the point at any length. These certificates are issued *ex parte* and have the force of decrees for the debts therein mentioned, it is of the utmost importance for the safety of the public that the form of the certificate should be strictly complied with. This certificate with the entries filled up by the hand of a responsible officer like the Certificate Collector ensures that that officer did apply his mind to the correctness or otherwise of those entries.

The learned Vakil for the respondents was unable to draw any real distinction between this case and the unreported judgment to which we have referred.

The result is we set aside the decrees of the Courts below and decree the suit of the plaintiff with respect to his first prayer with costs in both Courts.

Greaves, J.—I agree.

S. D. *Decree set aside.*

(1) 23 C. 775; 23 I. A. 45; 7 Sar. P. C. J. 1; 12 Ind. Dec. (N. S.) 514 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 36-B OF 1922.

June 26, 1924.

Present:—Mr. Kinkhede, A. J. C.

VITHOBA—DEFENDANT—APPELLANT

versus

Musammat BHIMAI—PLAINTIFF—RESPONDENT.

Malicious prosecution—False charge before Police—Setting law in motion—Liability, test of—Conduct of complainant before and after charge—Damages, measure of.

If a complainant does not go beyond giving what he believes to be correct information to the Police, and the Police without further interference on his part, except giving such honest assistance as they may require, think fit to prosecute, it is improper to make him responsible in damages for the failure of the prosecution. [p. 1016, col. 2.]

On the other hand if the charge is false to the knowledge of the complainant, if he misleads the Police by bringing suborned witnesses to support it, and if he influences the Police to assist him in sending an innocent man for trial before the Magistrate, it is improper to allow him to escape the liability because the prosecution has not technically been conducted by him. [*ibid.*]

The mere setting of the law in motion is not the criterion in deciding who the prosecutor is. The conduct of the complainant before and after making the charge must also be taken into consideration. [*ibid.*]

The foundation of an action for malicious prosecution is malice, and malice may be shown at any time in the course of the inquiry. [p. 1017, col. 1.]

Gaya Prasad v. *Bhagat Singh*, 30 A. 525; 10 Bom. L. R. 1080; 4 M. L. T. 204; 18 M. L. J. 394; 5 A. L. J. 665; 14 Bur. L. R. 318; 11 O. C. 371; 8 C. L. J. 337; 35 I. A. 189; 12 C. W. N. 1017 (P. C.) and *Periya Goundan* v. *Kuppa Goundan*, 52 Ind. Cas. 782; 42 M. 880; 37 M. L. J. 234; 10 L. W. 235; 26 M. L. T. 140; (1919) M. W. N. 577, followed.

A prosecution, though at the outset, not malicious, as having been undertaken at the dictation of a Judge or Magistrate, or if spontaneously undertaken, from having been commenced under a *bona fide* belief in the guilt of the accused, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malo animo* in the prosecution with the intention of procuring *per nefas* a conviction of the accused. [*ibid.*]

Fitzjohn v. *Mackinder*, (1861) 9 C. B. (N. S.) 505 at pp. 522, 531; 30 L. J. C. P. 257; 7 Jur. (N. S.) 1283; 4 L. T. 149; 9 W. R. 477; 127 R. R. 746; 142 E. R. 199, followed.

An award of all legitimate expenses incurred by a successful accused person for his or her defence and for establishing his or her innocence in criminal cases, is always justifiable as those expenses are the direct and necessary consequences of the false and malicious prosecution. [p. 1021, col. 1.]

VITHOBA *v.* BHIMAI.

Appeal against the decree of the Additional Subordinate Judge, Akola, dated the 29th April 1922, in Civil Suit No. 230 of 1920.

Mr. *M. R. Bobde*, for the Appellant.

Mr. *A. V. Khare*, for the Respondent.

JUDGMENT.—This judgment will govern both the appeals. First Appeal No. 36-B of 1922 arises out of Suit No. 230 of 1920, while First Appeal No. 59-B of 1922 arises out of Suit No. 202 of 1920 of the file of the Additional Sub-Judge, Akola. Both these suits have been disposed of by the judgment dated 29th April 1922 in Suit No. 230 of 1920 as the parties agreed that the two cases be consolidated and disposed of together. In Suit No. 230 of 1920 the plaintiff, *Musammat* Bhimai, claim compensation from the defendant, Vithoba, for malicious prosecution under section 302 of the Indian Penal Code and valued her claim at Rs. 5,932, while in Suit No. 202 of 1920 the plaintiff's claim was for Rs. 1,100 on account of compensation for malicious prosecution under section 323, Indian Penal Code. This latter claim was made against the defendant, Vithoba, and as also against his son Kashiram. The plaintiff succeeded in getting a decree for Rs. 4,032 in Suit No. 230 of 1920 and for Rs. 1,050 in Suit No. 202 of 1920 against the respective defendant or defendants and these appeals have been filed against the said decrees by the person or persons against whom the same have been passed.

The arguments, in support of these appeals, have been addressed in First Appeal No. 36-B of 1922 in particular. I will, therefore, proceed to discuss first the arguments on points common to both and then take up any points, which may be special to either case.

The facts have been sufficiently set forth in the judgment of the lower Court in Civil Suit No. 230 of 1920. I need not, therefore, recapitulate them here. I do not also, for the same reasons, propose to re-produce in detail the respective pleadings of the parties in this judgment. Suffice it to say, in brief, that according to the plaintiff, the defendant, Vithoba who is her husband's cousin, is coveting the estate, which she has inherited from her husban, Dattoo Patel, and with that object in view, he has, from time to time, made several endeavours to deprive her of it, by hook or crook. Being thus mischievously and maliciously inclined towards her, he is said to have given currency to false stories about her conduct and made false reports to the Police and started false prosecutions against her. The prosecutions (1) under section 302, Indian Penal Code, in the Court of the Sub-Divisional Magistrate, Akola (Case No. 36 of 1919) and (2) under section 323, Indian Penal Code, in the Court of the Bench Magistrate, Balapur (Case No. 75 of 1919) are said to be such false prosecutions. They have ended in plaintiff's favour, she having been discharged by the Magistrate, in each case. It must be mentioned, for the sake of clearness, that it is the plaintiff's case that in the prosecution under section 302, Indian Penal Code, the real prosecutor was the defendant although it was conducted by the Police. The other prosecution, of course, was started upon a complaint made in the name of defendent Kashiram but according to the plaintiff there also Kashiram and his father Vithoba acted in concert. In short, the plaintiff alleges that the defendant, Vithoba, is responsible for both the prosecutions, and that as he started them without any reasonable and probable cause and out of malice he is liable to her in damages. On behalf of the defendant, who is also the Police Patel of the village, it is contended that his position, as a Police Patel of the village, imposed upon him a duty to report all occurrences and render all such help to the Police as would bring to their notice the commission of an offences and even enable them to prevent offences taking place, and that in making the reports to the Police, which led to the starting of the prosecution under section 302, Indian Penal Code, he acted in his official capacity and not without any reasonable and probable cause or with malice. It is admitted, on behalf of the defendant or defendants, that

the plaintiff was discharged in both the criminal cases for want of evidence.

The following points may be formulated as being material for the proper decision of these appeals:—

(1) (*a*) Was defendant, Vithoba, instrumental in getting the prosecution under section 302, Indian Penal Code, started against plaintiff?

(*b*) Did defendant, Vithoba, lodge the complaint under section 323, Indian Penal Code, through his son Kashiram against the plaintiff?

(2) Whether the aforesaid prosecutions were without reasonable and probable cause and also malicious?

(3) What amount of compensation is awardable to plaintiff in each case?

The Additional Sub-Judge, who decided the two suits has taken pains over the case; after setting forth the law, bearing on the points involved, as laid down by the Privy Council, he has proceeded to ascertain whether the facts necessary for the success of the plaintiff have been established by her as required by law. It would, therefore, be useful to state, at the outset, the law as laid down by their Lordships of the Privy Council in *Gaya Prasad* v. *Bhagat Singh* (1) and then discuss the correctness or otherwise of the proceedings of the Court below. This Privy Council case has been applied by the Madras High Court in *Periya Goundan* v. *Kuppa Goundan* (2). Both these decisions are accepted by the appellant's Counsel as guiding decisions on the points I have to decide. It is, however, complained that the Judge of the lower Court has not ascertained fully the several facts necessary to be established as laid down by their Lordships of the Privy Council and that consequently he erred in thinking that the plaintiff was entitled to succeed although, as a matter of fact, the *data* placed by her before the Court in support of her claims was insufficient to warrant the passing of any decrees in her favour. I am, therefore, asked to discharge the decrees passed by the Court below.

Their Lordships of the Privy Council have observed as follows at page 533* of the report of their decision in *Gaya Prasad* v. *Bhagat Singh* (1):

"In India the Police have special powers in regard to the investigation of criminal charges, and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believes to be correct information to the Police, and the Police without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant; if he misleads the Police by bringing suborned witnesses to support it, if he influences the Police to assist him in sending an innocent man for trial before the Magistrate it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conduct by him. The question in all cases of this kind must be—who was the prosecutor?—and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion; the conduct of the complainant before and after making the charge, must also be taken into consideration. Nor is it enough to say, the prosecution was instituted and conducted by the Police. That again is a question of fact. Theoretically all prosecutions are conducted in the name and on behalf of the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence, who *pro hac vice* represents the Crown. In India a private person may be allowed to conduct a prosecution under section 495 of the Criminal Procedure Code, which provides that 'any Magistrate inquiring

(1) 30 A. 525; 10 Bom. L. R. 1080; 4 M. L. T. 204; 18 M. L. J. 394; 5 A. L. J. 665; 14 Bur. L. R. 318; 11 O. C. 371; 8 C. L. J. 337; 35 I. A. 189; 12 C. W. N. 1017 (P. C.).

(2) 52 Ind. Cas. 782; 42 M. 800; 37 M. L. J. 234; 10 L. W. 235; 26 M. L. T. 140; (1919) M. W. N. 577.

* Page of 30 A.—[*Ed.*]

into or trying any case may permit the prosecution to be conducted by any person other than an officer of Police..... Any person conducting the prosecution may do so personally or by a Pleader.' When this is permitted, it is obviously an element to be taken into consideration in judging who is the prosecutor and what are his means of information and motives. The foundation of the action is malice, and malice may be shown at any time in the course of the inquiry."

Their Lordships support their observations by the following extracts in *Fitzjohn* v. *Mackinder* (3) from Bramwell, B. J. and Cockburn, C. J's. judgments, respectively:—

"This action is not for damages in respect of the.....indictment only, but also for the residue of the prosecution, and the damage consequent upon it..... Where an action is maintainable in respect of the whole prosecution, including the preferring of the bill, it is in part maintainable for the subsequent stages and conduct of it."

"A prosecution, though in the outset not malicious, as having been undertaken at the dictation of a Judge or Magistrate, or, if spontaneously undertaken, from having been commenced under a *bona fide* belief in the guilt of the accused, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, persevers *malo animo* in the prosecution, with the intention of procuring *per nefas* a conviction of the accused."

The above tests laid down by their Lordships of the Privy Council must be satisfied in every suit for compensation for malicious prosecution. I will examine the facts in the light of the said tests and see how far plaintiff has substantiated her allegation that the defendant Vithoba was the prosecutor in both the criminal cases and after this is done, I will next consider the question how far the prosecutions were malicious and without reasonable and probable cause and to what extent the defendant's liability is established.

Plaintiff's husband died in 1910 and for a period of nine years there was nothing against her character. It is only twice in 1919 that attempts have been made to blacken her character. From the absence of any evidence to show that the plaintiff had carried any intrigues with anybody else or for the matter of that with any of her low caste servants during the first ten years of her widowhood, I am entitled to draw a presumption that her character was pure and unblemished when she was in the prime of her youth. In view of this presumption the story, that when she became advanced in age and was nearing thirty-five she lapsed in prostitution and began to have illicit connection with her Mahar servant, sounds highly improbable. It is equally improbable that she would make an exhibition of herself after conception, if she at all conceived, as the result of her illicit connection with her favourite servant Soma Mahar. The defendant, Vithoba, has been on inimical terms with the plaintiff since long; his attempts at depriving her of the estate have failed in the past, and it is, therefore, very likely that he hit upon the idea of depriving her at least of her control over the estate, as the natural guardian of her minor son Shamrao, and with that end in view imputed immoral character to her as disqualifying her for continuing as a guardian, and, therefore, concocted the story about the pregnancy, and gave currency to it in order to bring her into disgrace and blacken her character, in the eyes of the public, and particularly, of the caste people and relations, with the ultimate object of paving his own way to the estate, in her hands, or at least to secure a strong hold on the same under colour of a claim to guardianship of her minor son's person and property. The admitted report to the Police dated 2nd June 1919 that Bhimai was pregnant and may try to cause abortion appears, therefore, to be in the nature of a *peshbandi* to support the future application, dated 1st

(3) (1861) 9 C. B. (N. S.) 505 at pp. 522, 531; 30 L. J. C. P. 257; 7 Jur. (N. S.) 1283; 4 L. T. 149; 9 W. R. 477; 127 R. R. 746; 142 E. R. 199.

July 1919 for guardianship which was lodged actually on 1st August 1919 in the Court of the District Judge Akola, by alleging therein that the boy's natural mother was unfit to act as a guardian as she was leading an unchaste and immoral life. But he wanted to prepare the ground still further by lodging beforehand a criminal complaint against the plaintiff and Soma Mahar under section 323, Indian Penal Code (Exhibi P-2) on 4th July 1919. These proceedings were pending from 4th July 1919 to 23rd December 1919 but so far as plaintiff Bhimai was concerned, they terminated on 26th November 1919 when she was discharged by the Magistrate for want of sufficient evidence (Exihibit P-3). Between 4th July 1919 and 26th November 1919 there were 13 hearings and at every hearing she was personally present. She could not attend the hearings dated 5th November 1919 and 10th November 1919 owing to her arrest in the case started against her under section 302 of the Indian Penal Code for an offence of having given birth to an illegitimate child and of having subsequently killed it. The several hearings which took place in the case under section 323, Indian Penal Code, were at short intervals as the following dates:—8th August 1919, 20th August 1919, 10th Sepetmber 1919, 17th September 1919, 27th September 1919, 9th October 1919, 17th October 1919, 29th October 1919, 5th November 1919, 10th November 1919, 21st November 1919, 24th November 1919 and 26th November 1919 will show.

Out of these hearings those dated 8th August 1919, 20th August 1919, 10th September 1919, 17th September 1919, 29th October 1919 and 5th November 1919 are particlaurly important. The accusation against the plaintiff in the above case under section 323, Indian Penal Code, was that while Soma Mahar was being reprimanded by defendant's son Kashiram for having beaten plaintiff's son Shamrao, he was assaulted not only by Soma Mahar but also by the plaintiff, who is said to have kicked Kashiram. This kicking must have taken place some time before 4th July 1919 when the criminal proceedings were started against her. If she was then, carrying and her pregnancy was an advanced one of six, seven or even eight months, as some of the defendant's witnesses depose, it is absurd to say that she was, in spite of her delicate condition, in a position to give kicks and assault Kashiram. If the evidence be true that she was pregnant and, therefore, avoided attending the caste *panchayat* in June convened by defendant, Vithoba, and thus failed to convince her caste people that she was not then pregnant, it is not understood how, in spite of her pregnancy, she attended the hearings dated 8th August 1919 and 20th August 1919 when as the witnesses including Vithoba say that they could easily observe that her belly was enlarged meaning thereby that she was in an advanced state of pregnancy. The fact that she did attend Court and expose herself to public gaze two months later shows that she had no reason to conceal herself evidently because she was not then carrying.

Exhibit P-1 is the order of her discharge dated 23rd December 1919 for want of evidence, in the other criminal case which was started against her on 3rd November 1919 upon a Police *challan* under section 302 of the Indian Penal Code. The *challan* which forms part of the record of the Criminal Case No. 36 of 1919 shows that the defendant Vithoba's information, as given to the Police on 12th September 1919 was that, owing to her having had illicit connection with Soma Mahar, she became pregnant and was consequently out-casted by the caste *Panchayat* convened by him at Chicholi at which she refused to attend, and that she was, therefore, all along on the look out for an opportunity to cause abortion, [to prevent which, he, as admitted by himself and his son Kashiram in the witness box, had posted one Baliram (D. W. No. 10) to keep a watch over her movements and thus to make it impossible for her to have any such opportunity in the village], and that she was last seen with her big belly on the occasion of her appearance in the Balapur Court on 20th August 1919; but when she next appeared on 10th September 1919 in that Court, her belly had assumed normal proportions, thereby suggesting that she either

caused abortion or gave birth to the illegitimate child and subsequently put an end to its life by drowning it in a well at Ridhora. It states that with a view to bring about this abortion or delivery and death of this illegitimate child she shifted to a house specially engaged at Akola sometime on 26th August 1919 and that it was sometime before 1st September 1919 that the abortion or delivery of the child took place, and further that on 1st September 1919 the child was discovered in the well at some distance from her residence at Akola.

It will thus be seen that it was on the definite information of Vithoba, which he gave to the Police in the presence of four other persons, whom he had taken with him to the Police Station in all probability to impress upon the Police Officer that his information was true and correct, that the Police Officer proceeded to start the prosecution against the plaintiff under section 302, Indian Penal Code. The repeated assertion by Vithoba that the plaintiff was leading an immoral life, had illicit intercourse with Soma Mahar and had consequently become pregnant, but was on the look out for causing abortion and further that she either caused abortion or was delivered of the illegitimate child and that she killed it by drowning it in the well with the object of concealing her own intrigue and guilt, is the direct cause of the plaintiff's prosecution under section 302 of the Indian Penal Code. Vithoba did not stop with merely giving information to the Police but he tried his best to substantiate the accusation by giving his own evidence in support of it, as Exhibit P-2, a copy of his deposition dated 12th November 1919 in the criminal case under section 302, Indian Penal Code, would show. A perusal of the deposition will clearly show the malice which actuated him and influenced his conduct throughout both before and after the prosecution. He had already exposed her by convening a village *Panchayat*, and it is very unlikely that having reported against her on 2nd June 1919, he would spare any pains for harassing her still further. The very fact that three different proceedings were commenced against her in three different Courts almost side by side, is a clear manifestation of a deliberate intention on his part to do every harm to her and also damage her reputation. He as well as his son Kashiram have both admitted that he attended at almost every hearing of the case under section 323, Indian Penal Code. This clearly proves the interest which he must naturally have taken in the successful termination of that prosecution. It is in evidence that he had financed that prosecution. This does not strike me as in any way unusual as the father and the son are still joint as the denial of it in the pleadings does. I have, therefore, no hesitation in holding that the prosecution under section 323, Indian Penal Code, started by Kashiram, was at the instance of Vithoba and that the latter actually aided and supported it in every possible way. In short Vithoba was interested in the result of that prosecution and could safely be said to be a prosecutor along with his son Kashiram though the complaint stood in the name of Kashiram alone.

As regards the question whether, in the prosecution under section 302 of the Indian Penal Code, the real prosecutor was the defendant, Vithoba, or only the Crown, I must say that there is overwhelming evidence on the record to show that the real prosecutor was Vithoba, and that the real responsibility for it, therefore rested on him. The witnesses examined in the present case on behalf of the plaintiff, as also of the defendant, have given their depositions before the Judge, who decided the case. He had ample opportunities of noting their demeanour in the witness-box and also of forming his own opinion about their veracity and independence. His conclusions about the weight to be attached to their testimony cannot, therefore, be lightly set aside or ignored. He has preferred to believe the plaintiff and witnesses examined on her behalf, who impressed him as witnesses of truth, and has discarded the testimony of the defendant, Vithoba, his son Kashiram, and the other witnesses examined on his behalf as untrustworthy. I have myself read through the oral evidence and considered it carefully in the light of the surrounding circumstances and the probabilities

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of the case and have come to the conclusion that the lower Court's appreciation of the evidence on record is not, in any way, incorrect; but that it is fully justified. The documentary evidence, adduced in the case on behalf of the plaintiff, also clearly points to the conclusion that the defendant, Vithoba, was at the bottom of all mischief and that for every step taken in connection with either the plaintiff's excommunication from the caste, or her prosecution under section 323 or under section 302 of the Indian Penal Code, or the application for her removal from the guardianship of the person and property of her minor son Shamrao, the defendant Vithoba was responsible. The orders passed in all the three cases are evidence of the facts that the proceedings terminated in favour of the plaintiff. They are not of themselves evidence of her innocence, but I have no hesitation in holding that the plaintiff has, satisfactorily, proved by other evidence the falsity of the accusation, which, the defendant Vithoba or his son Kashiram, laid at her doors. The medical certificate dated 19th September 1919 as also the testimony of several eye-witnesses, who had opportunities of seeing her at close distance on several occasions, amply corroborate her statement in the witness-box that she was not pregnant and did not give birth to any illegitimate child and that she was not, in any way, concerned with the killing of the child and that he acted maliciously towards her in starting the prosecution under section 302, Indian Penal Code. There is also ample corroboration for her assertion that she did not give any kicks to, or, assault, Kashiram, as alleged by the defendant. The facts and the circumstances of the case point to the falsity of the charges with which the defendant accused her.

I think there is ample material on the record to prove her innocence. The fact that the defendant has not hesitated to bring forward in these civil suits suborned witnesses to support his false defence affords a clear proof of the long-standing malicious intention on his part, to do harm to the plaintiff, and to damage her reputation, and, to involve her in an expensive litigation. I do not think it will serve any useful purpose for me to re-produce here the evidence oral and documentary, which supports the findings of the lower Court on the point of (1) Vithoba being a real prosecutor in both the prosecutions and (2) of the said prosecutions being based on false averments and as such being started by malice and without any reasonable and probable cause.

I, therefore, uphold the findings of the lower Court on these points. I am further, of opinion that judging the evidence on record in the light of the tests laid down by the Privy Council the irresistible conclusion, to which I come, is that the defendant, Vithoba, had rendered himself responsible in damages, for the prosecution of the plaintiff, an innocent woman, and that he cannot escape his liability merely because the prosecutions under section 323 or under section 302 of the Indian Penal Code were not started in his name or had not technically been conducted by him in his own name. Great stress is laid before me upon the circumstance that his capacity of a Patel of the village compelled him to take the action he did and that there was ample justification for the same. I am not prepared to agree with him in this respect. His attitude, from the beginning to the end teeming as it is with malice, negatives the existence of all *bona fides* in his actions and I am constrained to say that he overstepped the proper limits in several ways.

I am not prepared to hold that the defendant was entitled to any privilege, either absolute or qualified, in the matter of either the complaint under section 323 or the prosecution under section 302 of the Indian Penal Code. It is impossible for me to hold from the evidence on record that defendant honestly believed the truth of what he said or did or reported. My finding, therefore, is that the defendant, Vithoba, had absolutely no justification for starting any of the prosecutions against the plaintiff, and further that in connection with the prosecution under section 323, Indian Penal Code, both Kashiram and

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he are jointly liable in damages to the plaintiff, and in connection with the prosecution under section 302 of the Indian Penal Code, he cannot escape his liability on the mere excuse that the Crown was the apparent prosecutor.

I will, next, deal with the question of damages to be awarded to the plaintiff. The lower Court has awarded compensation for the malicious prosecutions under the following heads:—

No.	Head	(1) For prosecution under section 302, I. P. C.	(2) For prosecution under section 323, I. P. C.
		Rs.	Rs.
1	Counsel's fee ...	1,100	550
2	Medical fee ...	32	
3	Physical and mental worry ...	2,000	500
4	Loss of reputation	1,000	
	Total	4,132	1,050

An award of all legitimate expenses, incurred by a successful accused person for his or her defence and for establishing his or her innocence in the criminal cases, is always justifiable, as those expenses are the direct and necessary consequence of the false and malicious prosecution. That Counsel's fees come under such legitimate expenses cannot be and has not been doubted. All that is said on the strength of the evidence of P. W. No. 3 is that the plaintiff had not fully paid up what she had undertook to pay to her Counsel. The mere fact that the actual payment of a small portion is deferred ought not to make any difference, especially, as I have before me, clear evidence of the extent of her liability. Although Rs. 1,100 are proved, I find the Judge has, in the ultimate calculation, taken the figure at Rs. 1,000. I, therefore, uphold the award of Rs. 1,000 and Rs. 550 under the first head.

As regards Rs. 32 no attempt was made to challenge the payment. I allow it.

As regards Rs. 2,000 and Rs 500 awarded for physical and mental worry, all that is urged is that the amounts are excessive, looking to the duration of the two cases and to the fact that so far as the case under section 302, Indian Penal Code, is concerned, there was nothing in the hands of the prosecution to connect plaintiff with the dead body of the child, and it was only a walk over to get a discharge. I do not agree with the learned Pleader in this contention. I think the plaintiff's mind must necessarily have been exercised over this prosecution much more than over the other prosecution. The charge was very serious and if proved by the suborned evidence would have put her out of her estate, if not, out of her very existence in this world. She was arrested on 31st October 1919, had to put up with the indignities of a Jail life from 31st October 1919, to 8th November 1919, when the Magistrate looking to her respectability, released her on a heavy bail of Rs. 4,000. Since her arrest she had to appear in Court ten times. This must necessarily have caused her great personal discomfort although by the timely release on bail she was saved from the further disgrace of remaining in Jail, Police custody or of standing in the dock. I think, the damages awarded under this head in the case under section 302, Indian Penal Code, do not appear to be excessive. I, therefore, confirm the award of Rs. 2,000. As regards the award of Rs. 500 under the same count for the prosecution under section 323, Indian Penal Code, I find that there were 13 hearings out of which she attended 11 hearings. No doubt the offence was not serious but all the same it must have caused good deal of mental worry and physical trouble to her to attend the Court of the Honorary Magistrate. Taking into consideration the awkwardness of position, which a female accused would feel when made to appear and stand amid unusual surroundings, leaving her comfortable residence and the ease of life, she must have enjoyed there, I do not consider myself justified

in disturbing the estimate made by a Judge of sufficient experience and standing. I, therefore, uphold the award of Rs. 500 also in the other case.

The only item left is of Rs. 1,000 awarded as damages for loss of reputation. This must always depend upon the respectability and the social position one enjoys in his or her own society. The Trial Judge, after taking into consideration or the relevant circumstances has thought fit to award Rs. 1,000 and has stated that it is quite fair. Nothing that has been said before me, induces me to think that it is either unfair or excessive. I, therefore, confirm this award also.

The result is that the appeals wholly fail and are dismissed with costs. Costs in the lower Courts will be paid as already ordered.

G. R. D. *Appeals dismissed.*

ALLAHABAD HIGH COURT.

APPLICATION IN ORIGINAL SUIT NO. 1 OF 1923.

December 18, 1923.

Present:—Mr. Justice Piggott.

Babu DWARKA DHISH PRASAD SINGH—PLAINTIFF—APPLICANT

versus

THE HON'BLE *Maharaja* KESHVA PRASAD SINGH BAHADUR, C. B. E. —DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—"Any other sufficient cause," meaning of—Compromise—Consent obtained by fraud—Review—Procedure.

The words "any other sufficient reason" in O. XLVII, r. 1 of the Civil Procedure Code, must be taken to refer to something *ejusdem generis* with the words that precede them. [p. 1024, col. 2.]

Semble.—Where the attention of a Court is invited to the fact that some fraud has been practised upon a party in connection with a petition of compromise which has been accepted by the Court, it may apply the provisions of O. XLVII, r. 1 of the Civil Procedure Code, to set aside the order accepting the compromise, if satisfied that the alleged fraud has been practised, but the matter is one which should ordinarily be litigated in a separate suit. [p. 1024, cols. 1 & 2.]

Case-law discussed.

Messsr. *S. K. Dar*, *Harnandan Prasad* and *N. P. Asthana*, for the Applicant.

JUDGMENT.—The application before me is one presented on the 8th of September 1923, asking this Court to review an order of the 11th June 1923, according to which it was held that a certain suit pending before the Court had been wholly adjusted by a lawful agreement and it was ordered that a decree should be passed in the terms contained in a certain paragraph of an affidavit purporting to be sworn by the plaintiff in connection with the aforesaid agreement. The application, as presented to the Court, did not refer to any provision of the Code of Civil Procedure; but I have been informed in argument that it is intended to invoke either the inherent jurisdiction of this Court under section 151 of that Code, or the power of review given by O. XLVII, r. 1 of the same. When I set myself to specify the grounds upon which this application is made to me, I find it exceedingly difficult to compose any coherent summary of the 66 paragraphs of the affidavit which has been sworn in support of the application. The first 19 paragraphs are recitals of facts, some of which are apparent from the record before the Court and none of which have any bearing upon the question for determination, except in so far as they may be regarded as necessary to introduce or lead up to the allegations made in subsequent paragraphs. In the next four paragraphs it is merely asserted that the defendant, at a certain stage of the proceedings, communicated to the plaintiff a desire to enter into negotiations for a settlement of the suit. The six following paragraphs contain allegations, some of which are preferred in terms perhaps designedly vague, and certainly susceptible of more than one interpretation; but I can only understand these paragraphs as meaning that a certain petition of compromise and affidavit, which were presented to this Court on the 23rd of May 1922, were executed by the plaintiff without knowledge of their contents, and because he was in fear of his life at the hands of the defendant. The story is continued in the next few paragraphs, but they do not seem to me to contain any

matters directly bearing on the question now before me until I come to the 42nd paragraph of the affidavit. It is now necessary to explain exactly what did take place in this Court. A petition of compromise, supported by affidavit, was presented to me on the 23rd of May 1923. I took up the matter in the presence of Counsel for both parties on the 25th of May. The important part of my order was that the application should be put up for disposal on the 11th June 1923, and that the plaintiff should then attend in person. On the 11th June the plaintiff did not attend in person, but was represented by Mr. Sultan Ahmed, Advocate of the Patna High Court, a gentleman of the highest position in his profession, who was appearing in this Court by permission of the Hon'ble the Chief Justice. The record of the proceedings which followed shows that I was fully alive to the difficulties of the situation created by the failure of the plaintiff to comply with the order directing his personal attendance. I was assured by Mr. Sultan Ahmed that the order requiring the personal attendance of the plaintiff had reached the said plaintiff and that he, as Counsel for the plaintiff, had been instructed by the latter to ask the Court to excuse the non-attendance of the plaintiff in person and not to pass any further order insisting upon his personal attendance on a subsequent date. I also received from Mr. Sultan Ahmed, and accepted from him, his assurance that he had been instructed by the plaintiff personally to press the application of the 23rd of May 1923, that is to say, the application compromising the suit. I was also fully awake to the fact that this application amounted in substance to a withdrawal of the suit by the plaintiff and an abandonment by him of the claim which he had preferred against the defendant. I dealt with the matter on the basis of a petition of compromise tendered to the Court by Mr. Sultan Ahmed, under instructions from his client, on the 11th June 1923. I am, therefore, not concerned to enquire into the precise circumstances under which the petition was presented to this Court on the 23rd of May 1923, or the affidavit by which it was supported came to be sworn. I accepted Mr. Sultan Ahmed's assurance that his client had expressed to him a desire that he should represent him before the Court on the 11th of June 1923, that he should ask the Court to excuse the personal attendance of the said client and that he should ask the Court to dispose of the suit in the terms of the petition of compromise which had been laid before me, in the first instance, on May the 23rd, 1923. Afer considering the affidavit now laid before me I am of opinion that I was not only justified in accepting these assurances from Mr. Sultan Ahmed, but that I was bound to do so. In the face of these assurances, I disbelieve the statement made in paragraph 42 of the affidavit now before me. I take note that in paragraph 44 of the said affidavit the plaintiff does not say that he did not instruct Mr. Sultan Ahmed to do any one of the things which he now knows that Mr. Sultan Ahmed did it on his behalf on the 11th June 1923. What he says is that he represented to the said Counsel what he had been previously told to say by the defendant, and he asserts that he did this because he only saw Mr. Sultan Ahmed in the presence of the defendant and that the defendant had told him that he would come to serious grief if he failed to give Mr. Sultan Ahmed those instruction which he actually did give. The paragraph does not even assert that the plaintiff asked to be allowed to see Mr. Sultan Ahmed in private and without the presence of the defendant. To sum up the matter, it seems to me that the allegations in the affidavit before me are, in substance, that the plaintiff signed certain papers and swore a certain affidavit without knowing the contents of those papers or of the affidavit, at a certain place in Allahabad on the 23rd of May 1923, at a time when he was suffering wrongful confinement at the hands of the defendant and the servants or agents of the defendant

and because he believed his life to be in danger at their hands if he refused to sign these papers and to swear this affidavit. I have not examined the officer before whom the affidavit was sworn; but there are, in my opinion, considerations apparent enough on the materials now before me to justify me in declining to take any action upon these allegations. I have asked whether any report was ever made to the Police in Allahabad, or any complaint ever presented to a Magistrate of this place, in respect of the offences of wrongful confinement, criminal intimidation and extortion disclosed by paragraphs 25 to 31 of this affidavit, and I am informed that nothing of the sort was ever done. I have sufficient confidence in the official who certifies that the affidavit in question was solemnly affirmed before him to feel certain that he did not permit the plaintiff to affirm without first satisfying himself that the plaintiff was aware of the contents of the affidavit. Finally, I am of opinion that it is a question of minor or subsidiary importance to consider the circumstances under which this affidavit was sworn, or this petition presented to me on the 23rd of May 1923, seeing that my decision on the 11th June 1923 was wholly based upon the assurances given me by Mr. Sultan Ahmed.

For these reasons I am not of opinion that this is a case which calls for the exercise of any inherent powers which this Court may possess, in order to set aside the order of the 11th June 1923 or the decree which followed thereon. As a question of law, I am further of opinion that the provisions of O. XLVII, r. 1 of the Code of Civil Procedure would not warrant me in allowing this application on the basis of an application for review of judgment. The case is in my opinion, obviously distinguishable from that reported as *Dalichand Shivram Marwadi* v. *Lotu Sakharam Pardhi* (1) (?). The Calcutta High Court has held that, where the attention of a Court is invited to the fact that some fraud has been practised upon a party in connection with a petition of compromise which has been accepted by a Court in which a suit was pending, that Court may apply the provisions of O. XLVII, r. 1 to set aside the order accepting the compromise, if satisfied that the alleged fraud has been practised. I cannot find any allegations of fraud in the affidavit before me. There are allegations which go far beyond the mere assertion that the plaintiff's assent to the compromise or withdrawal of his suit was obtained by undue influence. They are, as I have noted, assertions that the said compromise was obtained by the wrongful confinement of the plaintiff, by criminal intimidation and by extortion. Those assertions I distrust and I have given reasons for doing so sufficient to warrant me in taking no action upon the affidavit which contains them. Even in cases where fraud has been alleged, with that definiteness and fulness of specification which the law requires, the decisions of the Calcutta High Court which have been laid before me in argument, while asserting jurisdiction on the part of a Court to take up a petition like the one before me as a petition for review, on the strength of the words, "or for any other sufficient reason" in the aforesaid rule, express the opinion that the matter is one which should ordinarily be litigated in a separate suit. My own opinion is that the words, "or for any other sufficient reason," must be taken to refer to something *ejusdem generis* with the words that precede. My attention has been drawn to one case, not to be found in the authorised Law Reports, in which the Madras High Court held that a review of judgment could be granted in a case of fraud, where the circumstances were such that the Court could bring the case under the earlier provisions of O. XLVII, r. 1 of the Civil Procedure Code, by holding that the application for review was based upon the discovery of new and important matter. In so far as the affidavit laid before me in support of this application purports to refer to any new or important matter supposed to have come to the knowledge of the plaintiff since the 11th

(1) 55 Ind. Cas. 616; 44 B. 405 at p. 408; 22 Bom. L. R. 136 (?).

June 1923, I disbelieve any allegations to this effect, principally by reason of the confidence which I feel in accepting the assurances given me on that date by Mr. Sultan Ahmed. For these reasons I reject this application.

Z. K. *Application rejected.*

MADRAS HIGH COURT.

SECOND CIVIL APPEALS No. 1104 AND 1231 OF 1921.

April 14, 1924.

Present :—Mr. Justice Madhavan Nair.

GUNTAKA VENKATADRI—DEFENDANT No. 2—APPELLANT IN S. A. No. 1104 OF 1921

GUNTAKA KOTIREDDI—DEFENDANTS Nos. 3 TO 5—APPELLANTS IN S. A. No. 1231 OF 1921

versus

BATULA SUBBAREDDI—PLAINTIFF—RESPONEENT IN BOTH.

Hindu Law—Widow—Surrender.

A Hindu widow can renounce the estate in favour of the nearest reversioner and, by a voluntary act, efface herself from the succession as effectively as if she had then died. This voluntary self-effacement, sometimes referred to as a surrender and sometimes as a relinquishment or abandonment of her rights may be effected by any process having that effect, provided there is a *bona fide* and total renunciation of the widow's right to hold the property. [p. 1026, col. 1.]

Bhagwat Koer v. *Dhanukdari Prashad Singh*, 53 Ind. Cas. 347; 47 C. 466 at p. 483; 37 M. L. J. 513; 17 A. L. J. 1036; (1919) M. W. N. 860; 1 P. L. T. 1; 2 U. P. L. R. (P. C.) 27; 46 I. A. 259; 22 Bom. L. R. 477; 24 C. W. N. 274; 12 L. W. 105 (P. C.), relied on.

Second appeal against the decree of the Court of the Subordinate Judge, Masulipatam, in Appeal No. 85 of 1920, (A. S. No. 279 of 1920 on the file of the District Court, Kistna), preferred against the decree of the Court of the Additional District Munsif, Godaveri, in O. S. No. 332 of 1919, (O. S. No. 6 of 1919 on the file of the Court of the Principal District Munsif, Gudivada).

Mr. *K. Kameswara Rao*, for the Appellant in S. A. No. 1104 of 1921.

Mr. *A. Krishnaswami Iyer*, for the Appellant in S. A. No. 1231 of 1921.

Mr. *K. Bhashyam Iyengar*, for the Respondent in both appeals.

JUDGMENT.—The defendants who are the alienees from the first defendant the widow of the deceased Rammana, are the appellants in these two connected second appeals. The plaintiff's suit is for the recovery of one half of the properties of his maternal grandfather, Venkatareddi, on the ground that the compromise entered into in Original Suit No. 193 of 1888 by his mother as his guardian with the first defendant is unlawful and not binding on him. Venkatareddi died in 1876 and his widow died in 1888. Their only daughter Appamma, the mother of the plaintiff, died in 1907, Appamma's elder son Rammanna died in 1887 leaving a widow Achamma, the present first defendant. In 1888 Achamma instituted a suit for the recovery of the properties of Venkatareddi alleging that her husband Ramanna had been adopted by Venkatareddi. The defendant in the suit was present plaintiff who was a minor represented by his mother Appamma as guardian. The suit ended in a compromise by which the present first defendant Achamma, the plaintiff in that suit, got half of the properties of Venkatareddi and half of the ancestral properties of her husband, and the other half was allotted to the present plaintiff. It is this compromise that is attacked by the plaintiff as not binding on him.

The lower Appellate Court holding that the compromise does not amount to a *bona fide* settlement of doubtful claims and also that Appamma's conduct in connection with the compromise does not amount to a surrender of her life-estate, came to the conclusion that it was not valid and binding on the plaintiff and gave him a decree for possession of the properties. I agree with the Subordinate Judge as regards both the grounds on which his decision is based. I do not think that the case of adoption set up by the present first defendant in Original Suit No. 193 of 1888 was a

strong one. One ground in support of it that is put forward was the transfer of *patta* to Ramanna's name in the mutation proceedings of 1881. It is to be observed that this transfer took place five years after the death of Venkatareddi and the adoption was not put forward as a ground for the transfer of *pattas* (See Exhibits III and IV series). Further, in some of these documents the transferee's name is described as Battula Ramanna, "Battula" being the name of Ramanna's natural family. Achamma described herself as the widow of Battula Ramanna. If Ramanna had been really adopted, he would have been referred to by the house name of Venkatareddi which was "Bommareddi." The only ground in support of the adoption that could have been put forward, so far as one could see from the materials on record, was the transfer of *patta* effected in the circumstances already mentioned. The case of adoption does not appear to have been so strong as to cause serious apprehension in the mind of the mother who was the guardian of the present plaintiff in that suit. I, therefore, agree with the Subordinate Judge in thinking that the compromise does not amount to a *bona fide* settlement of doubtful claims.

We have next to consider whether Appamma's conduct in connection with the compromise amounted to a surrender of her life-estate. As pointed out in *Bhagwat Koer* v. *Dhunkdari Prashad Singh* (1) it is no doubt true that "a Hindu widow can renounce the estate in favour of the nearest reversioner, and by a voluntary act, efface herself from the succession as effectively as if she had then died"; and "this voluntary self-effacement, sometimes referred to as a surrender and sometimes as a relinquishment or abandonment of her rights may be effected by any process having that effect, provided that there is a *bona fide* and total renunciation of the widow's right to hold the property." Though there was no formal surrender by the widow of her estate in the case referred to, as pointed out by their Lordships of the Privy Council, there was an express agreement binding upon the widow that for considerations which appeared to be sufficient she would have abandoned the claim. It is to be noticed that in the case before us there is no act of surrender by the widow. The question is whether such a surrender can be inferred from the conduct in connection with the case. Appamma was not a party to the suit in her personal capacity as representing Venkatareddi's estate. The defendant in the suit was her minor son, the present plaintiff. She denied the adoption and contended that her elder son the deceased husband of the present first defendant acquired no interest in the properties of Venkatareddi, Venkatareddi's heirs being his widow, herself and her son. The suit was compromised and the plaintiff thereby got one half of Venkatareddi's properties. I do not think that the inference made by the Subordinate Judge in the circumstances of the case that the conduct of Appamma in connection with the compromise cannot be considered to amount to a surrender on her life-estate is wrong.

I, therefore, dismiss these second appeals with costs.

V. N. V.

K. S. D. *Appeals dismissed.*

(1) 53 Ind. Cas. 347; 47 C. 466 at p. 483; 37 M. L. J. 513; 17 A. L. J. 1036; (1919) M. W. N. 860; 1 P. L. T. 1; 2 U. P. L. R. (P. C.) 27; 46 I. A. 259; 22 Bom. L. R. 477; 24 C. W. N. 274; 12 L. W. 105 (P. C.).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1618 OF 1922.

July 18, 1924.

Present :—Mr. Justice Mukerji and Mr. Justice Dalal.

SUKURWA—DEFENDANT—APPELLANT

versus

Sheikh NAZIR AHMAD—PLAINTIFF—RESPONDENT.

U. P. Land Revenue Act (III of 1901), ss. 48, 49,

SUKURWA *v.* NAZIR AHMAD.

56, 86, 230—Power of recording cesses—Assistant Record Officer, when can make record—Cess recorded by Settlement Officer, when recoverable—Sanction of settlement operations, whether sufficient.

The power of recording cesses conferred on the Record Officer by section 56 of the U. P. Land Revenue Act can be exercised by the Assistant Record Officer under section 230, subject to the control of the Record Officer.

Where there is no revision of records notified by the Local Government as required by section 48 of the U. P. Land Revenue Act and no Record Officer has been appointed by it under section 49, the Assistant Record Officer has no authority to make any record such as would make a cess valid under the provisions of section 56 of the Act.

A mere sanction of a settlement operation of a district does not include a definite sanction as is required by section 86 of the U. P. Land Revenue Act for the preparation of a list of cesses in accordance with village custom.

Second appeal from a decree of the District Judge, Pilibhit, dated the 1st July 1922.

Mr. *Iqbal Ahmad*, for the Appellant.

Sir *Tej Bahadur Sapru* and Dr. *K. N. Katju*, for the Resopondent.

JUDGMENT.—This is a second appeal from a decree passed by the District Judge of Pilibhit reversing a decree of the Munsif of that place. There are several connected appeals and this order will govern them all. The suit was filed in the Civil Court for the recovery of cesses by a *zemindar* from tenants. Every suit referred to a separate tenant. It was said that these cesses were customary dues payable by these agricultural tenants in addition to rent and that the *zemindar* was entitled to recover them under section 56 or 86 of the Land Revenue Act. The appellant's Counsel argued that cesses could be recovered only if they were held to be payable under those two sections and not otherwise, and his contention was that the cesses recorded by the Assistant Record Officer or Assistant Settlement Officer, Munshi Harbishan Dayal, did not comply with the provisions of either section. We shall examine the provisions of each section separately.

Taking up section 56 first—cesses which are payable by tenants on account of the occupation of land and other cesses shall be recorded by the Record Officer under the appellations by which they are known and no cesses not so recorded shall be recoverable in any Civil or Revenue Court. It was stated on behalf of the plaintiff that these cesses were recorded by the Assistant Record Officer Munshi Harbishan Dayal in the *dasturdehi* prepared under his supervision. The beginning of Chapter IV, relating to revision of maps and records, first lays down in section 48 that if the Local Government thinks that, in any District or other local area, a general or partial revision of the records, or a re-survey, or both, should be made, it shall publish a Notification to that effect. In the present case no such Notification was published by the Local Government. The powers of an Assistant Record Officer are defined in section 50. The appointment of an Assistant Record Officer is directed in section 49 which gives the Local Government the power to appoint a Record Officer and as many Assistant Record Officers as it may seem fit. In the *Tahsil* of Pilibhit within which the lands held by the defendants, agricultural tenants, are situated no Record Officer was appointed in or about the year 1914. Munshi Harbishan Dayal was appointed as Assistant Record Officer. Under section 230 an Assistant Record Officer is granted all or any of the powers conferred by the Act on Record Officers subject to the control of the Record Officer. It is apparent that when no Record Officer was appointed the Assistant Record Officer cannot exercise any power conferred on the Record Officer. Section 56 grants the powers of recording cesses to a Record Officer only, and an Assistant Record Officer can exercise that power under section 230, subject to the control of the Record Officer. Under the circumstances two facts are wanting here. There was no revision of records notified by the Local Government and no Record Officer was appointed by it. Munshi Harbishan Dayal had, therefore no authority to make any record such, as would make a cess valid under the provisions of section 56 of the Land Revenue Act.

Next we turn to the provisions of section 86. Clause 1 of that section enacts

that the list of all cesses other than those referred to in section 56 levied in accordance with village custom shall, if generally or specially sanctioned by the Local Government, be recorded by the Settlement Officer, and no cesses not so recorded shall be recoverable in any Civil or Revenue Court. Munshi Harbishan Dayal was appointed Assistant Settlement Officer, and there was also a Settlement Officer for the *Tahsil* of Pilibhit. There was also a Notification declaring this particular *Tahsil* to be under Settlement. The general or special sanction of the Local Government is, however, wanting in this case. The learned Counsel for the respondent argued that the general sanction of settlement operations included a general sanction of all these. We are not prepared to hold that the sanction of a settlement operation would include such a definite sanction as is required by section 86. In our opinion these cesses, if recorded by Munshi Harbishan Dayal as Assistant Settlement Officer with the powers of a Settlement Officer under section 231, were neither generally or specially sanctioned by the Local Government. The cess is, therefore, not recoverable under section 86 either.

A similar opinion to the one we are giving here was held by a Bench of this Court in Second Appeal No. 159 of 1917. In that case the provisions of section 86 only were considered. The relevant part of the judgment runs as follws :—

"We consider that it lay upon the plaintiff to show that the cesses he claimed had been generally or specially sanctioned by the Local Government..... It is contended that inasmuch as these cesses were recorded in the Settlement they must have been taken to have been generally sanctioned. We cannot agree with this contention. We hold that no sanction was ever given as contemplated by section 86."

The position here is the same. The case to which we have referred related to land situated in Pargana Pilibhit as here.

In the result we decree this appeal and dismiss the plaintiff's suit with costs of all the Courts including Counsel's fees here on the higher scale. The objection by way of appeal requires no order as the appeal has been decreed.

K. S. D. *Appeal decreed.*

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 260 OF 1923.
February 14, 1924.
Present:—Mr. Justice Phillips and Mr. Justice Odgers.

S. S. BALAKRISHNA AIYAR AND ANOTHER—PETITIONERS—APPELLANTS
versus
MUTHAMMAL—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. IX, r. 13, O. XVII, r. 3—Vakil stating "no instructions", effect of—Appearance—Decree on merits—Remedy.

The mere fact that a Vakil says he has no instructions, after he has appeared for the party at many hearings, does not mean that he withdraws from the undertaking in his *Vakalatnama*, unless it is so stated. [p. 1029, col. 2.]

Where after many hearings, the Vakil for the defendants stated on the final hearing day that he had no instructions, but the Court disposed of the case on the merits, on an application to set aside the decree as *ex parte* :

Held, (1) that there was an appearance and O. XVII, r. 3 of the Civil Procedure Code applied to the case ; [*ibid.*]

(2) that the defendant ought to have filed an appeal against the decree ; [*ibid.*]

Gundan v. *Kamakhan Rama Chetti*, 33 Ind. Cas. 660; 3 L. W. 524 and *Viswanatha Asari* v. *Sami Asari*, 73 Ind. Cas. 982; 18 L. W. 209; (1923) M. W. N. 802; (1924) A. I. R. (M.) 43, followed.

(3) that the filing of an application to set aside the decree as if it had been made under O. IX, r. 13 was wrong. [*ibid.*]

Appeal against the order, dated the 24th July 1923, of the Court of the Additional Subordinate Judge, Coimbatore, in I. A. No. 113 of 1923, in O. S. No. 2 of 1922.

Mr. *S. S. Ramachandra Iyer*, for the Respondents.—I take the preliminary objection that the appeal is incompetent.

The learned Sub-Judge has written out a judgment setting out the issues and

discussing the evidence and has, therefore, purported to proceed under O. XVII, r. 3, Civil Procedure Code, and not under r. 2. The petition itself was not, therefore, maintainable in the lower Court. The appellant must proceed by way of appeal against the decree itself and not apply to set aside the *ex parte* decree under r. 2. *Vide Gundan* v. *Kamakha Rama Chetti* (1), *Viswanatha Asari* v. *Sami Asari* (2) and *Akula Bakkayya* v. *Aluri Venkatanarasimham*, (3).

The mere fact that the Vakil who is in charge of the case reports "no instructions" when his application for adjournment is refused does not amount to default of appearance.

As to whether the decision is one under O. XVII, r. 3 or r. 2, the cases are clear that it is one under O. XVII, r. 3, if the Vakil does say "no instructions": *Akula Bakkayya* v. *Aluri Venkatanarasimham* (3), *Gundan* v. *Kamakha Rama Chetti* (1) and *Viswanatha Asari* v. *Sami Asari* (2). In fact *Patinhare Tarkatt Rama Mannadi* v. *Vellur Krishnan Menon* (4) lays down that the Court must proceed under section 158 of the Code of 1882.

The cases are also clear that the decision is one under O. XVII, r. 2, if the Vakil who applies for adjournment is one who appears only for asking for an adjournment: *Satish Chandra Mukerjee* v. *Ahara Prasad Mukerjee* (5).

In this case the Vakil has appeared in a number of hearings in the case from the beginning. There have been 15 adjournments and it is the same Vakil who applied for adjournment. Under the circumstances his stating "no instructions" cannot amount to "non-appearance."

Mr. *S. Krishnamurthi Iyer*, for the Appellant.—It is a case of no appearance and the decree is an *ex parte* decree. *Gundan* v. *Kamakha Rama Chetti* (1) and *Viswanatha Asari* v. *Sami Asari* (2) are not cases of the Vakil stating "no instructions": *Majeti Nagaratnam* v. *Pachigolla Ramayya* (6). The Court must proceed under O. XVII, r. 2. It is deemed to have proceeded under the section: *Prativdi Bhayankaram Pichamma* v. *Kamisetti Sreeramulu* (7) and *Chandramathi Ammal* v. *Narayanasami Iyer* (8).

The Court has to decide forthwith and on the materials then on record: *Ram Kishun Lal* v. *Jatadhari Lal* (9). It should not have taken evidence.

Mr. *S. S. Ramachandra Iyer* in reply:—*Chandramathi Ammal* v. *Narayanasami Iyer*, (8) is a case which has come upon appeal from the decree itself. *Akula Bakkayya* v. *Alure Venkatanarasimham* (3) is a case where the evidence was taken. "Forthwith" does not preclude the Court from taking evidence.

JUDGMENT.—The decree in Original Suit No. 138 of 1920 is one passed under O. XVII, r. 3 of the Code of Civil Procedure, as is clear from the judgment. The mere fact that the Vakil said he had no instructions after he had appeared for the parties at many hearings does not mean that he withdraws from the undertaking in his *vakalat* unless it is so stated. We must, therefore, hold that there was an appearance and O. XVII, r. 3 applies.

Appellant ought, therefore, to have filed an appeal against the decree: *Vide Patinhare Tarkatt Rama Mannadi* v. *Vellur Krishnan Menon* (4) and *Gundan* v. *Kamakha Rama Chetti* (1). The filing of an application to set aside the decree, as if it had been made under O. IX, r. 13, was, therefore, wrong as also the appeal from the order thereon. This appeal must, therefore, be dismissed with costs.

V. N. V.
K. S. D. *Appeal dismissed.*

(1) 33 Ind. Cas. 660; 3 L. W. 524.
(2) 73 Ind. Cas. 982; 18 L. W. 209; (1923) M. W. N. 802; (1924) A. I. R. (M.) 43.
(3) 39 Ind. Cas. 948; 33 M. L. J. 553; (1917) M. W. N. 565.
(4) 26 M. 267.
(5) 34 C. 403; 5 C. L. J. 247; 2 M. L. T. 123; 11 C. W. N. 329 (F. B.).
(6) 27 Ind. Cas. 882; 2 L. W. 105.
(7) 43 Ind. Cas. 566; 41 M. 286; 34 M. L. J. 24; 23 M. L. T. 1; (1918) M. W. N. 92 (F. B.).
(8) 5 Ind. Cas. 23; 41 M. 241; 19 M. L. J. 760; 7 M. L. T. 369.
(9) 46 Ind. Cas. 488; 3 P. L. J. 481; (1918) Pat. 236.

KISHORI MOHAN *v.* CHHANGA LAL.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 168 OF 1923.

July 22, 1924.

Present:—Mr. Justice Mukerji and Mr. Justice Dalal.

KISHORI MOHAN—DEFENDANT—APPLICANT

versus

CHHANGA LAL—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 152—Clerical mistake—Party, whether entitled to correction—Court, discretion of.

Under section 152 of the Civil Procedure Code, there is no right in any party to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of the Court and the discretion has to be exercised in view of the peculiar facts of each case. [p. 1031, col. 1.]

Civil revision against an order of the District Judge, Farrukhabad, dated the 17th September 1923.

Mr. *Durga Prasad*, for the Applicant.

Mr. *Baleshwari Prasad*, for the Opposite Party.

JUDGMENT.—This application in revision came before one of the learned Judges of this Court and he referred the case to a Bench of two Judges, being of opinion that there was somewhat of a conflict between two cases decided by this Court, *viz*:—

Balgobind Rai v. *Sheoraj Rai* (1).

Sahdeo Gir v. *Deo Dutt Misir* (2).

We shall consider whether there is really any conflict between the two cases or not in the course of this judgment. But it will be necessary to state the facts.

It appears that the applicant before us was a defendant in a suit for sale, he having been treated as a subsequent purchaser. The Subordinate Judge passed a decree for sale on the 10th of December 1920. The decree that was framed was incorrect in so far as it ordered the payment of a larger sum than was really due on a proper calculation of the amount payable according to the judgment of the Subordinate Judge. The applicant submitted to the decree although it ordered him to pay a sum larger than was really due under the judgment of the Subordinate Judge. The plaintiff was dissatisfied with the decree as he claimed a larger amount. He filed an appeal and the learned District Judge dismissed the appeal on the 12th of July 1921. A final decree for sale followed on the 6th of May 1922. On the 9th of March 1923 an execution of the final decree for sale was taken out by the plaintiff and the defendant-applicant paid up the amount for which the decree was executed and then made an application to the learned Subordinate Judge asking him to correct his decree. This application was made on the 21st of March 1923. The opposite party the plaintiff took objection to the hearing of this application on the ground that the Court of the District Judge was the only Court which could correct the decree if any correction was needed. The applicant thereupon made an application to the learned District Judge on the 21st of July 1923. On the 8th of September 1923 the learned Judge passed the order which is sought to be revised. He held that there ought to be some limit to a party's making an application for correction of a decree and he refused to grant the application although he thought that there was some error in the decree of the learned Subordinate Judge.

In this Court in the case of *Balgovind Rai* v. *Sheoraj Rai* (1) there was an application in revision against the order of a District Judge who amended a decree which he had affirmed in appeal and which was passed by a Munsif. In the circumstances of that case this Court held that, the District Judge had no jurisdiction to correct the error in the decree of the Munsif. It will be noticed that the decree of the Munsif had been passed under the old Code and the language employed by their Lordships who heard the application shows that they were considering the provisions of section 206 of the Code of Civil Procedure. It is true that section 206 of the old Code is not specifically mentioned, but the learned Judges used the following language :—

"It was necessary for the applicant to show not a variance between the judgment of the Munsif and the decree of the Munsif, but a variance between the judg-

(1) 46 Ind. Cas. 376; 16 A. L. J. 451

(2) 29 Ind. Cas. 50; 37 A. 323; 13 A. L. J. 449.

TUKARAM *v.* GANPAT.

ment of the District Judge and the decree of the District Judge".

Clearly, therefore, they were not considering the language of section 152 of the present Code of the Civil Procedure. In the case of *Sahdeo Gir* v. *Deo Dutt Misir* (2), already referred to, this Court had no hesitation in ordering the correction of a judgment and a decree of a Subordinate Court. There was, however, no appeal to any Appellate Court and this Court was concerned only with one decree and one judgment. In our opinion there is really no conflict between the two cases mentioned.

Coming to the present case, from the statement of facts already made, it would appear that the applicant has been guilty of laches to a very great extent. He did not examine the decree that was passed against him in the first instance. There was an appeal and he was a party to that appeal. He did not bring the fact to the notice of the Appellate Court that the decree of the Court below had been framed for a sum in excess of what was really due under the judgment of that Court. When the final decree was passed he did not bestir himself. When the decree was executed he quietly paid up and then discovered that he had paid a sum larger than what was really due by him. Under section 152 of the Civil Procedure Code, there is no right in any party to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of the Court and the discretion has to be exercised in view of the peculiar facts of each case. In this case the District Judge did exercise that discretion and was of opinion that in view of the peculiar facts of the case he should not correct the mistake which was after all for a sum which was about one-seventh of the total amount payable. We cannot say, sitting in revision, that the learned Judge failed to exercise his jurisdiction or that in the exercise of his jurisdiction he acted illegally or with material irregularity.

We, therefore, dismiss the application with costs which will include Counsel's fees in this Court on the higher scale.

K. S. D. *Application dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 120 OF 1923.

July 25, 1924.

Present:—Mr. Prideaux, A. J. C.

TUKARAM—PLAINTIFF—APPELLANT

versus

GANPAT—DEFENDANT—RESPONDENT.

Landlord and tenant—Tenancy for fixed period—Holding over—Adverse possession.

Where a tenancy is for a fixed period and the tenant holds over for 12 years after termination of the tenancy (no new tenancy being created) the landlord's remedy to recover possession is barred and the tenant becomes absolute and complete owner of the property. [p. 1032, col. 1.]

Pusa Mal v. *Makdum Bakhsh*, 3 Ind. Cas. 566; 31 A. 514; 6 A. L. J. 584, *Chandri* v. *Daji Bhau*, 24 B. 504; 2 Bom. L. R. 491; 12 Ind. Dec. (N. S.) 867 and *Bisheshar Nath* v. *Kundan*, 75 Ind. Cas. 454; 44 A. 583; 20 A. L. J. 593; (1922) A. I. R. (A.) 318, followed.

Adimulam v. *Pir Ravuthan*, 8 M. 424; 9 Ind. Jur. 309; 3 Ind. Dec. (N. S.) 291, not followed.

Appeal against the decree of the Additional District Judge, Wardha, dated the 1st December 1922, in Civil Appeal No. 97 of 1922.

Mr. *M. B. Niyogi*, for the Appellant.

Mr. *M. K. Hardas*, for the Respondent.

JUDGMENT.—The case of the plaintiff who is a minor is that the *kotha* in suit is the ancestral property of his father and uncle. The latter let it out to the defendant at a rental of 4 annas per mensem. There was a written lease and it expired on 9th April 1910, and the suit was filed on the 20th of April 1922.

The Courts below have found that the *kotha* in dispute belonged to the plaintiff's father and uncle, that it was leased to the defendant who executed a rent-note Exhibit P-1 in favour of the plaintiff's father and uncle in 1319 *Fasli*, and the defendant had continued in possession as a tenant on sufferance from 10th April 1919. The lower Appellate Court finds that Art. 139 of the Limitation Act bars the suit. It has, therefore, dismissed the case.

It is argued for the plaintiff-appellant here that as the tenancy was for a fixed period, the defendant on the expiration of the term held over as tenant at sufference, *i. e.*, one who comes in by right and holds over without right, and

that time under Art. 139 does not run against the lessor until such tenancy at sufferance has been determined. That view of the law was laid down in *Adimulam* v. *Pir Ravuthan* (1), a case of 1885. But since that date the trend of authority is to the effect that where the tenancy is for a fixed term, and the tenant holds over for 12 years after termination of the tenancy (no new tenancy being created) the landlord is barred, and the tenant becomes the absolute and complete owner of the property: See *Pusa Mal* v. *Makdum Bakhsh* (2), *Chandri* v. *Daji Bhau* (3) and *Bisheshar Nath* v. *Kundan* (4). It is unnecessary to quote further cases. The lower Appellate Court's view of the law governing the case is correct, and the suit has been rightly dismissed.

The result is that this appeal fails and is dismissed with costs. Appellant will pay respondent's costs.

K. S. D. *Appeal dismissed.*

(1) 8 M. 424; 9 Ind. Jur. 309; 3 Ind. Dec. (N. S.) 291.

(2) 3 Ind. Cas. 566; 31 A. 514; 6 A. L. J. 584.

(3) 24 B. 504; 2 Bom. L. R. 491; 12 Ind. Dec. (N. S.) 867.

(4) 75 Ind. Cas. 454; 44 A. 583; 20 A. L. J. 593; (1922) A. I. R. (A.) 318.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 65 OF 1923.

July 11, 1924.

Present:—Mr. Justice Kanhaiya Lal and Mr. Justice Mukerji.

HARIHAR PRASAD—DEFENDANT—APPELLANT

versus

RAM DAUR (PLAINTIFF) AND *Musammat* PARTAPI—DEFENDANT—RESPONDENTS.

Hindu Law — Mitakshara—Succession—"Sons", meaning of—Grandson of father's sister, whether bandhu.

The word 'sons' used in the rule of Mitakshara as to the succession of *bandhus*, is used in a generic sense and includes a grandson. [p. 1033, col. 2.]

Adit Narayan Singh v. *Mahabir Prasad Tiwari*, 60 Ind. Cas. 251; 48 I. A. 86 at p. 95; 40 M. L. J. 270; (1921) M. W. N. 153; 19 A. L. J. 208; 2 P. L. T. 97; 33 C. L. J. 263; 29 M. L. T. 240; 6 P. L. J. 140; 23 Bom. L. R. 692; 25 C. W. N. 842; 14 L. W. 20 (P. C.), followed.

A grandson of father's sister is a *bandhu* and as such within the heritable line. [p. 1035, col. 1.]

Ramchandra Martand Waikar v. *Vinayak Venkatesh Kothekar*, 25 Ind. Cas. 290; 41 I. A. 290; 18 C. W. N. 1154; 27 M. L. J. 333; 1 L. W. 831; 10 N. L. R. 112; 16 M. L. T. 447; (1914) M. W. N. 835; 16 Bom. L. R. 863; 12 A. L. J. 1281; 20 C. L. J. 573; 42 C. 384 (P. C.), distinguished.

Per *Kanhaiya Lal, J.*—*Bandhus* are *sapindas* though of a different *gotra*. [p. 1033, col. 2.]

A *bandhu* must, in order to be heritable in a female line, fall within the fifth degree from the common male ancestor and must be so related to the deceased person that they are mutually *sapindas* of one another. [p. 1035, col. 1.]

Per *Mukerji, J.*—Where a *bandhu* is related to the deceased through his father seven degrees have to be counted and not five. It is only when the claimant is connected with the deceased through his mother that five degrees have to be counted. [p. 1036, col. 1.]

Shib Sahai v. *Saraswati*, 30 Ind. Cas. 903; 13 A. L. J. 786; 37 A. 583, followed.

Second appeal from a decree of the District Judge of Benares, dated the 10th November 1922.

Mr. *Harnandan Prasad*, for the Appellant.

Dr. *N. C. Vaish*, for the Respondent.

JUDGMENT.

Kanhaiya Lal, J.—The dispute in this appeal relates to fixed-rate tenancy belonging to Sumera, who died leaving a widow *Musammat* Partapi. The plaintiff claims to be the nearest heir of Sumera deceased. He denied that *Musammat* Partapi was lawfully married to Sumera; but the Courts below found on that point against him. The fixed-rate tenancy in question has been sold by *Musammat* Partapi to Harihar Prasad, for a consideration of Rs. 300 on the 4th July 1919, out of which only Rs. 50 have been found to have been taken for legal necessity.

The main question for consideration in this appeal is whether the plaintiff is the nearest reversionary heir of Sumera deceased, and as such entitled to impeach the validity of the sale. The Court of first instance found against him, but the lower Appellate Court held, relying on the pedigree proved in the case and on an admission of

the contesting defendant himself in a previous suit, that the plaintiff was the nearest *bandhu* or reversionary heir of the deceased and entitled as such to protect his reversionary right.

It appears from the pedigree that the common ancestor of the plaintiff and Sumera deceased was Kashi, who had a son, Chikuri *alias* Hanuman, and a daughter *Musammat* Budhia. Sumer was the son of Hanuman. The plaintiff is the son of Gangu, the son of *Musammat* Budhia. There is no nearer kinsman, agnate or cognate, shown to be alive in the family. The rule as to the succession of *bandhus*, laid down in the Mitakshara, (Chapter II, section 6, paragraph 1) runs as follows:—

"On the failure of agnates, the cognates are heirs. Cognates are of three kinds, related to the person himself, to his father, or to his mother, as is declared by the following text:—

"The sons of his own father's sister, the sons of his own mother's sister, and the sons of his maternal uncle, must be considered as his cognate kindred. The sons of his father, paternal aunt, the sons of his father's maternal aunt and the sons of his father's maternal uncle must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt; and the sons of his mother's maternal uncle must be reckoned his mother's cognate kindred."

Here by reason of near affinity the cognate kindred of the deceased himself are his successors in the first instance; on failure of them his father's cognate kindred, or if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended.

The text above quoted is variously attributed to *Vriddha Shatatap* or to *Baudhayana*. It defines and illustrates the different classes of *bandhus* who are capable of inheriting. It was not cited by the author of the Mitakshara for the purpose of giving an exhaustive enumeration of the *bandhus* entitled to inherit, but only as an authority for or illustration of his proposition that there were three classes of *bandhus*, namely *atma bandhus* or those related to the person himself, *pitri bandhus* or those related through his father, and *matri bandhus* or those related through his mother. Mitra Misra, the author of the Viramitrodaya, points out that the maternal uncle is recognized as an heir, but he is not mentioned there, and it would be anomalous, if his sons are included and he is not included. Balam Bhatta, a lady commentator on the Mitakshara, suggests that the words "sons" includes daughters, and that the sisters and their sons are not excluded.

In *Girdhari Lall Roy* v. *The Government of Bengal* (1) their Lordships of the Privy Council accordingly held that the enumeration of *bandhus* in the text is only illustrative and not exhaustive; and in *Buddha Singh* v. *Laltu Singh* (2) and *Adit Narayan Singh* v. *Mahabir Prasad Tiwari* (3) their Lordships declared that the word "sons" used there is used in a generic sense and includes a grandson.

Manu declares (IX, 187) that the inheritance of a deceased *sapinda* goes to the nearest of the *sapindas*. He does not mention *bandhus* specifically. But later writers have pointed out that *bandhus* are also *sapindas*, though of a different *gotra*. The *sapinda* relationship arises according to the Mitakshara between people who are connected by particles of one body; but as such a relationship might exist in some remote degree in a very wide circle, the author of the Mitakshara has discussed the limits within which such *sapinda* relationship exists in his dissertation on marriage, to which similar considerations are applicable.

(1) 10 W. R. P. C. 31; 12 M. I. A. 448; 1 B. L. R. P. C. 44; 2 Suth. P. C. J. 159; 2 Sar. P. C. J. 382; 20 E. R. 408; 3 Mad. Jur. 386; 1 Ind. Dec. (N. S.) 28 (P. C.).

(2) 30 Ind. Cas. 529; 42 I. A. 208; 29 M. L. J. 431; 2 L. W. 897; 13 A. L. J. 1007; 18 M. L. T. 409; 17 Bom. L. R. 1022; 20 C. W. N. 1; 22 C. L. J. 481; (1915) M. W. N. 772; 37 A. 604 (P. C.).

(3) 60 Ind. Cas. 251; 48 I. A. 86 at p. 95; 40 M. L. J. 270; (1921) M. W. N. 153; 19 A. L. J. 208; 2 P. L. T. 97; 33 C. L. J. 263; 29 M. L. T. 240; 6 P. L. J. 140; 23 Bom. L. R. 692; 25 C. W. N. 842; 14 L. W. 20 (P. C.).

HARIHAR PRASAD *v.* RAM DAUR.

Commenting on the text of Yagnyavalkya (I, 52-53), requiring that a man should marry a girl who is not his *sapinda*, that is within seven and five degrees from the father and mother respectively the author of the Mitakshara says:—

"She is called his *sapinda* who has (particles of) the body (of some ancestor, etc.) in common (with him). Non-*sapinda* means not his *sapinda*. Such a one (he should marry). The *sapinda* relationship arises between two people through their being connected by particles of one body. Thus the son stands in *sapinda* relationship to his father, because of particles of his father's body having entered (his). In like manner (stands the grandson in *sapinda* relationship) to his paternal grandfather and the rest, because through his father particles of his (grandfather's) body have entered (into his own). Just so (is the son a *sapinda* relation of) his mother, because particles of his mother's body have entered (into his). Likewise the grandson stands in *sapinda* relationship to his maternal grandfather and the rest through his mother. So also (is the nephew) a *sapinda* relation of his maternal aunts and uncles and the rest, because particles of the same body (the paternal grandfather) have entered (into his and theirs); likewise does he stand in (*sapinda* relationship) with paternal uncles and aunts and the rest. So also the wife and the husband (are *sapinda* relations to each other) because they together beget one body (the son). In like manner brother's wives also (are *sapinda* relations to each other) because they produce one body (the son) with those (severally) who have sprung from one body. Therefore one ought to know that wherever the word "*sapinda*" is used, there exists (between the persons to whom it is applied) a connection with one body either immediately or by descent."

Vignyaneshvara then proceeds to refute the theory that the *sapinda* relationship with maternal relations rests on the connection arising from obsequil offerings, the exception as regards obitual impurity being otherwise explicable, and referring to the passage in the text "*beyond the fifth and the seventh from the mother's side and the father's side respectively*" he observes:—

"On the mother's side in the mother's line, after the fifth, on the father's side in the father's line, after the seventh (ancestor), the *sapinda* relationship ceases. These two latter words must be understood: and, therefore, the word "*sapinda*," which on account of its (etymological) import, (connected by having in common) particles (of one body) would apply to all men, is restricted in its signification, just as the word *pankaja* (which etymologically means "growing in the mud" and therefore would apply to all plants growing in the mud, designates the lotus only) and the like, and thus the sixth descendant beginning with the son and one's self (counted) as the seventh (in each case) are *sapinda* relations."

The *sapinda* relationship thus ceases beyond the fifth ancestor from the mother's side and beyoud the seventh from the father's side. The plaintiff is the fourth in descent from the common ancestor, namely the grandfather of Sumer, and as the nearest reversionary heir at the present time he is entitled to protect his reversionary right.

The learned Counsel for the appellant relies on the decision in *Ramchandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (4) but the general conclusion there arrived at after a close examination of the authorities was

(*a*) that the *sapinda* relationship on which the heritable right of collaterals was founded ceased in the case of *bhinna gotra sapindas* with the fifth degree from the common ancestor; and

(*b*) that in order to entitle a man to succeed to the inheritance of another he must be so related to the latter that they would be *sapindas* of each other.

But the common ancestor in the

(4) 25 Ind. Cas. 290; 41 I. A. 290; 18 C. W. N. 1154; 27 M. L. J. 333; 1 L. W. 831; 10 N. L. R. 112; 16 M. L. T. 447; (1914) M. W. N. 835; 16 Bom. L. R. 863; 12 A. L. J. 1281; 20 C. L. J. 573; 42 C. 384 (P. C.).

present instance was Kashi and the plaintiff is only fourth in degree from him. In *Adit Narayan Singh* v. *Mahabir Prasad Tiwari* (3) the mother's sister's grandson was given preference to the son of the mother's paternal aunt; and the principle there laid down was that under the Mitakshara in preferring the nearer to the more remote class of *bandhus*, reliance was not to be placed on the individual propinquity or on the efficacy of offerings to a deceased person, but the rule was that a *bandhu* must, in order to be heritable in a female line, fall within the fifth degree from the common male ancestor and must be so related to the deceased person that they were mutually *sapindas* of one another, *i. e., where the Mitakshara applies persons connected by particles of one body.*

Within the agnatic circle, *sapindaship* is always mutual. But among cognates or *bandhus* the question of mutuality of *sapinda* relationship is by no means easy of solution, specially where several females intervene, unless the principle of religious benefit, which the Mitakshara seeks to exclude, is introduced. But as regards the grandson of the father's sister, there would be a common ancestor near enough to whom both he and the deceased, or one in the absence of the other, may have offered oblations, for Manu (IX, 186) says:—

"To three (ancestors) must water be given (at "their obsequies): for three is the funeral cake ordained: the fourth (in descent) is the giver (of these oblations); the fifth has no concern with them."

Professor Rajkumar Sarvadhikari, applying the principle of religious benefit as a test of mutuality treats the father's sister's grandson as within the heritable line (Sarvadhikari's Hindu Law, 2nd Edition, page 637). Mr. Golap Chandra Sircar excludes the principle of religious benefit and taking affinity by *sapindaship* according to the Mitakshara Law as necessarily mutual includes him within the heritable line (Shastri's Hindu Law 4th Edition, pages 74 and 294).

The cross-objection as regards the extent of the legal necessity is futile.

The appeal and the cross-objection must, therefore, fail and are dismissed with costs including fees in this Court on the higher scale.

Mukerji, J.—This appeal arises out of a suit instituted by a person calling himself the next reversioner to the estate of one Sumer deceased to obtain a declaration that transfer of Sumer's property made by his wife *Musammat* Partapi to one Harihar Prasad was not made for legal necessity and is not binding to the reversioner for the time being on the death of *Musammat* Partapi.

The suit failed in the first instance, but it succeeded in the lower Appellate Court which found that the sale consideration was good and supported by legal necessity to the extent of Rs. 50.

The appeal is by the defendant and his contention is two-fold (1) the respondent, who claims as a *bandhu*, has failed to prove that there was no male agnate within fourteen degrees of Sumer living at the date of suit and the second is that under the Hindu Law the respondent is not a *bandhu* at all. The plaintiff-respondent Ram Daur has filed a cross-objection urging that no legal necessity had been established.

To take the last point first, it appears that on this point both the Courts were of the same opinion and they held that the sum of Rs. 50 having been borrowed originally by Sumer, his wife was justified in paying it off. This point, therefore, is decided against the plaintiff-respondent.

The first contention of the appellant has no weight. The learned District Judge finds that nobody has been able to even suggest that there is any closer relation than the plaintiff living. Indeed, in a former suit instituted by one Sheo Nandan, who is shown in the pedigree to be found in the plaint, the appellant pointed out the present plaintiff's father Gangu as nearer reversioner than Sheo Nandan. Both Sheo Nandan and Gangu claim through females and it is clear that if there had been a male agnate of Sumer living Gangu would

not have been pointed out as a nearer reversioner than Sheo Nandan.

On point No. 2, there can be no doubt that the plaintiff-respondent is a *bandhu* and is as such entitled to succeed to Sumer, if *Musammat* Partapi should now die. Among the *bandhus* expressly mentioned in the Mitakshara is a father's sister's son. It has been held by the Privy Council in the case of *Adit Narayan Singh* v. *Mahabir Prasad Tiwari* (3) that the word "sons" in the text includes grandsons. Thus by an express text of the law the plaintiff Ram Daur is a *bandhu* of the deceassed himself and as such is entitled to succeed. On behalf of the appellant we were pressed with the Privy Council case of *Ram Chandra Martand Waikar* v. *Vinayak Venkatesh Kothekar* (4). It was contended that their Lordships of the Privy Council had held that a *bandhu* in order to succeed must be within five degrees of the deceased counting both the deceased and the claimant. This contention, however, is not sound and the case is no authority for any such proposition. Where the claimant is related to the deceased through his father seven degrees have to be counted and not five. It is only when the claimant is connected with the deceased through his mother that five degrees have to be counted. This was held by this Court in the case of *Shib Sahai* v. *Saraswati* (5). In that case the claimant was 8th in degree and, therefore, lost his suit. The method of counting adopted in this case is open to objection. The counting is to be done from the common ancestor, as was held in the case of *Adit Narayan Singh* v. *Mahabir Prasad Tiwari* (3) by their Lordships of the Privy Council. Applying this test, the applicant is amply within five degrees from the common ancestor Kashi, and Sumer is well within seven degrees of the same person.

As for the test of mutuality, it also exists. For, I have already shown that Gangu the father of the claimant was the father's sister's son to the deceased and Sumer is Ram Daur's *pitribandhu*, being Gangu's maternal uncle's son.

Partapi, the transferor, has not been served with notice of the appeal, having been impleaded as a respondent. But this does not affect the appeal. I hold that the respondent was rightly successful.

I would dismiss both the appeal and the cross-objection.

By the Court.—The appeal and the cross-objection fail and are dismissed with costs including in this Court fees on the higher scale. The name of *Musammat* Partapi who has not been served will be removed from the record.

K. S. D.

Appeal and Cross-objection dismissed.

(5) 30 Ind. Cas. 903; 13 A. L. J. 786; 37 A. 588.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 302 OF 1923.

June 16, 1924.

Present:—Mr. Hallifax, A. J. C.

JODHRAJ MARWARI—APPLICANT

versus

BISANLAL—NON-APPLICANT.

Contract Act (IX of 1872), s. 23—Bail-bond—Agreement to indemnify surety—Forfeiture of bond—Suit to recover amount, whether competent.

Any agreement, whether express or implied, to indemnify a surety, who has given a bail-bond for the appearance of the principal, is void under section 23 of the Contract Act and if the bail is forfeited on account of the failure of the principal to appear, the surety cannot sue to recover the amount.

Sunder Singh v. *Kishen Chand*, 1 P. R. 1899; *Laxmanlal* v. *Mulshankar*, 32 B. 449; 10 Bom. L. R. 553, followed.

Fateh Singh v. *Sanwal Singh*, 1 A. 751; 1 Ind. Dec. (N. S.) 543, referred to.

Application for revision of the order of the Small Cause Court, Raipur, dated the 8th October 1923, in Small Cause Suit No. 404 of 1923.

Mr. *P. C. Dutt*, for the Applicant.

Mr. *B. V. Pradhan*, for the Non-Applicant.

ORDER.—The plaintiff Jodhraj, who applies for revision of the decree of the Small Cause Court dismissing his suit

was surety on a bond for Rs. 50 executed by the defendant for his appearance in a Criminal Court. The defendant failed to appear and the Magistrate called upon the plaintiff to show cause why the bail should not be forfeited. The plaintiff then spent a great deal of time and money in trying to prove that the defendant was prevented from appearing by a sudden access of pain in the stomach, which was untrue to his knowledge and could not anyhow have justified the failure to appear. The bail was forfeited and Jodhraj sued the defendant for the fifty rupees and all the money he had spent in trying to avoid paying it.

He cannot, of course, recover the money he spent in trying to avoid his liability by proving a falsehood, and the fact that he claimed it and still urges his claim to it illusrates the extent to which untruth and perjury in a Court of Law are regarded as quite the normal and proper course for a litigant. In regard to the Rs. 50 it also seems beyond doubt that even an express agreement to indemnify him in that matter would be void under section 23 of the Contract Act, the object of it being of such a nature that if permitted it would defeat the provisions of the Criminal Procedure Code; an implied agreement to that effect would, of course, be equally void.

Sureties on a bail-bond are required in order that the failure of the principal to appear may be at the peril of others besides himself, and the whole object of that provision is defeated if the principal and surety are allowed to relieve the latter of the peril and confine it to the former by an arrangement among themselves. It is true that under section 513 of the Criminal Procedure Code the principal may in most cases be allowed by the Court to deposit a sum of money in lieu of executing a bond, and this appears to have been urged in some of the published cases on the point as an instance of the law allowing the indemnifying of the surety by the principal. But the permission granted under that section cancels the demand for sureties; the deposit of money by the principal is accepted in lieu of his bond with sureties, and there is no surety to be indemnified.

That such an agreement is void under section 23 of the Contract Act was the view taken, for reasons stated at length, by a Full Bench of the Chief Court of the Punjab in *Sunder Singh* v. *Kishen Chand* (1) and more recently by the Bombay High Court in *Laxmanlal* v. *Mulshankar* (2). Both judgments referred to that of the Allahabad High Court in *Fateh Singh* v. *Sanwal Singh* (3) in which the slight difference of the facts gives added force to the reasoning as applied to those of the present cases. The application for revision is rejected and the applicant must pay all the costs, in which the Pleader's fee will be fifteen rupees.

K. S. D. *Revision rejected.*

(1) 1 P. R. 1899.
(2) 32 B. 449; 10 Bom. L. R. 553.
(3) 1 A. 751; 1 Ind. Dec. (N. S.) 543.

ALLAHABAD HIGH COURT.

EXECUTION SECOND CIVIL APPEAL No. 1476 OF 1924.

July 28, 1924.

Present :—Mr. Justice Kanhaiya Lal.

BISHNATH SINGH AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

BASDEO SINGH—DECREE-HOLDER—RESPONDENT.

Bundelkhand Land Alienation Act (U. P. Act II of 1903), s. 9 (3)—Mortgage by member of agricultural tribe—Decree—Reference to Collector, whether can be made.

The power to refer a case to the Collector under section 9, sub-section (3) of the Bundelkhand Land Alienation Act can be exercised at any stage, *i.e.*, either before a decree has been passed or made absolute. [p. 1038, col. 1.]

The claim can be referred even though it has nominally matured into a decree which has been since found to be unenforceable. [p. 1038, col. 2.]

Hanuman Prasad Narain Singh v. *Harakh Narain*, 58 Ind. Cas. 551; 42 A. 142; 1 U. P. L. R. (A.) 192; 18 A. L. J. 59, distinguished.

Sheo Pragash Singh v. *Radha Mohan Singh*, Second Appeal No. 1457 of 1920, followed.

Second appeal against the decree of the Judge of the Court of Small Causes exercising the powers of a Subordinate Judge, Allahabad, dated the 9th of August 1923.

RUPI v. SADASHEO.

Messrs. *Baleshwari Prasad* and *Anant Lal*, for the Appellants.

Mr. *S. Abu Ali*, for the Respondent.

JUDGMENT.—In a suit filed on foot of a mortgage effected by the appellants on the 13th May 1909 a preliminary decree for sale was passed on the 17th January 1918 which was made absolute on the 20th December 1919. The parties are members of an agricultural tribe.

When the decree was put under execution, an objection was filed by the judgment-debtors under section 16 of the Bundelkhand Land Alienation Act (U. P. Act II of 1903), saying that the mortgaged property could not be sold in execution of a decree. The Court upheld that objection. The decree-holder then asked the Court to take proceedings under section 9 of the said Act. That prayer was acceded to by the Court of first instance and the order of that Court was upheld by the lower Appellate Court.

The contention here is that no reference can be made under section 9 sub-section (3) of that Act after a decree has been made absolute. But that section contains no such limitation. All that it lays down is that if a suit is instituted in any Civil Court on a mortgage after the commencement of this Act by a member of an agricultural tribe, the Court shall, if it finds that the mortgage is enforceable, refer the case to the Collector with a view to the exercise of the power conferred by sub-sections (1) and (2) of section 9. This power can be exercised at any stage *i. e.*, either before a decree has been passed or made absolute, because under section 16 the decree in such a case cannot be enforced by the sale of the mortgaged property and must be left out of account, as if it had in effect never been passed. So long as the decree or mortgage subsists, the claim to recover the money or to enforce the mortgage also subsists: and a reference can be made to the Collector who can refuse or alter the terms of the mortgage so as to bring into accordance with the Act and make it conform to the limitation imposed thereby. The decision in *Hanuman Prasad Norain Singh* v. *Harakh Narain* (1) does not apply, because no reference under section 9 was there asked for. On the other hand the decision in *Sheo Pragash Singh* v. *Radha Mohan Singh* (A. S. No. 1457 of 1920) decided on the 18th July 1922 supports the conclusion that the claim can be referred to the Collector, though it had nominally matured into a decree which has been since found to be unenforceable.

The appeal, therefore, fails and is dismissed with costs including fees in this Court on the higher scale.

K. S. D. *Appeal dismissed.*

(1) 58 Ind. Cas. 551; 42 A. 142; 1 U. P. L. R. (A.) 192; 18 A. L. J. 59.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 28 OF 1922.

July 2, 1924.

Present:—Mr. Hallifax, A. J. C.

April 29, 1924.

Present:—Mr. Kotval, A. J. C., and Mr. Prideaux, A. J. C.

Musammat RUPI—PLAINTIFF—APPELLANT

versus

SADASHEO AND OTHERS—DEFENDANTS—RESPONDENTS.

C. P. Tenancy Act (I of 1920), s. 5—Absolute occupancy holding—Tenant, whether can bequeath interest—Statutes, interpretation of.

An absolute occupancy tenant is not empowered to bequeath any right in his holding.

Anandi Bai v. *Harlal Brahman*, 15 C. P. L. R. 1, approved.

Ramchandra Balkrishna v. *Ramchandra Jairam*, 65 Ind. Cas. 952; (1922) A. I. R. (N.) 222, not followed.

Ragho v. *Sadoo*, 5 Ind. Cas. 428; 6 N. L. R. 6 at p. 10, *Tek Chand* v. *Tulai*, 3 Ind. Cas. 52; 5 N. L. R. 103, referred to.

Statutes interfering with vested rights have to be strictly construed.

Appeal against the decree of the Additional District Judge, Nagpur, dated the 15th November 1921, in Civil Suit No. 8 of 1921.

Mr. *K. A. Potey*, for the Appellant.

Mr. *M. R. Indurkar*, for the Respondents.

ORDER.

Hallifax, A. J. C.—The plaintiff-appellant Rupi Bai is one of the four widows of one Baji Rao. The defendants are the two sons of separated

brothers of Baji Rao and also his other three widows. Rupi Bai sued for possession of a quarter of her husband's estate of which she alleged that the first two defendants had taken wrongful possession, impleading the other three widows as they refused to sue with her. The defendants pleaded that Baji Rao devised the whole of his estate by Will to his nephews, the first two defendants, subject to the payment of Rs. 90 every year to each of the four widows, each of them being declared entitled on default in the payment of her allowance to get possession of her share in the whole property. Rupi Bai contested this Will but it was held proved and her suit was dismissed. She now appeals on the sole ground that the estate included an absolute occupancy field of 10·7 acres, which cannot be devised by Will, and she is, therefore, entitled to her quarter share in at least that much of the property.

In addition to the 10·7 acres of absolute occupancy land the property consists of shares in four villages, 50·76 acres of *malik makbuza* land, 41·95 acres of occupancy land and certain houses and moveable property. Rupi Bai is filing a second suit based entirely on the Will for possession of a quarter of the whole property or payment of Rs. 90 a year. The effect of the success of this appeal on the chances of success in that suit is not a matter to be discussed here. That there must be some such effect has been pointed out, but Rupi Bai after consideration has elected to press the appeal, and if the view taken in *Anandi Bai* v. *Harlal Brahman* (1) is good law her appeal must succeed.

In *Ramchandra Balkrishna* v. *Ramchandra Jairam* (2), decided on 21st February 1922, I expressed a doubt obiter as to the soundness of that ruling of Ismay, J. C., in view of the later ruling in *Ragho* v. *Sadoo* (3) and the words of section 5 of the Tenancy Act of 1920. In *Anandi Bai* v. *Harlal Brahman* (1) the right of an absolute occupancy tenant was treated as a tenancy with certain special rights added to it by the law, so that the holder could not have any right beyond the ordinary rights of a tenant, that was not given to him by the Tenancy Act, and that says nothing about a Will. The later view, expounded in *Ragho* v. *Sadoo* (3) and accepted by the Legislature, is that it is a proprietary right with certain restrictions imposed upon it by legislation. In that light the holder would have all the rights of a proprietor except those that were taken from him by the Tenancy Act, and the right to dispose of his property by Will is not so taken from him. Accordingly under section 9 of the C. P. Courts Act I refer for the decision of a Bench the question whether it is a correct statement of the law to say, as is said in *Anandi Bai* v. *Harlal Brahman* (1), that an absolute occupancy tenant is not empowered to bequeath any right in his holding.

A Bench consisting of Messrs. Kotval and Prideaux, A. J. C.s delivered the following

OPINION.—The question referred for our decision is whether it is a correct statement of law to say, as is said in *Anandi Bai* v. *Harlal Brahman* (1) that an absolute occupancy tenant is not empowered to bequeath any right to his holding.

In that case Sir Stanlay Ismay, J. C., held that section 38, sub-section 1, of the Tenancy Act IX of 1883 did not permit an absolute occupancy tenant to Will away his holding. That Judge held that the word "transferable" of the sub-section did not in ordinary parlance include a power of devise. In *Ragho* v. *Sadoo* (3) at page 10* the learned Judge who decided that case writes :—

"It thus follows that so far as the origin of his right is concerned, an absolute occupancy tenant is in a position to claim perfect independence of his landlord, nay more, he can say to the landlord that he holds his own estate subject to the condition that he respects his (the tenant's) right as created along with his own right by the

(1) 15 C. P. L. R. 1.
(2) 65 Ind. Cas. 952; (1922) A. I. R. (N.) 222.
(3) 5 Ind. Cas. 128; 6 N. L. R. 6 at p. 10.

* Page of 6 N. L. R.—[*Ed.*]

same paramount authority, namely, the Crown, in whom all rights in land then resided and who had absolute power to distribute and regulate them in any manner thought expedient in the best interest of the country. Although then the Tenancy Act incorporates an absolute occupancy tenant within its sphere of operation and classes him as a tenant along with tenants properly so-called, yet in its essence his right is something quite apart from the rights of tenants proper. Mere inclusion in the Act does not subject him to the disabilities of tenants apart from what the Act specially provides for.....Thus he is freed from all the disabilities ordinarily attaching to a tenant-right under the Act..."

The Tenancy Act XI of 1898, section 41 (1) stated that the right of an absolute occupancy tenant in his holding shall on his death devolve as if it were land and shall be transferable subject to the conditions contained in the section. The power to devise is not one of them. Section 5 of the present Tenancy Act of 1920 states:—

"The interest of an absolute occupancy tenant in his holding shall on his death pass by inheritance or survivorship in accordance with his personal law."

And section 6 (1) states that he may transfer any right in his holding to a co-tenant or to any person who, if he survived the tenant without nearer heirs, would inherit his right. So it seems that it was possible for Baji Rao to alienate in favour of his nephews, for in the event of the death of the widows or their re-marriage they would inherit. But this Act also gives no express authority for an absolute occupancy tenant to leave his holding by a Will. Before us *Tekchand* v. *Tulai* (4) is quoted, a case that lays down that the right of an absolute occupancy tenant is a tenant right and not a proprietary right.

At page 42 of *Seth Gangabishan* v. *Balmukund* (5) Sir Henry Drake-Brockman gives an interesting history of the absolute occupancy tenancy. He shows that originally when the subject of occupancy rights was under discussion, the rights of absolute occupancy tenants were considered to be beyond dispute. They were occupancy tenants with certain special privileges, and that for the purposes of the settlements in 1865 it was determined that any record of occupancy right based solely upon possession for twelve years should be made subject to any future alteration in the law, but that cultivators who could show special circumstances should be secured against any change in their position. That security was enforced by making all proprietors at settlement agree to respect all occupancy tenancies declared to be absolute and supplementry clauses were added to the *wajib-ul-arz*, the 6th clause running: "That the said *raiyats* shall have the power to transfer by sale, gift or Will their occupancy right, with all its privileges on payment to us of a sum equal to one year's rent for such land; provided that in every such case, the tenure shall be offered for sale in the first instance to us, at a sum amounting to five years' rent of such land, plus the full value without interest of all permanent improvement effected solely by the *raiyat* since the fixation of the rent, and shall not be sold to any other person unless we shall for the space of one month refuse or neglect to complete the purchase."

Thus it seems fairly clear that at the first Settlement it was contemplated to allow absolute occupancy tenant to devise these holdings, the power, however, being fettered by certain restrictions and we think there is force in the opinion of the learned Judge who decided the above case that the Legislature intended when enacting and re-enacting section 38 of the Tenancy Act, 1883, to cut down not the landlords but the absolute occupancy tenant's rights which would include the right to devise. Section 38 of the Act of 1883 says nothing about the absolute occupancy tenant's power to devise, and sub-clause 7 of the section runs: "Any transfer made in contravention of the section shall be void against the landlord," an amendment effected by section 9 of Act XVII of 1889. There is an

(4) 3 Ind. Cas. 52; 5 N. L. R. 103.
(5) 3 N. L. R. 40 at p. 42.

interesting history of this tenure given by the Hon'ble Mr. Dyer in Council when the Act of 1920 was being considered: see page 336 of the C. P. Gazette of December 1919. It is argued for the respondent that unless the power to devise has been expressly taken away it remains; but we think that there is no force in the argument. Statutes interfering with vested rights have to be strictly construed, but we think it is clear from the successive Tenancy Act that the Legislature did not intend to continue the original power of devise and that the absolute occupancy tenant has now lost that right. The case reported as *Ragho* v. *Sadoo* (3) does not deal with the question of the power of devise. It will appear from the remarks on page 11* of that case that in the absence of a specific provision allowing devise the tenant is like other tenants incapable of devising and that wherever he is freed from disabilities of tenants he is so freed expressly. Under the old Act of 1859, the power to devise was subject to restrictions and if it were held now to exist it would be held free from those restrictions which we do not think is contemplated.

The result is that we hold that the statement of the law in *Anandi Bai* v. *Harlal Brahman* (1) that an absolute occupancy tenant is not empowered to bequeath any right in his holding is correct.

Let the record be returned.

FINAL JUDGMENT.

Hallifax, A. J. C.—The opinion of the Bench is in favour of the appellant, to the effect that an absolute occupancy holding cannot be devised by Will, but the result of the other suit filed by the appellant has nullified the effect of this appeal. The possibility of this was indicated in the order referring the case for the opinion of a Bench. Her present claim is for a quarter share in an absolute occupancy holding of 10·7 acres, which is a claim as an heir to a quarter share in the whole estate left by Baji Rao for his widows to inherit, as all the rest passed to his nephews under his Will. In her other suit she has been given a decree for maintenance and the amount payable to her is made a charge on the whole estate of Baji Rao in the hands of his nephews.

It is obvious that she cannot both inherit the estate and have a charge for maintenance on it. The decree giving her maintenance and making it a charge on the whole estate even the portion legally devised to others, is a decision that she cannot inherit any of it. Indeed it goes beyond the Will in other respects, as the Will directed that if her maintenance allowance were not paid she was to be given possession only of a four-anna share in one of the four villages in each of which Baji Rao had an eight-anna share in addition to a great deal of *malik makbuza* and tenancy land and some houses. She has finally elected to keep her decree and abandon this appeal. It will be dismissed accordingly and the appellant must pay all the costs in both Courts.

K. S. D. *Appeal dismissed.*

*Page of 6 N. L. R.—[*Ed.*]

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEALS NOS. 207-B AND 208-B OF 1923.

June 24, 1924.

Present:—Mr. Kinkhede, A. J. C.

VITHAL—PLAINTIFF—APPELLANT IN BOTH

versus

SADASHEO AND ANOTHER—DEFENDANTS—RESPONDENTS IN APPEAL NO. 207-B OF 1923.

MOHAN LAL AND ANOTHER—DEFENDANTS—RESPONDENTS IN APPEAL NO. 208-B OF 1923.

Co-sharers—Lease by one co-owner, operation of—Suit for ejectment of trespasser—Plaintiff, what has to prove—Material date.

In a suit by one co-owner for ejectment of a trespasser from the entire premises, the burden of proof lies on him to show that he had an unrestricted authority to eject him on the date of the suit. The mere fact that he had such authority at some point of time in the past is not sufficient to show that he continued to be clothed with that authority at the date of the suit, as to be alone entitled to call upon the defendant to vacate the entire premises, in spite of the fact that his other co-owner had manifested his intention to the contrary by granting him a fresh lease of the entire premises. [p. 1044, col. 1.]

VITHAL *v.* SADASHEO.

A lease by one of two co-owners can operate only on the lessor's half interest and is voidable as against the other co-owner. [p. 1044, col. 1.]

Appeal against the decree of the Additional District Judge, Yeotmal, in Civil Appeal No. 33 of 1922 dated the 31st January 1923.

Mr. *M. R. Bobde*, for the Appellant.

Mr. *B. R. Pendharkar*, for the Respondents.

JUDGMENT.—This judgment will govern both the above appeals. Second Appeal No. 207-B of 1923 arises out of Suit No. 198 of 1920, which relates to field Survey No. 58, and the southern half share of field Survey No. 85 of *Mauza* Mandar Jahagir. These were leased out by plaintiff, Vithal, to defendant, Sadasheo, Laxman for the year 1919-1920 for a *makta* of Rs. 36 under a *kabuliyat* dated 14th April 1919 which though taken in his name alone, was for the benefit of his separated co-sharer Yeshwant Sadasheo also.

Second Appeal No. 208-B of 1923 relates to portions of fields Survey Nos. 38 and 55 of the same *mouza* leased to defendant Mohanlal by plaintiff for one year 1919-20 on a *makta* of Rs. 62 as per *kabuliyat* dated 19th May 1919 which stands in the name of plaintiff and his co-sharer Yeshwant Sadasheo.

The defendant No. 1 in Suit No. 198 of 1920 so also the defendant No. 1 in the other Suit No. 201 of 1920 had agreed to vacate the lands respectively held by them without the necessity of a notice to vacate at the end of the year. None of them, however, vacated the land held by them. Plaintiff sent a notice to defendant Mohanlal through post on 21st December 1919, but the latter continued to cultivate the land against his will and in spite of his demand, during the year 1920-21; hence plaintiff brought this suit to eject him and also to recover one year's *makta* with interest from him. Sadasheo was not served with a similar notice; he continued to cultivate the land for the year 1920-21, presumably without obtaining plaintiff's consent thereto. Plaintiff has, therefore, sued him also for ejectment and for recovery of the *makta* with interest. Both these suits were instituted on 14th September 1920. The lessee in each case disputed the plaintiff's exclusive right to eject him, on the ground that he held under two lessees, *i. e.*, plaintiff and defendant No. 2 and not under plaintiff alone and that plaintiff alone could not sue. The Court made Yeshwant Sadasheo a co-defendant in each of the two suits and thus made the two suits maintainable; but in spite of this the plea of the non-maintainability of the suit was pressed and it prevailed in both the suits. The defendant No. 1 in each case further urged that he had taken a fresh lease of the land in suit for the year 1920-21 from defendant No. 2 and had paid up the arrears of lease money to him and that he was not, therefore, liable for ejectment or for the lease money to plaintiff. The plaintiff maintained that he alone was the manager and had the right to lease out the land and also to collect the lease money from the tenants and that defendant No. 2 had no right to grant any lease which could bind him. Plaintiff's suit was, however, dismissed on the ground that he alone could not maintain ejectment. He, therefore, preferred appeals to the Court of the Additional District Judge, Amraoti, and the latter Court remanded the cases for fresh decisions on the merits after holding that plaintiff was entitled to partial ejectment in any case unless the lease granted by the defendant No. 2 to defendant No. 1 be held, for any reason, to be binding on him. Against this order of remand there were miscellaneous second appeals in both the cases. Kotval, Additional Judicial Commissioner, upheld the order of remand as correct as the following extract from his judgment will show:—

"So far as I understand the lower Appellate Court gives no finding on the facts of this case. All that it does is to point that the dismissal of the suit by the First Court on the mere ground that defendant No. 2 does not desire to eject the tenants is wrong and that the suits are maintainable for partial ejectment if Sadasheo and Mohanlal are tenants on sufferance, or for entire eject-

ment if they are trespassers. Whether they are trespassers liable to be wholly ejected at the plaintiff's instance or tenant on sufferance liable to be partially ejected is left open for determination by the Trial Court after taking further pleas and deciding the issues thereon."

The appeals were accordingly dismissed.

After this, each of the cases was tried on the merits by the Munsif, who dismissed it on the ground that defendant No. 2 was the sole manager and he had the real authority to make and unmake tenants, and that he was right in accepting rent from defendant No. 1. Against these dismissals the plaintiff appealed to the Additional District Judge, Amraoti. He set aside the dismissals and granted to the plaintiff a decree for joint possession of the fields covered by each suit to the extent of his half share therein. He held that plaintiff had tacit authority from defendant No. 2 to lease out the joint fields in 1919-1920, and that as defendant No. 2 admitted that the *kabuliyats* taken from defendant No. 1 in the two cases were taken at his instance, the mere fact that the *kabuliyat* taken from Sadasheo was written in the name of plaintiff alone and not of both plaintiff and defendant No. 2, as in the case of Mohanlal's *kabuliyat*, made no difference and that no importance could be attached to the accidental omission of defendant No. 2's name from it. It was further found that in view of the defendant No. 2's attitude and of his election not to eject the tenant, plaintiff could not claim to eject the defendant lessee from the whole of the land comprized in each suit particularly as he could not be considered as a trespasser upon the land. The defendant No. 2's acceptance of rental arrears from, as also his act of leasing out of the fields to, the defendant No. 1, in each case, for the year 1920-21 before the date of the filing of the present suits by plaintiff, was treated by him as a clear revocation of plaintiff's authority to act on his behalf. In view of such an attitude on defendant No. 2's part it was held that plaintiff could assert his right to joint possession in respect of only his half interest in the joint property and could not claim to eject the tenants from the entire premises. The Additional District Judge also held that defendant No. 2 was entitled to realise the rents from the tenants and give them a discharge from further liability for the same. The plaintiff's claim for the rental arrears was, therefore, dismissed in each case. He has, therefore, come up in second appeal, and presses for a decree for ejectment of defendant No. 1 from the entire premises and for rental arrears. The defendants Nos. 1 and 2, in their turn, have filed cross-objections and they urge for the dismissal of the claims in their entirety.

In view of the findings of fact arrived at by the lower Appellate Court, I think, it is not open to the plaintiff-appellant to urge that at the date of the suit the defendant No. 1 was a pure trespasser liable to ejectment at his instance. According to the very terms of the lease dated 14th April 1919 in one case and dated 19th May 1919 in the other case the lease was to determine by efflux of time on the 31st March 1920. The relationship of landlord and tenant created for this specific term of one year (1919-20) was to come to an end, *ipso facto*, and the defendant was to be no longer under any obligation to cultivate the land on behalf of either the plaintiff or defendant No. 2. Moreover, it is not clearly stated in the *kabuliyat* that defendant No. 1 had undertaken to return the land to plaintiff alone, or that he had made any special contract with plaintiff to the exclusion of defendant No. 2 against taking a fresh lease from any one of them or without consulting the other. Under such circumstances, the original letting of the land to defendant No. 1, even if it be by plaintiff alone, must be deemed to have operated as a distinct demise for one year only by each of his own part, and a cross-confirmation of each for the part of the other, without any estoppel, so that the joint demise of the whole of the premises may affect the whole of the interest passing from each

lessor. This, however, left each of the joint lessors the option of giving a fresh lease, or of giving due notice to quit, and also if he chose, to recover his several share in ejectment, and to put an end to the tenancy as to the whole so that the ejectment may be maintained, although the notice to quit may be given by one of the lessors only. The plaintiff had communicated his intention to turn the defendant Sadasheo out, by serving him with a notice, and defendant Mohanlal by filing the suit, and ordinarily this could have operated to put an end to the tenancy not only as regards the tenancy of his share but also as regards defendant No. 2's share. But in view of the attitude manifested by defendant No. 2, in his turn, in his conduct anterior to the institution of the suits, as found by the lower Appellate Court, I think that the tacit authority, which, according to the Additional District Judge, had vested in plaintiff to grant a lease in respect of the year 1919-20 on behalf of defendant No. 2 and of himself, must be deemed to have been, both expressly and impliedly, revoked, by defendant No. 2, so far as his interest was concerned, long prior to the suit. Each had, thus, revoked the authority of the other to act on his behalf in the matter of granting a fresh lease of, or of ejecting the lessee from, the entire premises. The burden of proving that the said authority was subsisting unrestricted in every way down to the date of the suit was on the plaintiff. But he has failed to discharge it. The mere fact, therefore, that he had such an authority at some point of time in the past, is not sufficient to show that he continued to be clothed with that authority at the date of the suit (14th September 1920) as to be alone entitled to call upon the defendant No. 1 to vacate the entire premises, in spite of the fact that his other co-owner (defendant No. 2) had clearly manifested his intention to the contrary by granting him a fresh lease of the entire premises. The fresh lease, however, could operate only on the lessor's half interest and was voidable as against the plaintiff. The principle underlying the case of *Daryao Shah* v. *Tiran Shah* (1) may, very fittingly, have applied to this case, but for the express and mutual revocation of each other's authority. See *Ramji Patel Kunbi* v. *Syed Nur Mohammed* (2).

Under these circumstances, I do not think, there is any room for interference with the decree passed for joint possession to the extent of plaintiff's half share and for substituting in its place a decree for complete ejectment as desired by the plaintiff-appellant, or for complete dismissal of the claim as desired by the defendants-respondents. The cross-objections also are equally unsustainable as the appeals, and for precisely the very same reasons. The appeals and the cross-objections, so far as they relate to the lands involved in each suit, therefore, fail. The claim for rental arrears has been rightly dismissed for the reasons given by the lower Appellate Court.

The result is that the appeals and the cross-objections are dismissed with costs. Costs in the Courts below will be paid as already ordered.

G. R. D. *Appeal dismissed; Cross-objections dismissed.*

(1) 2 N. L. R. 45.
(2) 4 N. L. R. 45.

MADRAS HIGH COURT.

CIVIL APPEAL No. 141 OF 1921.
February 25, 1924.
Present:—Mr. Justice Ramesam and Mr. Justice Jackson.

T. S. SIVARAMA AIYAR AND OTHERS —PLAINTIFFS—APPELLANTS

versus

T. S. GOPALAKRISHNA CHETTIAR AND OTHERS—LEGAL REPRESENTATIVE OF DEFENDANT No. 1 AND DEFENDANT No. 2 —RESPONDENTS.

Madras Hindu Transfers and Bequests Act (Mad. Act I of 1914), s. 2, scope of—Retrospective effect—Will—Bequest in favour of unborn son of daughter—Birth and death of son before vesting,

effect of—Construction of Will—Bequest, whether valid—"Disposition," meaning of.

A testator who died in 1877 by Will executed in English a few months before death gave certain property to his wife and daughter with rights of survivorship to each other. The Will further provided that if his daughter did not beget male issue in her lifetime, the property given to the wife and daughter was after their lives to go to his brother and his male heirs. If a male was born to the daughter, it was to *inherit* the real property given to them. A son was born to the daughter in 1881 but died after living for a day. The widow died in 1903 and the daughter in 1918. In a suit for possession by the sons of the testator's brother against the son-in-law of the testator who claimed the property as the heir of his deceased child :

Held, (1) that after the death of the testator's widow his daughter took an estate for life; [p. 1046, col. 2.]

(2) that there was no intestacy of the remainder; [p. 1049, col. 1.]

(3) that the word "*inherit*" used in the Will did not indicate that the daughter's sons were intended to succeed as on an intestacy after the daughter's death; [p. 1047, col. 2; p. 1048, col. 1.]

(4) that the daughter's sons were intended to be devisees under the Will, and to take a contingent remainder, which would be converted into a vested remainder after the birth of the daughter's first son, subject to its diminution as the number of daughter's sons was augmented by further births ; [p. 1049, col. 1.]

Bhagabati Barmanya v. *Kalicharan Singh*, 10 Ind. Cas. 641; 38 C. 468; 15 C. W. N. 393; 9 M. L. T. 411; 13 C. L. J. 434; 21 M. L. J. 387; 8 A. L. J. 433; 13 Bom. L. R. 375; (1911) 2 M. W. N. 295; 38 I. A. 54 (P. C.), *Bhagabati Barmanya* v. *Kalicharan Singh*, 32 C. 992; 1 C. L. J. 482; 9 C. W. N. 749, *Chunilal* v. *Bai Muli*, 24 B. 420; 2 Bom. L. R. 46; 12 Ind. Dec. (N. S.) 812, *Harris* v. *Brown*, 28 C. 621; 28 I. A. 159; 5 C. W. N. 729; 3 Bom. L. R. 808; 8 Sar. P. C. J. 92 (P. C.), *Dias* v. *De Livera*, (1879) 5 A. C. 123; 49 L. J. P. C. 26; 42 L. T. 726, considered.

(5) that no child having been born to the daughter during the testator's lifetime, the disposition in favour of the daughter's son was, however, void, and there being no vesting of any estate in or after 1914 to be validated, the Madras Hindu Transfers and Bequests Act was inapplicable and the disposition was not validated thereby. [*ibid.*]

Per *Ramesam, J.*—The Madras Hindu Transfers and Bequests Act is not declaratory in the sense that it declares what the law always was. Still it is certainly intended to be retrospective. [p. 1049, col. 1.]

Muthuswami Ayyar v. *Kalyani Ammal*, 38 Ind. Cas. 223; 40 M. 818; 21 M. L. T. 93; 5 L. W. 334, *Shanmuga Devar* v. *Shanmuga Devar*, 53 Ind. Cas. 202, *Perianyagi Ammal* v. *Ratna Velu Mudaliar*, 76 Ind. Cas. 1042; 18 L. W. 625; 32 M. L. T. 137; (1924) A. I. R. (M.) 316, referred to.

The words "come into operation in section 2 clause (2) of the Madras Hindu Transfers and Bequests Act are intended to include all cases of vesting after the Act, though the testator died before the Act. [p. 1049, col. 2.]

Shanmuga Devar v. *Shanmuga Devar*, 53 Ind. Cas. 202, referred to.

The Madras Hindu Transfers and Bequests Act applies to all Wills made after it and to all Wills made before it, when the testators die after it. [*ibid.*]

When the testator dies before the Act :—

(*a*) If the vesting is *after the Act* and the legatee lives up to the termination of the preceding estate the Act applies. [p. 1049, col. 2; p. 1050, col. 1.]

(*b*) If the vesting is *after the Act* the Act will apply even though the legatee died before the termination of the preceding estate. [p. 1050, col. 1.]

(*c*) If the vesting is *before the Act*, still the Act will apply if the devisee survives until after termination of the preceding estate. [*ibid.*]

(*d*) If the vesting is *before the Act*, and the devisee lives until after the Act, but may not or does not live until the termination of the preceding estate, the Act will apply to him and he will transmit the vested estate to his heirs. [*ibid.*]

(*e*) But when the vesting was *before the Act* and the devisee does not live upto the termination of the preceding estate nor even upto beyond the date of the passing of the Act so as to give an opportunity for the Act to operate upon his *contingent and void* estate and convert it to a vested and valid estate, the Act does not apply. [p. 1050, cols. 1 & 2.]

Perianyagi Ammal v. *Ratna Velu Mudaliar*, 76 Ind. Cas. 1042; 18 L. W. 625; 32 M. L. T. 137; (1924) A. I. R. (M.) 316, *Kudopa Venkayamma* v. *Kakarla Narsamma*, 35 Ind. Cas. 150; 40 M. 540; 31 M L. J. 33; 20 M. L. T. 221; 4 L. W. 189, *Muthuswami Ayyar* v. *Kalyani Ammal*, 38 Ind. Cas. 223; 40 M. 818; 21 M. L. T. 93; 5 L. W. 334, referred to.

All that the Act does is, that it validates certain dispositions which, but for it, would be void. But one has to stop its application when the application sought is not the mere validation of a disposition but involves the transmission by inheritance of the interest which never existed upto the time of the succession. [p. 1050, col. 2.]

Per *Jackson, J.*—"Disposition" is a word of most general import and includes distribution. [p. 1051, col. 2.]

There is nothing in the language of the Madras Hindu Transfers and Bequests Act to give it such comprehensive character as to make it applicable to every disposition in a Will executed before it. [*ibid.*]

Appeal against the decree of the Court of the Second Additional Subordinate Judge, Tanjore, in O. S. No. 68 of 1919, (O. S. No. 84 of 1919, Sub-Court, Kumbakonam).

Mr. *S. Varadachariar*, for the Appellants.

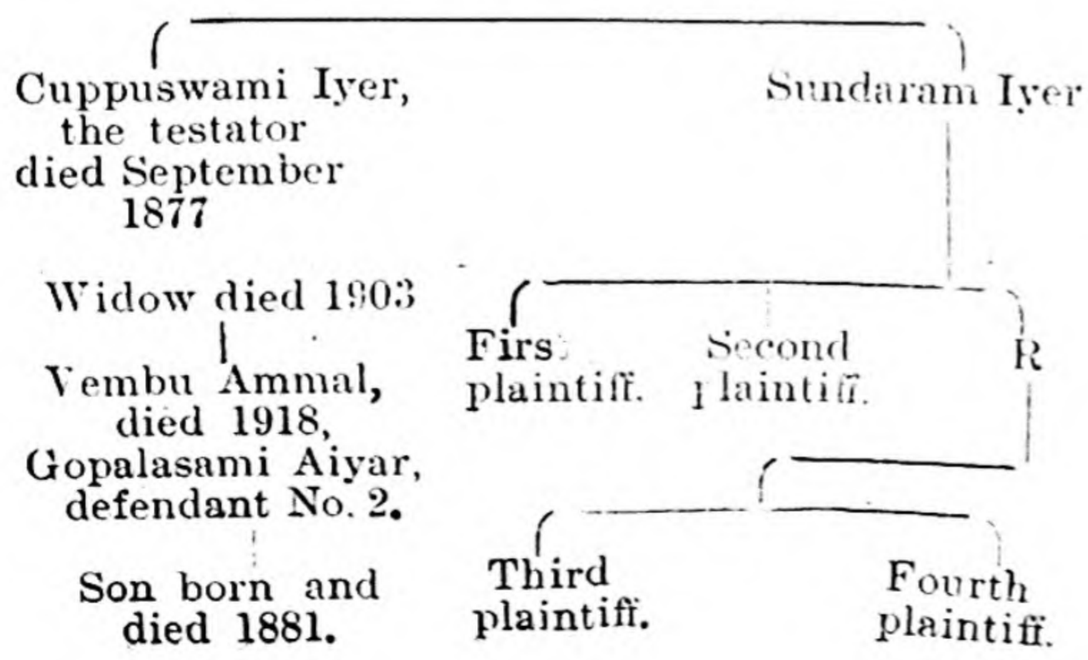
Messrs. *A. Krishnaswami Iyer*, *M. S. Venkatarama Iyer* and *T. Tyagaraja Iyer*, for the Respondents.

JUDGMENT.

Ramesam, J.—This appeal arises out of a suit for possession

he plaintiffs claiming to be entitled, after the death of one Vembu Ammal, to the suit properties, of which a lease for seven years had been granted by her to the original sole defendant on 19th June 1918. The lessee pleaded that, under the Will of the last male owner Cuppuswami Aiyar, Vembu Ammal's husband, Mr. T. V. Gopalaswami Aiyar is entitled to the properties after her death, and not the plaintiffs. He also contended that the lease was binding on the remainderman. One of the issues originally framed was "Whether the suit is bad for the non-joinder of T. V. Gopalasami Aiyar as a party to it." The case was set down for preliminary argument on this issue and on 28th September 1920 T. V. Gopalaswami Iyer was added as second defendant in the suit. The Subordinate Judge found on the 6th issue that the lease by Vembu Ammal was not within her competency to grant. On the 11th and 12th issues, he found that the second defendant (and not the plaintiffs) was entitled to the vested remainder in the suit properties after Vembu Ammal's death. He accordingly dismissed the suit. The first defendant filed an appeal against the finding on the 6th issue but we are informed that he has since become an insolvent and his appeal has not been prosecuted. The present appeal has been preferred by the plaintiffs and in this appeal, neither party questions the correctness of the finding on the 6th issue.

The following pedigree shows the relationship of the parties:—



The last male owner of the suit properties was Cuppuswami Aiyar. He died in September 1877 leaving his daughter Vembu Ammal. His last Will —about the genuineness of which there is no question—is dated 24th July 1876. He was a Pleader of the Tanjore District Court. The Will is in English. His widow died in 1903 and the daughter in 1918.

Two questions arise in appeal—(1) What is the proper construction of the Will? (2) If the construction is, as contended by the respondent, is the disposition validated by Madras Act of 1914? The Will (Exhibit A) provides that the lands should be managed by his brother and half the income should be enjoyed by him, in his own right. He gave also one house to his brother. Another house and the other half of his lands were given "to the wife and daughter with the right of survivorship to each other, *i. e.*, wife and daughter." Lower down he provides: "If my daughter does not beget male issue in her lifetime half the land and the house given to my wife and daughter by this Will shall after their lives go to my brother and his male heirs. If a male is born to my daughter, it will inherit the real property given to my wife and daughter."

The Will provides for an estate during the joint lives of the wife and daughter, to be taken by them as tenants-in-common with a remainder in favour of each for her life after the death of the other. In the events that happened, after the death of the widow in 1903, the daughter took the estate and it is conceded by both parties that it was an estate for her life. The question is.—Did the Will dispose of the remainder after the daughter's life estate? If so what is the effect of the disposition? The respondent's contention is that the Will gave a contingent remainder to the daughter's sons—the contingency being, the coming into existence of the daughter's son. He accordingly argues that, when a son was born in 1881, the contingent remainder was converted into a vested remainder when the boy died after

living for a day; that it was then inherited by his mother who took the limited estate of a Hindu mother in it, and, after her, it was inherited by the second defendant in 1918. It may be observed here, that, at this stage we are concerned only with the construction of the Will and not with the validity of such a disposition as is contended for by the respondent.

Mr. Varadachari, for the appellants, argues that the testator did not intend to make any disposition under the Will in favour of the daughter's sons but intended that the Hindu Law of inheritance should operate in favour of the daughter's sons. When the daughter died in 1918, the daughter's sons, if any, would have taken it but as only one was born and even he did not survive upto 1918 the plaintiffs took the estate. In support of this argument, he lays special emphasis on the word 'inherit' which he argues is not the same as 'take.' He also contends that the word 'beget male issue in her lifetime' should be construed as 'have male issue surviving her.' He relies on *Srinivasa* v. *Dandayudapani* (1), the Will in which is somewhat similar. But as the Subordinate Judge points out, there is no disposition in favour of the daughter's son in the last case. The only bequest was in favour of the daughter who was to transmit the corpus intact to her male descendants. The words 'male descendants' were held not to be words of purchase. Wilkinson, J., construed them to be words of inheritance while Shepherd, J., thought that the daughter got a daughter's estate and there was an intestacy after her death, leaving the Hindu Law to take effect.

This case does not, therefore, help us. He also refers to *Gurusami Pillai* v. *Sivakami Ammal* (2) where it was pointed out by the Judicial Committee (at page 358) that "the words 'have issue' are often read as meaning 'leave issue,' but not without some reason derivable from the Will." I may at once say the appellant's contention about the construction of the expression "beget male issue in her lifetime" is only another way of stating his contention about the construction of the second sentence in the clause. If the second sentence can be construed, as he contends for, as a disposition in favour of only daughter's sons who survive Vembu Ammal or as providing for the succession of the daughter's son, as on an intestacy, in either case, the plaintiffs get the property. It is immaterial what the first sentence in the clause means as, either under the Will (if 'beget male issue' means leaving male issue surviving her) or otherwise, the plaintiffs are entitled. Thus, the construction of the first sentence need not detain us. It is the second sentence that has to be considered.

The question is,—Does the word 'inherit' indicate that the daughter's sons were intended to succeed, as on an intestacy, after the daughter's death. In *Bhagabati Barmanya* v. *Kalicharan Singh* (3) similar contention was raised as to the Bengali words "*Uttaradhikara Sutre*" translated as "by rights of inheritance" and negatived by their Lordships of the Privy Council. The Chief Justice who decided the case in the High Court of Calcutta [*Bhagabati Barmanya* v. *Kalicharan Singh* (4)] explained the expression as "after-takers" and Lord Macnaghten concurred with it. In *Watkins* v. *Fredrick* (5) Lord Westbury was of opinion that the words "to inherit" are used by the testator as equivalent simply to the word 'to take.'

In *Chunilal* v. *Bai Muli* (6) the daughter was described as 'heir' in three places: Yet it was held that the Will contained a disposition in favour of the daughter and the intention was not that she should succeed as heir. She predeceased the mother. In

(1) 12 M. 411; 4 Ind. Dec. (N. S.) 636.
(2) 18 M. 347; 22 I. A. 119; 5 M. L. J. 106; 6 Sar. P. C. J. 610; 6 Ind. Dec. (N. S.) 591 (P. C.).
(3) 10 Ind. Cas. 641; 38 C. 468; 15 C. W. N. 393; 9 M. L. T. 411; 13 C. L. J. 434; 21 M. L. J. 387; 8 A. L. J. 433; 13 Bom. L. R. 375; (1911) 2 M. W. N. 295; 38 I. A. 54 (P. C.).
(4) 32 C. 992; 1 C. L. J. 482; 9 C. W. N. 749.
(5) (1865) 11 H. L. C. 358; 11 E. R. 1371 at p. 1374; 145 R. R. 237.
(6) 24 B. 420; 2 Bom. L. R. 46; 12 Ind. Dec. (N. S.) 812.

Harris v. *Brown* (7) the words "descend to the eldest son," were said to be the same as "devolve or go" and it was held that the eldest son took under the Will. In *Moulvi Mahomed Shumsool Hooda* v. *Shewakram* (8) their Lordships say "The testator uses the word 'heir' as signifying the person who is to take immediately in succession to another." On the whole I am inclined to agree with the respondent's contention that the daughter's sons were intended to be devisees under the Will and not to succeed as on an intestacy.

Mr. Varadachari next argues that the daughter's sons were intended to take only if they were born before the testator's death. He refers to *Mann* v. *Thompson* (9) and *Dias* v. *De Livera* (10) quoted by Lord Macnaghten in *Bhagabati Barmanya* v. *Kalicharan Singh* (3). I have no hesitation in rejecting this contention. Assuming such a rule gives effect to the intention of Hindu Testators also (*cf.* the Hindus Wills Act of 1870, section 2) the exception to the rule, recognised in English Law and Indian Succession Act, section 99, extended by Hindu Wills Act to Bengal should be applied to Hindu Wills also as expressing a rule of common sense, giving effect to intentions of testators in favour of persons described as standing in a particular degree of kindred to a specified individual "when the possession is deferred until a time later than the death of the testator, by reason of a previous bequest." Even in *Bhagabati Barmanya* v. *Kalicharan Singh* (3) the rule was not actually applied in ascertaining the intentions of the testator. The consideration that the well-known doctrine of Hindu Law (laid down in the *Tagore case**) that a gift to an object not in existence is absolutely void—a consideration that must have been known to the testator in the present case also—did not prevent the application of the exception to ascertain the intention in that case. It is true that in that case, the disposition failed as to those born after the testator's death on account of the rule of Hindu Law governing a gift to persons not in existence at the time of the testator's death but it took effect as to those in existence at the testator's death, the rule in *Leake* v. *Robinson* (11) not being applicable. I may also add that in this Presidency, the rule in *Mann* v. *Thompson* (9) was not applied in *Kudopa Venkayamma* v. *Kakarla Narsamma* (12).

The next alternative contention of Mr. Varadachari is—even if the daughter's sons were intended to take under the Will, they take only if they survive the daughter and do not take a vested estate immediately after birth. He points out that if the first son of the daughter takes a vested estate as soon as he was born other sons of the daughter would be deprived of all benefits under the Will a result not intended by the testator, unless the somewhat complicated construction is adopted that as a second or third son is born, the earlier born sons would be divested *pro tanto* so as to give the last born an equal share with the others. This complicated construction is the one suggested by the respondent and adopted by this High Court in *Kudopa Venkayamma* v. *Kakarla Narsamma* (12). The principle that a contingent estate becomes converted into a vested estate as soon as he contingency happens is not a principle peculiar to the English Law or to the Indian Succession Act (section 107). In *Hickling* v. *Fair* (13) Lord Davey says: "It is an elementary principle in the construction of Wills that a gift to a class after a life interest or life-rent includes all persons within the description of the class who were alive at the testator's death or have come into being during the lifetime of the life-tenant or life-renter.

(7) 26 C. 621; 28 I. A. 159; 5 C. W. N. 729; 3 Bom. L. R. 808; 8 Sar. P. C. J. 92 (P. C.).

(8) 2 I. A. 7 at p. 15; 22 W. R. 409; 14 B. L. R. 226; 3 Sar. P. C. J. 405.

(9) (1854) Kay 638 at p. 643; 18 Jur. 826; 2 W. R. 582; 101 R. R. 785; 69 E. R. 271.

(10) (1879) 5 A. C. 123; 49 L. J. P. C. 26; 42 L. T. 726.

*See *Jotendro Mohun Tagore* v. *Ganendro Mohun Tagore*, 18 W. R. 359; 9 B. L. R. 377; Sup. Vol. A. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82.—[*Ed.*]

(11) (1817) 2 E. R. 363; 3 Mer. 363; 16 R. R. 168; 35 E. R. 979.

(12) 35 Ind. Cas. 150; 40 M. 540; 31 M. L. J. 33; 20 M. L. T. 221; 4 L. W. 189.

(13) (1899) A. C. 15 at p. 35; 68 L. J. P. C. 12.

That principle is common to Scotland and England, and is applicable, I should suppose, wherever the English language is used." The Indian Legislature thought fit to extend it to Bengal Hindus. The better principle is to permit the vesting at the earliest possible moment consistent with the language of the testator *i. e.*, immediately after the person named comes into being, unless there are express words postponing the vesting till after the termination of the preceding life-estate. (See also Jarman on Wills, Volume II, p. 1667, Halsbury's Laws of England, Volume 28, page 716, section 1339.)

I, therefore, agree with the respondent's contention that the Will should be construed as giving a contingent remainder to the daughter's sons, such contingent remainder being converted into a vested remainder after the birth of the first daughter's son, subject to its diminution as the number of daughter's sons is augmented by further births.

The next question is. What is the effect of this disposition? As the law stood upto 1914, the disposition is void by the rule in the *Tagore case*, as no child was born during the testator's life-time. No estate vested in the child born in 1881 as he died immediately. He did not transmit any estate to his heirs.

Does the Madras Act I of 1914 (commonly known as Seshagiri Aiyar's Act) make any difference? In my opinion it does not.

The Act is not declaratory in the sense that it declares what the law always was. Still, it is certainly intended to be retrospective. The extent to which it can be used retrospectively is indicated in section 2 (2) and in various decisions of this Court [*Koudopa Venkayamma* v. *Kakarl, Narasamma* (12), *Muthuswami Ayyar* v. *Kalyani Ammal* (14), *Shanmuga Devar* v. *Shanmuga Devar* (15), and *Perianayagi Ammal* v. *Ratnavelu Mudaliar* (16)] the Act has been used retrospectively. The actual decision in these cases does not help the respondent who wants the principle of these cases to be extended.

(14) 38 Ind. Cas. 223; 40 M. 818; 21 M. L. T. 93; 5 L. W. 334.
(15) 53 Ind. Cas. 202.
(16) 73 Ind. Cas. 1042; 18 L. W. 625; 32 M. L. T. 137; (1924) A. I. R. (M.) 316.

The argument on the Act centred on the meaning of the expression "come into operation." The appellant contends that it is synonymous with 'rest.' The respondent points out such a construction excludes cases obviously with the intention of the Act *e.g.*, cases when a vested remainder becomes vested before the Act but the actual enjoyment is to begin after the Act. He also relies on the contrast between the words "come into operation" and "vested" in the clause (2). To this last argument, the appellant replies that the words "vest" and "operate" are used somewhat indiscriminately in the Act and refers us to the other sections. This is true; and yet I do not agree with the appellant's contention that the term of vesting is all that was intended. Nor am I able to agree with the respondent's contention that the words were intended to denote only the term of distribution. In my opinion, the words "come into operation" are intended to include all cases of vesting after the Act though the testator died before the Act. [See *Shanmuga Devar* v. *Shanmuga Devar* (15) where Seshagiri Aiyar, J., uses the words 'final vesting'—a case of transfer.] But, in cases where the vesting may happen before the Act on a proper construction of the Will, the Act will further help the devisee named if he survives until after the termination of the preceding estate, so as to be able to take actual possession of the property. But for the application of the second principle, he himself must survive. An analysis of the possible cases may serve to clear my view on the application of the Act.

(1) The Act applies to all Wills made after it and to all Wills made before it, when the testators die after it. This is an obvious case.

(2) When the testator dies before the Act :—

(*a*) If the vesting is *after the Act* and the legatee lives upto the termi-

nation of the preceding estate the Act applies. This also is an obvious case.

(*b*) If the vesting is *after the Act* the Act will apply even though the lagatee died before the termination of the preceding estate *e.g.*, a testator died in 1877 giving a life-estate to his daughter and remainder to his daughter's sons. A son is born in 1915 but dies before the daughter who lives upto 1918. The remainder becomes vested in the son at his birth and when he dies it goes to his heirs. [*Perianayagi Ammal* v. *Ratnavelu Mudaliar* (16) is an example.] [*Muthuswami Ayyar* v. *Kalyani Ammal* (14) is an example of a declaratory suit before the death of the life-tenant].

(*c*) If the vesting *is before the Act*, still the Act will apply if the devisee survives until after the termination of the preceding estate *e. g.*, in the last illustration, if a son was born in 1881 and survives his mother, he takes the estate. This case will be excluded from the operation of the Act if the appellant's contention is accepted. The further transmission of the estate to the devisee's heir is an obvious result.

(*d*) I would even concede a further case. If the vesting *is before the Act* and the devisee lives until after the Act, but may not or does not live until the termination of the preceding estate, the Act will apply to him and he will transmit the vested estate to his heirs.

In this case, the proper construction of the Will involves a vesting before the Act. The disposition is void by reason of the *Tagore case*; if the devisee lives beyond 1914, the void vesting will be converted into a valid vesting by reason of the Act. The estate having vested, descends to the heirs of the devisee [*Muthuswami Ayyar* v. *Kalyani Ammal* (14) is an example].

(*e*) This is the last case that can happen and it is the present case. When the vesting was before the Act and the devisee does not live upto the termination of the preceding estate nor even upto beyond the date of the passing of the Act so as to give an opportunity for the Act to operate upon his *contingent and void* estate and convert into a vested and valid estate, the Act does not apply. In such a case, the devisee took no estate and transmitted no estate—a result which is a bare statement of actual facts and does not involve any legal subtlety. To hold the opposite and to say that the Act applies to this case also is to say that an estate which never vested and which, therefore, never existed (not even as a contingent estate—being *void*) descended by inheritance to the heir of the person who was intended to have it but never had it—a fiction for which there is no warrant in the language of the Act and to give effect to which would be unparalleled in the annals of legislation. Mr. Krishnaswami Aiyar points out to the fact that, in cases (*a*), (*b*) and (*d*) (when the vesting happens at a time different from the falling into possession) the estate will be transmitted to the heirs of the devisee. This is true but this is not because of the Act but because the interest of the devisee was vested in him before his death. What interests descend by inheritance is a matter depending on general principles of law. The Act has nothing to do with it. All that it does is it validates certain dispositions which, but for it, would be void. But one has to stop its application when the application sought is not the mere validation of a disposition but involves the transmission by inheritance of the interest which never existed upto the time of the succession. Mr. Krishnaswami Ayyar argues that the effect of section 2 (2) is, as if the Act existed prior to 1881, if not before 1877. I cannot accept this construction of the Act, as it involves, in my opinion, fictitious devolution.

Mr. Krishnaswami Ayyar refers to Jarman, Volume II, p. 1353, to show that contingent remainders may descend. According to the passage cited, they descend only when the contingency is a collateral event not relating to the devisee; but the principle is inapplicable when the contingency is the passing of an Act validating the disposition and the devisee surviving, at least,

after the passing of the Act. The real answer to the argument is that, there is not even a contingent interest, for contingent interest means a valid contingent interest not a void contingent interest.

I, therefore, differ from the Subordinate Judge on the application of Act I of 1914, allow the appeal and decree the plaintiffs' suit. In appeal, the second defendant will pay their costs. In the Court below, both the defendants will be liable for their costs. The first defendant will be liable for the mesne profits from 17th August 1918 upto the date of the suit and for the mesne profits subsequent to the suit. The Court below will ascertain the mesne profits upto the date of the suit and then pass a final decree. The mesne profits subsequent to suit will be determined in execution. The Subordinate Court of Kumbakonam will take up the point reserved and pass the final decree.

The memorandum of objections by first defendant is dismissed with costs.

Jackson, J.—I have had the advantage of reading my learned brother's judgment, and have arrived at the same conclusion though by a different route. Two circumstances lead me to interpret the Will, Exhibit A, as making the male born to the testator's daughter heir to the real property given to his wife and daughter after their death and without any intention that the property should vest in him at birth and come to him by survivorship. In the first place the testator having deliberately chosen to write his Will in English may I think he presumed to have intended that the words employed should bear their commonly accepted connotation. In the second place it will be found that the Will originally ran "If my daughter does not beget male issue in her lifetime half the land and the house given to my wife and daughter by this Will shall after their lives go to my brother and his male heirs. My earring etc." This left it to be presumed what should happen if his daughter did have male issue, and no doubt the testator on reading over his Will, saw that it should not be a mere matter of presumption. So he inserted in smaller script, "If a male is born to my daughter it will inherit the real property given to my wife and daughter", which I take to mean 'the property shall after their lives go to her male issue' merely expanding the previous sentence; whereas if he had intended that propery should vest in her male issue from birth, the testator would have made it clear in a separate clause.

If, however, the alternative and, of course, perfectly reasonable construction is adopted, so that the property vested in the male issue from the moment of birth it remains to be considered how far this Will can be validated by the retrospective effect of Act I of 1914. The Will is dated 1876. The testator died in 1877. A son was born to the daughter in 1881. The testator's widow died in 1903; his daughter in 1918. Therefore, the Will was executed before Act I of 1914; but the provisions of the Act apply to such of the dispositions made in it as were intended to come into operation at a time subsequent to the passing of the Act. [Section 2 (2) Act I of 1914]. It is argued for the appellants that "dispositions" can refer only to the vesting under the Will, and inasmuch as the vesting on the birth of the son in 1881 was null and void, there is no disposition to be considered which can be said to have been intended to come into operation after 1914. For the respondents on the other hand it is argued that "dispositions" include distribution, and the provisions of the Act apply to the distribution in 1918 on the death of the daughter. It is further argued that inasmuch as the Act applies to this disposition it must be held to apply to every disposition in the Will; in other words the Will must be read in the light of Act I of 1914 from the date of its execution, because one of its dispositions has come into operation after the passing of that Act. I find nothing in the language of section 2 to give it this comprehensive character, and am sure that if that had been the intention of the Legislature it both could and would have expresssd it in plainer terms.

I agree, however, that disposition which is a word of most general import includes distribution, and what we have

to consider is the effect of the Act on each disposition as that disposition come into operation. The 'vesting' should have come into operation in 1881 when the son was born, but obviously the Act could have no bearing at this date, and this disposition was void. The next disposition is the death of the widow in 1903 with which the Act has nothing to do. Then in 1918 the daughter dies and under the Will as now interpreted if there is a son vested with the estate he as survivor succeeds to its enjoyment. But there is no such son, and, therefore, at this point of time there is no one to inherit under the Will. I do not think the death of the son soon after his birth in 1881 and at any rate before 1914 affects the question. Under the Will a male already vested with the estate must succeed the last life-holder. The son was certainly not vested in 1881 for that disposition was not intended to come into operation and obviously did not come into operation after 1914 and is, therefore, void. When then was he vested (supposing him to have survived)? Not in 1914. The Act itself cannot be regarded as a disposition vesting all the heirs who had failed to become vested previously owing to the *Tagore case*. And not, in my opinion, in 1918. The death of the mother could not vest the estate in her son. Of course he might inherit in the ordinary sense of the term but that brings us back to the alternative construction of the Will. If the Will is to be construed as allowing the male already vested to take the property as survivor on the decease of the life-holder, one can only say that no male was so vested in 1918. Because that disposition of the Will *i.e.*, the vesting on the date of birth, had become operative before the passing of the Act and, therefore, entirely null and void. There was no other vesting disposition which could or did occur. The only other disposition to come into operation was the distribution, and when that occurred there was no one with a vested title who could succeed. Of course the accident of the son's death simplifies the problem, but I agree with Mr. Varadachariar that the solution would be the same if he survived. It might be an extremely hard case if he did survive; but no hardship would arise in the present case if on my construction the Will was taken as giving him the succession by right of inheritance in the ordinary English sense.

V. N. V. *Appeal allowed;*
K. S. D. *Suit decreed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 287-B of 1921.
June 30, 1924.

Present:—Mr. Kinkhede, A. J. C.

LAXMI AND OTHERS—DEFENDANTS—APPELLANTS

versus

VENKATRAO—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 19—Mortgage-debt—Acknowledgment by female heir and trespasser, whether good—Counsel and client—Admission by Counsel in point of law—Minor party, whether affected.

An acknowledgment of a mortgage-debt by a limited female heir does not extend limitation as against the reversionary owner, much less does a renewal mortgage by a trespasser extend it. [p. 1055, col. 1.]

Soni Ram v. Kanhaiya Lal, 19 Ind. Cas. 291; 35 A. 227; 13 M. L. T. 437; 17 C. W. N. 605; 11 A. L. J. 389; (1913) M. W. N. 470; 17 C. L. J. 488; 15 Bom. L. R. 489; 25 M. L. J. 131; 40 I. A. 74 (P. C.), followed.

An admission on a law point by a Pleader cannot affect the interest of a minor. [p. 1055, col. 2.]

Appeal against the decree of the Additional District Judge, Akola, in Civil Appeal No. 318 of 1915, dated the 13th May 1921.

Mr. *A. V. Khare*, for the Appellants.

Mr. *G. G. Hatwalne*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit instituted by one Trimbakrao for recovery of possession of certain property to which he laid claim as a son duly adopted to the last male holder, Rustumrao, by his widow, Laxmi, defendant No. 1, on 3rd July 1913. He died during the pendency of the suit and in his place his widow, Chandrabhaga, was brought on record as his legal representative. Chandrabhaga also adopted a son and her place has been taken by the adopted son Venkatrao. The defendants to the

suit were Laxmi the widow of Rustumrao (defendant No. 1), Yelhai the widow of Rustumrao's brother Yeshwantrao(defendant No. 2), Ajani the mother of Rustumrao (defendant No. 3), Bajai the sister of Rustumrao (defendant No. 4), Laxman and Champatrao the husband and son of Bajai (defendants Nos. 5 and 6) and two more persons Maroti and the firm of Surajmal Jagannath Marwari (defendants Nos. 7 and 8) as transferees from Ajani defendant No. 3. The original plaintiff's adoption was challenged and his right of suit denied by all the defendants with the result that his claim was dismissed, against all the defendants except Laxmi defendant No. 1 by the first two Courts, but the dismissal was set aside by this Court in Second Appeal No. 423-B of 1917 on 26th April 1920 and the case was remanded for decision of the other points which had been left undecided in the first appeal. On remand the case came on for hearing before Mr. M. R. Pathak the Second Additional District Judge, Akola. During the pendency of that appeal Ajani (defendant No. 3) died and on her name being struck out, Bajai and her husband and son and the other defendants were renumbered as defendants Nos. 4 to 7 as Lalchand son of Surajmal and his son Poonamchand, were owners of the firm of Surajmal Jagannath, their name were shown as defendanst Nos. 7 and 8. The defendants Nos. 1 and 2 and Champatrao were represented by Pleaders at some stages of the appeal but the other respondents particularly respondents, Bajai, Lalchand and Poonamchand do not appear to have taken care to attend at the hearing of the appeal. Respondent Champat's Pleader was Mr. Rajwade. Plaintiff had applied for amendment of her plaint on 23rd December 1915 for including in it a prayer for possession of one-third share of Survey No. 71, one-fourth share of Survey No. 1 of *Mouza* Warwant from which after the death of the original plaintiff Trimbak his widow was forcibly dispossessed by defendants Ajani and Champatrao (defendants Nos. 3 and 6), but it remained unnoticed when the appeal was disposed of by Mr. R. V. Paranjpe. It was revived before Mr. M. R. Pathak and was granted in spite of the opposition of Champatrao (defendant No. 6) and the amendment allowed.

The special defence raised by defendants Yelhai (defendant No. 2), Ajani (defendant No. 3), Bajai and her husband and son (defendants Nos. 4 to 6) and Surajmal and Poonamchand (defendants Nos. 7 and 8) which was also adjudicated upon in the first Court by Mr. A. S. Sathe, Sub-Judge, before remand, adversely to their respective contentions, was not reiterated or pressed in the appeal at the stage when it came on for hearing before Mr. Pathak after remand, as those respondents either remained absent or did not press for maintaining the dismissal of the claim as against them. Thus the points, which the Additional District Judge thought he was called upon to dispose of by his judgment, were narrowed down. This state of things led the Additional District Judge to think that "on the merits of the case there are no other points involved which call for fresh decision." The Court, therefore, passed a decree against the defendants declaring the adoption of Trimbakrao to be valid, and held that his legal representative was entitled to be put in possession of the property in suit subject to the right of residence of defendants Nos. 2 and 3 Yelhai and Ajani in the *gadhi* and in the house below it for their respective lives.

Amongst the findings recorded by Mr. Achyutrao Sathe in his elaborate judgment dated 10th November 1914, there was a finding on issue No. 8 which dealt with the rights of the defendants Nos. 7 and 8 on the basis of a mortgage, dated 23rd December 1895, executed by Rustumrao and of its renewal mortgage executed by Ajani (defendant No. 3) on 21st February 1902. It was held that the claim on the mortgage was time-barred as there was no acknowledgment before 23rd December 1908 by Rustumrao or any of his heirs. The plaintiff was accordingly declared not bound by any mortgages in favour of defendant No. 8. There were other subsequent mortgages by defendants Nos. 2 and 3 Yelhai and Ajani. But they also were declared not

binding on plaintiff. The alienations made in favour of defendants Nos. 2 and 3 by defendant No. 1 were, however, held binding and effective as against plaintiff during the lifetime of those defendants Nos. 2 and 3, they being entitled to maintenance for life. The gift by defendant No. 3 Ajani of Survey No. 59 in favour of defendants Nos. 4 to 6 as per Exhibit D-4, dated 26th April 1905, was, however, held to be invalid as against plaintiff. The partition which the ladies had made of the estate was also held to be invalid and not binding on the plaintiff. All these findings of Mr. Achyutrao Sathe, Sub-Judge of the First Court were really unnecessary in view of the fact that plaintiff Trimbak's adoption was held invalid but as soon as the adoption was upheld they became material and necessary. It was, therefore, incumbent upon the several persons interested in upsetting those findings to appear before the First Appellate Court and urge arguments in support of their respective pleas so as to maintain the dismissal of the claim as against themselves, so far as the properties in which each of them had become interested on the basis of alienations made either by Rustumrao or by his widow Laxmi (defendant No. 1) or by Yelhai (defendant No. 2) or by Ajani (defendant No. 3) or by all or some of them acting jointly, before the date of the plaintiff's adoption as per adoption deed Exhibit P-2, dated 3rd July 1913, were concerned. But as stated above none of them cared to take advantage of the opportunity afforded to them, even when they were served with notices of the hearing of the appeal in connection with the amendment prayed for. Under these circumstances the Additional District Judge, Mr. Pathak, was perfectly justified in presuming that there were no points left for decision on the merits.

I have stated above that the decree passed by the First Court made certain reservations in favour of defendants Nos. 2 and 3, Yelhai and Ajani for their lifetime. Ajani, however, died during the pendency of the appeal in the Additional District Judge's Court and consequently the reservation in her favour necessarily vanished with her death. Yelhai died during the pendency of the present second appeal and consequently the reservation made for her lifetime also became redundant as soon as she died.

The present appeal was jointly filed on 3rd September 1921 by Laxmi (defendent No. 1), Yelhai (defendant No. 2), and Bajai (original defendant No. 4, renumbered as defendant No. 3) and Lalchand and Poonamchand (defendants Nos. 7 and 8 only). It is now being pressed by Laxmi, and by Bajai in her own capacity and also in the capacity of an alleged heir of Yelhai, her deceased aunt, and by Lalchand and Poonamchand in their capacity as mortgagees; the plaintiff in his turn has filed a cross-objection urging a claim for the *gadhi* house against Yelhai, which is a mistake for Bajai and for costs of the litigation. I will deal with the appeal first and then with the cross-objection.

Ground No. 1 in which the validity of the adoption is challenged is not pressed. So, for the purporses of this appeal the plaintiff's title is undisputed by the appellants.

Ground No. 2 deals with the questions of amendment permitted by the lower Appellate Court. As already stated the amendment was sought during Ajani's lifetime against her and Champatrao (defendants No. 3 and 6) but by the time the application was pressed and the amendment was allowed Ajani was dead. The only person then interested in opposing was Champatrao and he did oppose it but was unsuccessful in his opposition. He did not appeal against the decree. It has, therefore, become final as against him. The other defendants have no right to urge an objection which was available to Champatrao alone. Ground No. 2, therefore, fails.

Ground No. 3 also similarly fails because Yelhai (defendant No. 2) to whose right to remain in possession, for life, of the property given for her maintenance, at the family arrangement of 1909, it relates, has died. I am not prepared to hold that under the arrangement Yelhai had acquired any interest which

would devolve on her niece Bajai, at her death, because admittedly her right of enjoyment or residence was limited admittedly to her own lifetime. The above discussion disposes of ground No. 4 also. I need not deal with it separately.

The only point that remains for consideration is the one covered by ground No. 5. It deals with the question of the binding character of the mortgages in favour of defendants Nos. 7 and 8. In this connection my attention is drawn to the oral pleadings recorded by Mr. A. S. Sathe, Sub-Judge, on 22nd April 1915 wherein on behalf of plaintiff an admission was made by the Pleader to the effect that the mortgages, dated 23rd December 1895 and 21st February 1902, were binding and the plaintiff's only plea was that the bond of 1902 which was a renewal of the old mortgage-bond was regularly satisfied. In spite of this admission the Judge recorded in paragraph 23 of his judgment a finding which on the face of it, is inconsistent with it. Appellant's Pleader urges before me that the view of the Court of first instance that there was no acknowledgment within 12 years after the due date of the mortgage of 1895 is incorrect in view of the fact that there was admittedly a renewal in 1902 by Ajani as per Exhibit D-2, and that Ajani being a *de facto* manager and the representative of the estate a renewal mortgage by her amounted to an acknowledgment by a person representing the estate so as to extend the limitation under section 19 of the Indian Limitation Act. To this the respondent's Pleader reply is that if an acknowledgment by a limited female heir would not extend limitation as against the reversionary owner much less a renewal mortgage by a trespasser would extend it. I think the respondent's contention is amply supported by the Privy Council decision in *Soni Ram* v. *Kanhaiya Lal* (1). In this view of the case neither the renewal mortgage in 1902 by Ajani in favour of the mortgagee, nor the subsequent mortgages executed by the other females will be of any avail to keep the old mortgage of 1895 in time as against the real owner *i. e.*, the plaintiff. I do not. therefore, see any necessity to order a remand for a fresh decision on this point, or for inserting any declaration in respect of the mortgage of 1895 in the decree.

It is next contended on behalf of the appellants that this Court should give full effect to the admission made in the oral pleadings dated 22nd April 1915, and not permit the plaintiff to resile from it. It is argued that the admission on the point of the binding character of the mortgage of 1895 as also of its renewal mortgage of 1902, dispensed, in the circumstances of the case, with the necessity of proving that any acknowledgments were made by the mortgagor and his heirs before the expiry of 12 years from the due date of each mortgage. This argument is, no doubt, a plausible one but I am not prepared to accept it for the simple reason that the admission is on a point of law, and made by a Counsel and further that the person whose interests would be affected by it is a minor. For these reasons I hold that ground No. 5 also fails.

Although Bajai is one of the appellants, there. is absolutely no ground in the memo of appeal relating to Survey No. 59 covered by the gift (Exhibit D-4) made in her favour. Inspite of this an attempt is made at the hearing to press her claim in respect of that field. Field No. 64 is also claimed by her as an heir of Yelhai. I am not prepared to permit this new point not covered by any of the grounds of appeal to be pressed at this late stage. Similarly I cannot allow Laxmi (defendant No. 1) to claim her maintenance as against the plaintiff in this suit. It is still open to her to file a suit against plaintiff for a suitable provision being made for her residence and maintenance according to her position in life.

The result is that the appeal fails and is dismissed with costs.

As regards the cross-objection grounds Nos. 1 and 2 relate to the *gadhi* house. I think it is clearly an accidental slip to mention present defendant No. 3 as

(1) 19 Ind. Cas. 291; 35 A. 227; 13 M. L. T. 437; 16 C. W. N. 605; 11 A. L. J. 389; (1913) M. W. N. 470; 17 C. L. J. 488; 15 Bom. L. R. 489; 25 M. L. J. 131; 40 I. A. 74 (P. C.).

the person in possession instead of inserting a name of the original defendant No. 3, Ajani, against it. As Bajai is shown in the decree as the respondent No. 3 it is likely to lead to some confusion, I, therefore, direct that the word "Ajani" be read instead of defendant No. 3 in the description of the item No. 5 and item No. 6 wrongly shown as No. 3 in the decree of the First Appellate Court. As both Ajani and Yelhai are dead, I do not see any necessity for any rights of possession during their lifetime being reserved for them or any of them. I, therefore, order its deletion from the decree.

The question of costs only is now left. The Courts below have in their discretion thought fit to direct each party to bear its on costs throughout. Taking into consideration the circumstances of the case, I think the Courts below have not acted wrongly in the exercise of their discretion. I, therefore, decline to interfere with the order regarding costs. The appeal and the corss-objection thus fail and are dismissed with costs.

G. R. D. *Appeal and corss-objection dismissed.*

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 411 OF 1923.
July 15, 1924.
Present :—Mr. Kinkhede, A. J. C.
Seth LABHCHAND—PLAINTIFF—APPELLANT
versus
DARYASINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

C. P. Land Revenue Act (II of 1917), s. 203 (2)—Abadi site—Landlord, when can re-enter—Usufructuary mortgage by tenant.

A landlord gets no right of re-enty in respect of an *abadi* site under section 203 of the C. P. Land Revenue Act unless there is a permanent transfer such as sale, etc. He cannot sue for ejectment from the *abadi* site when there is a temporary loss of a right of enjoyment of occupation of the site on account of an execution of a mortgage with possession.

Govind Rao v. *Amrit Rao*, 4 N. L. R. 149 at p. 154 and *Narain* v. *Behari*, 31 Ind. Cas. 307; 11 N. L. R. 126, referred to.

A mortgage is not a transfer which permanently puts an end to the tenant's interest and, therefore, affords no cause of action to a landlord to sue for re-entry.

Appeal against the decree of the Additional District Judge, Nimar, dated the 9th August 1923, in Civil Appeal No. 30 of 1923.

Mr. *J. Sen*, for the Appellant.

Mr. *S. B. Gokhale*, for the Respondents.

JUDGMENT.—The *Lambardar* of *Mouza* Hiwala had succeeded in getting a decree from the Court of first instance for possession of certain *abadi* sites against some mortgagees in possession but the lower Appellate Court has upset the decree. The plaintiff has, therefore, appealed to this Court. The sole question to be considered is whether the execution of a possessory mortgage of *abadi* sites should entail a forfeiture of the occupiers' right to the site in the *abadi*. The right decision of the question turns upon the interpretation of the provisions of section 203 of the C. P. Land Revenue Act.

The lower Appellate Court has held that the original tenants have not abandoned the house property and are yet entitled to occupy house sites in the said *Mouza*.

In view of the wording of section 203, sub-section (2) of the C. P. Land Revenue Act, 1917, I hold that unless the tenant finally gives up his right of enjoyment of the occupancy the landlord gets no right of re-entry. Compare *Govind Rao* v. *Amrit Rao* (1). The observations of Stanyan, A. J. C. in *Narain* v. *Behari* (2) also show that unless there is a permanent transfer such as a *sale* the landlord's right of re-entry does not come into existence. A mortgage is not a transfer which permanently puts an end to the tenant's interest and, therefore, affords no cause of action to a landlord to sue for re-entry. On the whole the decision appealed against is correct and this appeal, therefore, fails and is dismissed with costs. The costs in the Courts below will be paid as already ordered.

G. R. D. *Appeal dismissed.*

(1) 4 N. L. R. 149 at p. 154.
(2) 31 Ind. Cas. 307; 11 N. L. R. 126.

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A finding of delay is a finding of fact but whether the conclusion drawn therefrom, that it disentitles the plaintiff from claiming the particular relief, is right or wrong is a matter which is open to consideration in second appeal as the legal result of certain facts is a question of law. **N** ABDUL MAJID KHAN *v.* BALAPPA **105**

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——————— *Finding of fact.*

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——————— *Question of fact—Acquiescence—Estoppel — Delay — Co-owner — Neighbouring owner.*

Acquiescence is not a question of fact but of legal inference from facts found and it is open, therefore, to the High Court to consider whether the question of acquiescence has been properly decided by the Court of Appeal below.

Acquiescence is no more than an instance of the law of estoppel by words or by conduct. If a party having an interest to prevent an act being done has full notice of its being done, and acquiesces in it, so as to induce a reasonable belief that he consents to it, and the position of others is altered by their giving credit to his

Appeal (Second)—concld.

sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license. But mere quiescence or absence of interference is not sufficient to create an estoppel.

The vigilance required of and the duty cast upon a co-owner with regard to an infringement of his right is greater than and of a different description from what is expected of a neighbouring owner when he finds an act being done by the other on his own property.

Mere delay in taking legal proceedings, if the remedy is not barred, is nothing.

The *onus* of proving acquiescence is on the person who alleges it. **C** BANESWAR *v.* AMULYA CHARAN **309**

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Approver, *evidence of—Retracted confession of co-accused—Conviction for murder—Independent corroboration, necessity of.*

It is unsafe to convict an accused for murder on the testimony of an approver and the retracted confession of a co-accused, especially when they are in conflict with each other and there is no independent corroboration. **O** PARMESHWAR *v.* EMPEROR, 11 O. L. J. 325; (1924) A. I. R. (O.) 369; 25 Cr. L. J. **135**

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Arbitration *and award—Arbitrator—Jurisdiction exceeded or not exercised—Consent of parties—Arbitrator as witness—Duty of Court—Examination on commission—Limit of examination—Award—Minors parties.*

The consent of the parties to an arbitration that the arbitrator should leave certain items undetermined may take various forms; an expressed withdrawal, a mutual understanding not to submit the necessary materials, a mutual recognition by the parties that a condition of things exists which makes a decision impossible, or a diplomatic silence with regard to a mutual understanding.

If an Arbitrator chooses to undertake the decision of a variety of matters with the consent of parties

Arbitration—contd.

and he deliberately, or by an oversight, without the consent of the parties, omits from his decision anything really material, it is sufficient to destroy the award; because, he derives his authority only from the consent of parties and from the moment he goes outside that consent, either by omitting to decide what they have submitted to him, or by deciding something which they have not submitted to him, he ceases to be clothed with the legal authority from which alone he derives his jurisdiction.

If in the course of events, which have happened since he took upon him his office, it has become impossible, or no longer desirable, either in the view of the Arbitrator or in the view of the parties themselves, to decide any one or another of the points originally submitted, and the parties themselves realise that the Arbitrator should disregard that point, the defect which would otherwise invalidate the award, ceases to be a defect.

An Arbitrator is not in the position of an ordinary witness. Therefore, a Judge ought never to issue a Commission for the examination of an arbitrator or submit him to a roving Commission by way of examination by the parties uncontrolled by the Judge himself, and when an arbitrator appears before him, he ought to exercise the severest possible control and circumspection over the examination.

The practice of calling Arbitrators indiscriminately, as though they were witnesses to the issue of fact, is not only an unreasonable burden upon the Arbitrators and certain to lead to a great deal of irrelevant evidence, but it also tends to lead the Judge unconsciously into a kind of re-hearing of the Arbitration. Nothing can be worse than that, because there is no appeal from an Arbitrator, and a Judge ought, from the first severely to discountenance any proceeding which attempts to take that form. But more than that he ought to exercise a severe control over the interrogatories or examination of the Arbitrator when summoned.

An Arbitrator is a judicial person in respect of the matter of which he has been appointed. He is entitled to the respect and consideration due to a person occupying that position, and his evidence ought to be confined strictly to the points which are in the eyes of the law material as coming from him. That is to say, any question of fact, upon some evidence or allegation tending to establish or disprove his own misconduct, may be put to him if he is charged with misconduct.

Where an Arbitrator finds as a fact that a party did withdraw or did agree to certain things, that is a finding of fact which a Court of law cannot go behind.

An Arbitrator may be examined upon the course of procedure which he has adopted, the material which he has utilised in arriving at his decision and all matters affecting the award itself, that is to say, the drawing up of the award, the piece of paper and so forth. The slightest attempt to get to the materials of his decision, to get to the back of his mind, and to examine him as to why

Benami transaction—contd.

of the suit and giving him the right to become the owner of the property recovered under the decree in that suit, is not of an executory nature requiring the execution in future of a formal deed of conveyance. Such an agreement is not opposed to public policy, the paramount public policy being not to interfere with contracts entered into freely and voluntarily by men of full age and competent understanding.

In equity as well as in law non-existing property may be made the subject of an agreement. When the property comes into existence, the contract to assign works out as a complete assignment by itself, provided the nature of the property is such that its transfer is not forbidden by law. The assignment, however, to be operative, must be valid in form and where it is not so, the doctrine of part performance cures the defect.

Essentials of doctrine of part performance stated. O BANSIDHAR *v.* AJUDHIA PRASAD, 10 O. & A. L. R. 701; 27 O. C. 175; 11 O. L. J. 619 **333**

——————— *Presumption of advancement—Criterion—Burden of proof—Trusts Act (II of 1882), s. 82.*

Where a transfer has been made ostensibly in favour of a wife or a son, there will not in dealing with Indians be the same presumption of advancement as there would be in the case of English people.

The criterion in these cases in India is to consider from what source the money comes with which the purchase-money is paid. But the source of the purchase-money is to be the criterion in the absence of all other relevant circumstances.

The burden of proving that a transaction was a *benami* one is on the assertor; even a slight quantity of evidence to show that it was a sham transaction will suffice for the purpose. Such a transfer, however, cannot be considered as nothing and the person who impugns its apparent character must show something or other to establish that it is a *benami* or sham transaction.

That a large portion of the consideration money was paid by a husband for the purchase of property in the name of his wife does not relieve those, who allege the transaction to be a *benami* one, from proving it to be so. This burden is greatly enhanced if a great length of time has passed since the transaction impugned. O RAJ KUNWARI *v.* MAHARAJ KUNWAR **832**

——————— *Test*—Onus—*Nature of evidence necessary—Decision, how arrived at.*

As *benami* transactions are very familiar in Indian practice, even a slight quantity of evidence to show that it was a sham transaction may suffice for the purpose.

The person who impugns the apparent character of a transaction must not rely, however, solely on probabilities. He must show something definite to establish that it is a sham transaction, on the principle that the burden of proof lies upon the person, who claims contrary to the tenor of a deed and alleges that the apparent is not the real state of things.

Benami transaction—concld.

The most important test to be applied in these cases is the source whence the consideration came.

Where it is asserted that an assignment in the name of one person is really for the benefit of another person, the principle applies that the trust of the legal estate results to the man who pays the purchase money.

The decision of the Court should rest not upon suspicion but upon legal grounds established by legal testimony.

Where, however, from the lapse of time, direct evidence of a conclusive or reliable character is not forthcoming, as to the payment of consideration, the case must be dealt with on reasonable probabilities and legal inferences arising from proved or admitted facts.

The doctrine of advancement in favour of wife or child does not apply in India, but the relationship is a circumstance which is taken into consideration in determining whether the transaction is *benami* or not. C BHUBANMOHINI DASI *v.* KUMUDBALA DASI, 28 C. W. N. 131; 39 C. L. J. 140; (1924) A. I. R. (C.) 467 **934**

——————— *Transfer of property by Anglo-Indians — Presumption of advancement, whether arises—Documents executed in solemn form, interpretation of—Courts, duty of, in interpreting —Gift—Subsequent acts, whether relevant.*

There is no widespread and persistent usage and practice among Anglo-Indians in Burma of transferring land *benami* without any intention of transferring the beneficial ownership in the way there is amongst Hindus and Muhammadans.

The presumption of advancement arises in the case of a transfer of land made by a registered deed by an Anglo-Indian husband to his Anglo-Indian wife.

In cases of transfers of land to wives or children without any intention of conferring on them the beneficial ownership, not only race, place of birth, domicile or residence have to be taken into consideration, but widespread and persistent usages and practices of executing such documents have also to be depended upon.

It is necessary that Courts should regard documents executed in a solemn form as primarily expressing the intention of the executant according to their tenor and evidence of strong motive should be forthcoming for acting with an intention contrary to that which the document indicates.

It is not only acts and conduct at or about the time of a deed of gift that are relevant but the evidence of subsequent act and conduct is also admissible. R LECUN *v.* LECUN, 2 R. 253; 3 Bur. L.J. 85; (1924) A. I. R. (R.) 283 **686**

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Bengal Municipal Act (III of 1884), s. 15 —*Rules under section, r. 14—Municipal election—Voting enclosure—Candidate, right of, to be present—Natural right.*

A candidate for election as a Municipal Commissioner has, in view of rule 14 of the Rules framed under section 15 of the Bengal Municipal Act, no right to be present in that part of the polling station where the votes are actually recorded. No such right can be recognised under natural law.

Where rights of candidates or electors are given expressly by Statute, they do not carry with them any rights under natural law not given by statutory law. **C** CHAIRMAN OF HOWRAH MUNICIPLITY *v.* HARI PADA ROY, 28 C. W. N. 892; (1924) A. I. R. (C.) 1070 345

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Bengal Public Demands Recovery Act (III of 1913), s. 4—*Form of certificate—Compliance with provision, whether essential.*

The form of a certificate under section 4 of the Bengal Public Demands Recovery Act should be strictly complied with, and a certificate which contains no entry in that part of it, which is really the certificate in the prescribed form, giving any of the particulars in the handwriting of the officer competent to issue such a certificate, is invalid. **C** ALI MIYAN *v.* WAJADDIN SIKDAR 1013

Bengal Tenancy Act (VIII of 1885), s. 29— *Amalgamated* jama.

A tenancy created by amalgamating additional land with an existing occupancy holding is not controlled by section 29 of the Bengal Tenancy Act.

A landlord is entitled to receive consideration for recognising the purchase of a non-transferable occupancy holding. **C** SASI KANTA ACHARJEE BAHADUR *v.* GENDA SHEIKH 970

——— **ss. 38, 52**—*Suit for rent—Abatement, whether can be claimed.*

Abatement of rent may be claimed in a rent suit under the Bengal Tenancy Act. **C** GOSTA BEHARI PRAMANIK *v.* HEM CHANDRA DAS DE, 29 C. W. N. 124 315

——— **s. 87**—*Non-transferable tenancy—Sale by tenant, effect of—Transferee, position of.*

When a tenant having no transferable interest transfers his interest and puts the transferee in possession, the original tenancy may be treated as abandoned, and when the transferee takes possession of the land he is no better than a trespasser as against the landlord. **C** SREERAM CHUNDER BASU *v.* NAGENDRA NATH 958

——— **ss. 95, 98, 100**—*Common Manager—Suit for rent—Execution of decree—Previous sanction of District Judge, whether necessary.*

There is no provision in the Bengal Tenancy Act which requires the previous sanction of the District Judge to be obtained to bring a suit for rent against a Common Manager or to execute a decree obtained in such suit. **C** SARAT CHANDRA *v.* RAJ KUMAR 327

——— **ss. 102, 103**—Alienability of impartible estates, evidence of—Settlement *khewats*, relevancy of. *See* HINDU LAW 886

——— **s. 103 (b)**—*Record of Rights—Presumption—Burden of proving contrary*—Talukdar *paying revenue to* Zemindar—Jama *not separate—Bengal Decennial Settlement Regulation (VIII of 1793), s. 5*—Kabuliyat, *definition of—Service tenure—Resumption, meaning of*—Zemindar, *rights of.*

The burden of proving that an entry in the Record of Rights is erroneous is on the party alleging it.

A *talukdar* who has been paying revenue to the *zemindar* but has taken no steps to obtain separation of his *jama* from the *zemindary jama* is not an independent *talukdar* within the meaning of section 5 of the Bengal Decennial Settlement Regulation, 1793.

A *kabuliyat* predicates a *patta*. A *patta* is granted by the *zemindar* as a title-deed to the tenant. The *kabuliyat*, as its name implies, is a mere acknowledgment, an engagement by the tenant to carry out the terms of the *patta*.

The "resumption" of a "service tenure" does not mean that on failure of the direct male line it "escheats" to the *zemindar* and becomes what is called his *sir* or *khas* property; the *jagir* retains its character, but the *zemindar* becomes entitled to make a new settlement with the knowledge and sanction of the authorities. **P C** SRINATH RAY *v.* PERTAP UDAI NATH SAHI DEO, (1923) M. W. N. 702; (1923) A. I. R. (P. C.) 217; 33 M. L. T. 408; 28 C. W. N. 145 879

——— **ss. 105, 105A, 106, 107, 108, 109 and 109A**—*Fair annual rent settled by Revenue Officer—Decision of Revenue Officer, force of—Decree of Civil Court—Decision of Revenue Officer not challenged by way of revision or appeal—Finality of decision—Question decided by Revenue Officer, whether can be re-opened.*

Where in a proceeding under section 105, Bengal Tenancy Act, for assessment of fair rent, the tenant contends that he holds the land rent free, and the Revenue Officer assesses an annual rent, by compromise or otherwise, the decision of the Revenue Officer, by virtue of provisions of section 107 (1) of the Act, has the force and effect of a decree of a Civil Court in a suit between the parties, and if it is not challenged by way of a revision or appeal, under sections 108 and 109A of the Act, it operates as a final decree as deciding between the parties, (*i*) that the tenant holds the land subject to the payment of rent; (*ii*) that the fair annual rent is that fixed by the Revenue Officer.

So long as the decision of a Revenue Officer, in proceedings under section 105A, Bengal Tenancy Act, remains in force, effect must be given to it under section 107 of the Act.

It is not open to defendants to raise by way of defence, under section 109, the very question which

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was decided by the Revenue Officer under section 105 of the Act. That section does not whittle away the effect of section 107 of the Act, and applies only to cases where no decision has been pronounced by the Revenue Officer concerned. **C** DHARANI MOHAN RAY *v.* ASUTOSH MUKERJI, 40 C. L. J. 31; (1924) A. I. R. (C.) 907 **396**

——— **ss. 105, 106** *Application by landlord under s. 105 and by tenant under s. 106—Disposal of application under s. 105 stayed by consent of parties—Decision given in application under s. 105 before final decision in application under s. 106—Decisions under two sections conflicting—Decision under s. 106, whether binding.*

A landlord applied for the settlement of fair rent under section 105, Bengal Tenancy Act. Then the tenant made an application under section 106 alleging that he had held his tenancy at a uniform rate of rent for so long that he was entitled to the presumption under section 50 of the Act. The hearing of the application under section 105 was stayed until the disposal of the application under section 106 on the ground, that the case under section 106 would dispose of the question whether the rent was fixed or not and this argument was not challenged on behalf of the landlord. The application under section 106 was dismissed for default and revived and decided eventually in favour of the tenant but between the date of its dismissal for default and the order for restoration the application under section 105 was taken up and a rent higher than that entered in the Record of Rights was fixed as fair rent:

Held, (*Mukerjee, J.*, dissenting).—that as by mutual consent of the landlord and tenant the question whether the rent could be enhanced or not was to be settled in application under section 106, the matter should be looked at from the position which the parties would have occupied had the application under section 106 been not dismissed for default and the application under section 105 not taken up by the Revenue Officer and the parties should be bound by the decision in application under section 106 and not by that in application under section 105. **C** PRASANNA DEB *v.* ACHHIR-UD-DIN MAHAMAD **953**

——— **s. 153**—*Suit for rent—Second appeal.*

Under section 153 of the Bengal Tenancy Act a second appeal does not lie when no question as to the amount of rent is either raised or decided in a suit for rent, where the value is below 100 rupees **C** BHARAT CHANDRA *v.* HARI KRISHNA **829**

——— **s. 158-B (2)**—*Land laws, scheme and policy of*—Raiyat, *position of*—*Under*-raiyat, *whether can acquire occupancy rights*—*Under*-raiyati *tenure, whether transferable*—*Previous possession, when can form basis of suit.*

The scheme and policy of the land laws of Bengal is to originally divide persons having interest in agricultural land into two classes, *viz.*, those in actual occupation or cultivating tenants and those entitled to rent from such tenants. There may be several degrees of rent-receivers, but there is one class of cultivating tenants who are called *raiyats*.

In theory the *raiyat* is supposed to be in actual occupation of the land and actually cultivating it. By virtue of this character, the *raiyat* is permitted to acquire a right of occupancy, or the right to remain in occupation of the land.

Though he is allowed to sub-let in the eye of law, the *raiyat* is the actual occupant of the land, occupying it through his lessee, as by sub-letting he does not become a middleman.

The Bengal Tenancy Act, however, has been less favourable to an under-*raiyat* and has taken away his right of acquiring a right of occupancy under any condition except by local usage or custom. He is no better than a tenant-at-will with no tangible interest in the land except that of holding it till the end of the agricultural year.

The right of an under-*raiyat* is not transferable.

The interest of an under-*raiyat* is not heritable.

Mere previous possession, unless perfected into adverse possession, cannot form the foundation of a suit for recovery of possession. **C** JNANENDRA NATH *v.* DUKHIRAM, 28 C. W. N. 865; 40 C. L. J. 90; (1924) A. I. R. (C.) 850 **386**

——— **s. 158B (2)**, *object of*—*Co-sharer landlord whether can waive benefit*—*Omission to serve notice of sale, effect of*—*Sale held in contravention of Statute, whether null and void*—*Question, how determined*—*Irregularity and nullity, distinction between*—*Test.*

The object of section 158B sub-section (2) of the Bengal Tenancy Act is to protect the co-sharer landlord.

It is open, however, to the co-sharer landlord to waive the benefit of sub-section (2) of section 158B of the Bengal Tenancy Act.

The omission to serve upon the co-sharer landlord the notice contemplated by sub-section 2 of section 158B of the Bengal Tenancy Act does not nullify the sale or alter its character to that of a sale held in execution of a money decree where the co-sharer concerned consents to the sale.

It cannot be maintained on principle that because a sale has been held in contravention of a statutory provision, it must, irrespective of the nature and purposes of the provisions, be deemed to be null and void.

When the provisions of a Statute have been contravened, if a question arises as to how far the proceedings are affected by such contravention the matter must be determined with regard to the nature, scope and object of the particular provision which has been violated.

An irregularity is a deviation from a rule of law which does not take away the foundation or authority for the proceeding or apply to its whole operation, whereas a nullity is a proceeding that is taken without any foundation for it or is so essentially defective as to be of no avail or effect whatever, or is void and incapable of being validated.

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The safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity. C RAJANI KANTA GHOSE *v.* RAHAMAN GAZI, 37 C. L. J. 417; 27 C. W. N. 765; (1924) A. I. R. (C.) 408 **507**

—— —— **s. 173,** application under—Limitation. *See* LIMITATION ACT, SCH. I, ART. 166 **322**

—— **Sch. III, Art. 3**—*Landlord and tenant—Land given for cultivation—Lessee settling tenants—Lessee, whether* raiyat—*Suit for recovery of possession against landlord—Limitation—* Raiyat, *test of.*

Where a landlord, under a *parwana*, gives a person "permission to cultivate" certain land, the latter is a *raiyat*, and limitation for a suit by him for recovery of possession, on dispossession by the landlord, is governed by Art. 3 of Schedule III to the Bengal Tenancy Act.

The mere fact that such a person settles tenants upon the land does not change the nature of his holding.

In order to determine whether a tenant is a *raiyat* or not the test is not the use which the tenant has made of the land but the purpose for which the land is leased. Pat GAYANI DAS *v.* DWARKA MANDAR, 3 Pat. 540; (1924) A. I. R. (Pat.) 269; (1924) A. I. R. (Pat.) 557 **79**

Bengal Tenancy (Amendment) Act (II of 1918) s. 49K—*Sale of tenure of aboriginal, whether nullity—Waiver of provisions of Act—Application to set aside sale—Limitation.*

A sale of the tenure of an aboriginal in execution of a decree in contravention of the provisions of section 49K of the Bengal Tenancy (Amendment) Act of 1918 is a nullity.

The Bengal Tenancy (Amendment) Act of 1918 was enacted with the object of protecting the aboriginals against indiscreet transactions. It is not, therefore, open to an aboriginal to waive the benefit of the provisions of the Act.

The question of limitation arises only where a sale is a valid sale until it is set aside; it does not arise where the sale is altogether void. C JOGGESWAR MAHATA *v.* JHAPAL SANTAL, 51 C. 224; 28 C. W. N. 556; (1924) A. I. R. (C.) 638 **848**

Bombay District Municipal Act (III of 1901), ss. 3 (12), 96—*Bye-laws of Kurla Municipality—Bye-law 132, meaning of—Street, definition of—Open space between buildings, whether street.*

While the owner of a large area of building land is erecting buildings thereon, the open spaces between the buildings cannot be considered as streets within the meaning of section 3 (12) of the Bombay District Municipal Act, until the buildings are finished, as the owner has a right to prevent all other persons from using his private land.

Bye-law 132 of the Bye-laws of the Kurla Municipality means that no point of a building must be at a greater height from the ground than the distance from the farther edge of the street on which the building abuts, to the end

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of the vertical line drawn from that point at the top of the building. B TYABALLI *v.* EMPEROR, 26 Bom. L. R. 216; (1924) A. I. R. (B.) 365; 25 Cr. L. J. 1188 **52**

Bombay High Court Rules, r. 214—Originating Summons—Declaratory decree, whether can be granted. *See* SPECIFIC RELIEF ACT, s. 42 **628**

Bombay Revenue Jurisdiction Act (X of 1876), ss. 4 (a), 5 (a)—*Bombay Titles to Rent-free Estates Act (XI of 1852), Sch. B, s. 8—Suit for declaration that plaintiff is* jangam *of* math, *maintainability of—Suit restraining Secretary of State from recovering economic rent, whether barred—Third person in possession of lands appertaining to office of village servant—Collector, power of, to levy economic rent—Order* ultra vires—*Suit to restrain Collector—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 14, applicability of.*

A suit for a declaration that plaintiff is the *jangam* of a *math* is barred under paragraph (2) of section 4 (*a*) of the Bombay Revenue Jurisdiction Act.

A suit against the Secretary of State for India and other defendants for an injunction restraining the former from recovering the full economic rent of certain lands and paying the same to the latter and restraining the latter from receiving the same, even if it falls under paragraphs 1 and 4 of section 4 (*a*) of the Bombay Revenue Jurisdiction Act, is saved from the bar created by section 5 (*a*) of the Act.

The Government has power to regulate by rules the question of emoluments relating to service performed to the State under the fifth provision of section 8, Schedule B, Bombay Titles to Rent-free Estates Act but it has no power under that Act to frame any rules with reference to the resumption of lands given as emoluments of any hereditary office, such as *kazis*, village *joshies*, etc. Any such rules must be *ultra vires*.

The office of *jangam* of a *math* comes under the first paragraph of section 8, Schedule B of Bombay Titles to Rent-free Estates Act.

Apart from some statutory provision or some rule having the force of law, the Collector has no power to disturb the possession of a third party, over lands appertaining to the office of a village servant, who may have acquired rights in respect of such lands under the operation of law, as, for example, by adverse possession. In such a case the Collector has no power either to evict the person in possession or to levy economic rent in respect of the lands.

A suit for an injunction restraining the Secretary of State for India from enforcing an order which is *ultra vires* is not governed by Art. 14, Schedule I of the Limitation Act. B PATDAYA *v.* SECRETARY OF STATE FOR INDIA, 25 Bom. L. R. 1160; 48 B. 61; (1924) A. I. R. (B.) 273 **577**

Bombay Titles to Rent-free Estates Act (XI of 1852), Sch. B, s. 8. *See* BOMBAY REVENUE JURISDICTION ACT, s. 4 (*a*) **577**

Bundelkhand Land Alienation Act (U. P. Act II of 1903), s. 9 (3)—*Mortgage by member of agricultural tribe—Decree—Reference to Collector, whether can be made.*

The power to refer a case to the Collector under section 9, sub-section (3) of the Bundelkhand Land Alienation Act can be exercised at any stage, *i.e.*, either before a decree has been passed or made absolute.

The claim can be referred even though it has nominally matured into a decree which has been since found to be unenforceable. **A** BISHNATH SINGH *v.* BASDEO SINGH **1037**

Burden of proof. *See* ACT OF STATE **779**

——— *See* ADVERSE POSSESSION **861**

——— Adverse possession—Joint owners. *See* ADVERSE POSSESSION **821**

——— Application to set aside award—Applicant, what must prove—Onus. *See* ARBITRATION **16**

——— *See* BENAMI TRANSACTION **934**

——— *Benami* transaction—Presumption of advancement—Criterion. *See* BENAMI TRANSACTION **832**

——— Contract for sale of goods—Dispute as to quality—Burden of proving defectiveness in quality. *See* ARBITRATION **341**

——— *See* LANDLORD AND TENANT—EJECTMENT **226, 594, 623**

——— Hindu joint family—Mortgage decree against father—Ancestral property sold—Suit to cancel auction—Immoral or illegal debt—Burden of proof. *See* HINDU LAW—JOINT FAMILY **180**

——— House built by tenant in *abadi*—Tenant's right to transfer such house—Burden of proof. *See* CUSTOM **810**

——— Record of Rights—Presumption—Burden of proving contrary. *See* BENGAL TENANCY ACT, s. 103 (*b*) **879**

——— Release in favour of father—Subsequent insolvency—Anticipatory fraud. *See* PROVINCIAL INSOLVENCY ACT, s. 53 **450**

——— Sale on credit or for cash. *See* EVIDENCE ACT, s. 102 **658**

——— Suit for possession. *See* EVIDENCE ACT, s. 107 **27**

——— Suit for possession of land—Encroachment, allegation of. *See* EVIDENCE ACT, s. 101 **645**

——— Undue influence. *See* CONTRACT ACT, s. 16 **817**

Cause of action—Implied contract to pay—Jurisdiction of Court. *See* CIVIL PROCEDURE CODE, s. 20 **122**

C. P. Land Revenue Act (II of 1917), s. 182—*Occupancy holding, transfer of*—Lambardar, *consent of, whether necessary.*

A *lambardar* is entitled to maintain a suit for ejectment against a transferee of absolute occupancy holding without his consent, even though the transfer was consented to by the other co-sharers. **N** VITHAL *v.* WAMAN **495**

——— **s. 203**—Abadi *site, occupation of, by tenant—Transfer by landlord—Right of tenant to resist entry by transferee—Adverse possession.*

The occupation by a tenant of an *abadi* site in a village makes him a licensee and unless the land is given to him as a house site he is not protected by section 203 of the Land Revenue Act. A sale by the landlord puts an end to the license.

No title by prescription can be acquired in respect of such land by the tenant in the absence of any assertion of adverse title against the landlord. **N** PUNJARAJSA *v.* CHAGANLALSA **182**

——— **s. 203 (2)**—Abadi *site—Landlord, when can re-enter—Usufructuary mortgage by tenant.*

A landlord gets no right of re-enty in respect of an *abadi* site under section 203 of the C. P. Land Revenue Act unless there is a permanent transfer such as sale, etc. He cannot sue for ejectment from the *abadi* site when there is a temporary loss of a right of enjoyment of occupation of the site on account of an execution of a mortgage with possession.

A mortgage is not a transfer which permanently puts an end to the tenant's interest and, therefore, affords no cause of action to a landlord to sue for re-entry. **N** LABHCHAND *v.* DARYASINGH **1056**

C. P. Tenancy Act (XI of 1898), s. 46 (5)—*Document transferring occupancy rights cannot be registered—Registration illegal even with regard to transferable property.*

A Registration Officer has no power to register a mortgage-deed purporting to mortgage occupancy rights which cannot be mortgaged, but if such a document is registered, it is to be regarded as not registered at all. And even if the deed includes some transferable property, besides the occupancy rights, its registration is illegal and must be ignored *in toto*. **N** KESARBAI *v.* JAMADAR, 20 N. L. R. 162 **126**

C. P. Tenancy Act (I of 1920), s. 2—*Mortgagee in possession of fractional share in village, whether "landlord"—Assignee of fractional share, position of.*

A mortgagee in possession of a fractional interest in a village is not a "landlord" within the meaning of the C. P. Tenancy Act, and, therefore, cannot maintain a suit for rent against the tenants. The position assignable to him by virtue of the mortgage is that of a mere transferee of a money claim to a portion of the arrears of rent when they accrue due to the landlord of the holdings held by the tenants of the village.

An assignee of only a fraction of proprietary rights in a village does not become a landlord and the assignor continues to be the landlord of

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the holdings, so long as he retains the remaining fraction to himself. **N** HARBAX *v.* LACHMAN **201**

——— **s. 5** — *Absolute occupancy holding—Tenant, whether can bequeath interest.*

An absolute occupancy tenant is not empowered to bequeath any right in his holding. **N** RUPI *v.* SADASHEO **1038**

Champerty — *Champertous agreements — Public policy in India.*

In India champerty is not necessarily opposed to public policy; and in deciding whether a champertous agreement should be set aside, it has to be considered whether such an agreement is extortionate, unconscionable, or one made for the purpose of gambling in litigation or of injuring or oppressing others by encouraging unrighteous suits, in which case it would be contrary to public policy and unenforceable. **M** GOLAPUDI SESHAYYA *v.* NADENDLA SUBBIAH, 20 L. W. 642; 47 M. L. J. 646; (1924) M. W. N. 887; (1924) A. I. R. (M.) 877 **499**

Charge, alteration of. *See* CRIMINAL PROCEDURE CODE, s. 236 **364**

——— Conspiracy to cheat—Charge covering three transactions—Different overt acts—Charge, whether bad—Cheating, charge of, what must contain—Omission to mention persons deceived, whether fatal. *See* PENAL CODE, s. 120B **545**

———, frame of—Defect in form—Prejudice to accused—Defect, whether cured. *See* CRIMINAL PROCEDURE CODE, s. 537 **50**

——— of murder—Alternative charge of causing evidence of offence to disappear—Prejudice—Test. *See* PENAL CODE, s. 201 **709**

——— Perjury — Contradictory statements in civil and criminal proceedings — Alternative charge. *See* CRIMINAL PROCEDURE CODE, s. 195 **59**

Charitable and Religious Trusts Act (XIV of 1920), ss. 3, 5—*Temple trust—Administration application by worshipper—Some only of trustees made parties—Order, whether binding on remaining trustees.*

In an application by a worshipper, under section 3 of the Charitable and Religious Trusts Act, in respect of the administration of a temple trust, which is managed by the vote of the majority of the trustees, all the trustees must be made parties, and where some only of the trustees are made parties, an order passed on the application is not binding on the remaining trustees. **M** SRINIVASA AYYANGAR *v.* ANNATHANAM AYYAR, (1924) M. W. N. 515; 35 M. L. T. 51 **733**

Chota Nagpur Encumbered Estates (Amendment) Act (III of 1909), ss. 3, 12A—*"Alienation", meaning of—Scope of Act.*

A Will operates only from the death of the testator and there can be no question of Commissioners' sanction after the death of the testator under section 12A of the Chota Nagpur Encumbered Estates (Amendment) Act of 1909. The alienation mentioned in that section and in section 3 refers to alienation *inter vivos* and not to Wills.

The Encumbered Estates (Amendment) Act creates a sort of administration of the immoveable estate of the debtor in some respects resembling that pursued in an administration suit but with the material difference that whereas in an administration suit the satisfaction of the claims of the creditors is primarily in view, in proceedings under the Act the protection of the debtor and the protection of his estate so far as practicable in spite of its encumbered condition is the main solicitude of the authorities concerned.

The Chota Nagpur Encumbered Estates (Amendment) Act restricts the power of the holder in disposing of the property in so far as it would interfere with the management of the estate. But the right to succession to the estate of the holder is not affected by the Act and is saved by the provisions of section 23. **C** PROTAP CHANDRA *v.* JAGADISH CHANDRA, 40 C. L. J. 331 **886**

Chota Nagpur Tenancy Act (VI of 1908), ss. 26 (a), 74—*S. 74, whether retrospective—Function of s. 26 (a)—Validation of agreements.*

Section 74 of the Chota Nagpur Tenancy Act has no retrospective effect inasmuch as it affects the substantive rights of parties.

Section 26 (*a*) of the Chota Nagpur Tenancy Act was not contemplated to invalidate agreements which were valid in their inception but to validate agreements in special cases out of such agreements as would otherwise have been invalid owing to the provision of section 21 of the Chota Nagpur Landlord and Tenant Procedure Act, 1879. **Pat** BHOLA NATH MAJHI *v.* SHIV PRASAD SINHA, (1924) Pat. 307 **988**

Civil Procedure Code (Act V of 1908), ss. 2, 47 (3)—*Decree, execution of—Dispute as to applicant being representative of party to decree—Determination of question, whether decree—Appeal—Succession Certificate Act (VII of 1889), s. 16—Succession certificate, effect of.*

The determination of a question arising between a decree-holder or a person claiming to represent the decree-holder and a judgment-debtor, as to whether any person is or is not the representative of a party, amounts to a decree and is appealable as such.

Where a succession certificate has been obtained by several persons in respect of a decree, and execution of the decree is sought, it is not open to the judgment-debtor to raise the objection that some of the applicants are not entitled to join in executing the decree. **A** PEARE LAL *v.* JHABBA LAL **604**

——— **ss. 2 (11), 47**—*Satisfaction of decree—Legal represntative, position of—Objection to liability—Executing Court, duty of.*

An order of substitution as the legal representative of a deceased judgment-debtor by itself renders the legal representative liable to satisfy the decree.

An Executing Court is bound before granting substitution to decide whether an alleged legal representative, who denies his liability to satisfy the decree, is the heir of the deceased judgment-debtor and, therefore, bound by the decree. **Pat** DINANATH SAHI *v.* MALHIJI BAID, (1924) Pat. 293; 3 P. L. T. 106; (1923) A. I. R. (Pat.) 149 **803**

——— **ss. 7, 94, 151, O. XXXVIII, rr. 5, 6**—*Attachment before judgment of immoveable property—Small Cause Court, whether can order attachment—Provincial Small Cause Courts Act (IX of 1887), s. 17—"Attachment" and "order of attachment", distinction between—"Interlocutory order," meaning of—Small Cause Court, whether has inherent powers.*

Per *Curiam* (*Walmsley and Chotzner, JJ.*, dissentiente).—A Provincial Small Cause Court has jurisdiction to make an order for attachment of immoveable property before judgment.

There is a difference between ordering the attachment of property and attaching the property. If a Provincial Small Cause Court makes an order for attachment of immoveable property, it would have to send it to an ordinary Civil Court for execution.

Per *Sanderson, C. J.*—In construing an Act words found therein should not be regarded as surplusage and full effect should be given to them if a reasonable interpretation can be found.

The only reasonable interpretation to be placed upon the words "so far as they relate to injunctions and interlocutory orders" in section 7 (*b*) of the Civil Procedure Code is that it was intended to exclude from the jurisdiction of a Provincial Small Cause Court the matters particularly specified in clauses (*c*) and (*e*) of section 94.

The meaning of the words "if it is so prescribed" in section 94 of the Civil Procedure Code is, if it is prescribed by the rules and orders contained in the First Schedule of the Code.

The order for attachment contemplated by section 94, clause (*e*) of the Code must be such an order as is specified in O. XXXVIII, r. 6, *viz.*, an order for attachment before judgment.

Per *Mukerjee, J.*—Something which is done between the commencement and the end of a suit or action, which decides some point or matter which, however, is not a final decision of the matter in issue, is known as an interlocutory order.

Order XXXVIII of the Civil Procedure Code has not been excluded either by section 7 read with section 94 or by O. L and is applicable to a Provincial Court of Small Causes.

Even a Provincial Court of Small Causes can act under section 151, Civil Procedure Code, and pass such orders as may be necessary.

Per *Chotzner, J.*—A Court which has not the power of executing a decree by attachment of immoveable property after judgment, cannot have the power of attaching such property before judgment.

Per *Walmsley, J.*—A Small Cause Court cannot attach property whether moveable or immoveable before judgment. **C** BARADA KANTA RAY *v.* MAIJUDDI, 28 C. W. N. 1056; 40 C. L. J. 199 **109**

——— **s. 10**—*Stay of suit—"Matter in issue," meaning of—Appeal, whether continuation of suit.*

For the purpose of section 10 of the Civil Procedure Code, an appeal is a continuation of a suit.

In order to attract the operation of section 10, Civil Procedure Code, it is necessary that every matter in dispute should be directly and substantially in issue in the two suits. The expression "matter in issue" in the section has reference to the entire subject-matter in controversy between the parties and is not equivalent to "any of the questions in issue." **S** JAINARAIN BABULAL *v.* NATHOOMAL MANOHARLAL **539**

——— **ss. 10, 115**—*Order refusing to stay suit—Revision—High Court, whether can interfere.*

Under section 115 of the Civil Procedure Code the High Court can set aside an order refusing to stay a suit under section 10 of the Code pending the final decision of a previously instituted suit between the parties, the matter in issue in both being identical. **L** MEHTAB SHAH *v.* ALI HAIDAR SHAH **234**

——— **s. 11**—*Co-defendants—Conflict of interest—Rights* inter se, *decision of*—Res judicata.

The decision in a case where there is a conflict of interest between the co-defendants, one of whom actively helps the plaintiff as against the other defendant, and where it is necessary to adjudicate between the defendants *inter se* to give appropriate relief to the plaintiff, operates as *res judicata* in a subsequent suit between the co-defendants. **R** MAUNG THWE *v.* MA SHWE PON, 3 Bur. L. J. 54; (1924) A. I. R. (R.) 279 **423**

——— **s. 11**—*Decision of Court not competent to try subsequent suit, whether* res judicata.

The decision in a rent suit decided by an Assistant Collector Second Class is not *res judicata* in the Court of an Assistant Collector First Class in a suit for ejectment which the Assistant Collector Second Class is not competent to try. **A** RAM DIN *v.* HAR DAYAL, (1923) A. I. R. (A.) 368 **790**

——— **s. 11**—Ex parte *decision*—Res judicata—*Decision in rent suit.*

An *ex parte* decision can operate as *res judicata.*

In the case of rent suits, the decision as regards the rent for one year is *res judicata* as regards the rate of rent for the following years. **M** GOVINDOSS KRISHNADOSS *v.* POLEGAR MANIKYANAYANIM **990**

——— **s. 11**—*"Heard and finally decided," meaning of—Finding recorded to avoid remand, whether* res judicata.

For a finding to become *res judicata*, it is necessary that the point should have been "heard and finally determined".

When a Court merely for the purpose of preventing a remand records a conclusion on an issue not necessary for the decision and the decree is not based upon it, the Court cannot be held to have "*heard and finally determined the*

Civil Procedure Code—1908—contd.

question." **M** BATHULA PETCHIREDDI *v.* YELLAPEDDI BHARATASASTRI, 20 L. W. 526; 47 M. L. J. 532; (1924) M. W. N. 859; (1924) A. I. R. (M.) 893 **485**

——— **s. 11**—Res judicata—*Appealability of decision.*

It is no criterion of the non-operation of a decision as *res judicata* that the person affected thereby could not appeal from it, although it may form part of one of the criteria mentioned in section 11 of the Civil Procedure Code. **N** GOVINDA *v.* LAXMAN, (1923) A. I. R. (N.) 139 **516**

——— **ss. 11, 47**—*Mortgage suit—Preliminary decree—Alienation before final decree—Suit for title by alienee, whether barred*—Res judicata.

Section 47 of the Civil Procedure Code applies only to questions regarding the satisfaction of the decree and not to questions arising in the proceedings for the making of a preliminary mortgage-decree final, as a suit on a mortgage remains pending till the final decree.

An alienee deriving his title under a surrender *pendente lite*, between the preliminary decree and the final decree, is bound by the terms of the preliminary decree and cannot be allowed to re-open the questions already decided in the suit, nor can he sue for the establishment of his title. **N** LACHIRAM *v.* BHOLU **452**

——— **s. 20**—*Cause of action—Implied contract to pay—Jurisdiction of Court.*

Defendant selected some cloth in District B. and ordered it to be sent to District G. when he promised to purchase such pieces as should be selected by his wife. The cloth was sent accordingly. Some pieces were selected and the remainder returned with a payment of price. Subsequently other consignments of cloth were sent to G. either by parcel post or were taken there in person. In a suit brought at B. by the seller for the balance of price:

Held, that there was an implied contract to pay at B and the Court had jurisdiction to try the suit.

Where no place of payment is specified either expressly or by implication a debtor must follow his creditor and pay where his creditor is. **O** MOHAMMAD MUMTAZ ALI KHAN *v.* GANGA PERSHAD **122**

——— **ss. 25, 151**—*Inherent jurisdiction, scope of—Suit, when to be stayed—Transfer—Test—Suit, vexatious and oppressive.*

Appeals to the inherent jurisdiction of the Court have to be regarded with the greatest caution. But if after exercising such caution the Court is clearly of opinion that the jurisdiction ought to be exercised, it should not be intimidated from so doing because no case on all fours is forthcoming from the reported decisions in the various High Courts.

The Court will interfere to prevent vexatious proceedings which would have the effect of preventing the due administration of justice.

Section 25 of the Civil Procedure Code does not apply or at any rate should not be confined to objection to a particular Judge personally. The objection must apply to the High Court as a whole.

The test for a transfer is much the same as for a stay of suit under section 151 of the Civil Procedure Code or alternatively the rather more lenient test adopted in section 527 of the Criminal Procedure Code.

Plaintiffs who carried on business in Bombay, Rangoon and Calcutta and had their head office at Bombay brought a suit at Bombay against defendants who also carried on business at those places as merchants and commission agents. The suit was for accounts in respect of certain transactions which had taken place at Rangoon under instructions of a partner of the plaintiffs' firm. The books of account as well as all the principal witnesses were at Rangoon and the suit involved a determination of the custom of trade observed at Rangoon with regard to the transactions. After the filing of the suit defendants paid what they regarded as balance due to the plaintiffs and offered to pay taxed costs to date but prayed that the suit should be stayed:

Held, (1) that it would be most inconvenient to the defendants to have the suit tried at Bombay;

(2) that as from the date when the defendants paid the amount to the plaintiffs and offered to pay taxed costs, the suit was vexatious and oppressive to the defendants;

(3) that the plaintiff was at liberty to withdraw the suit under O. XXIII, r. 1, Civil Procedure Code, but in default of his so doing within the time limited for presenting an appeal, all further proceedings in the suit should be stayed. **B** JETHABHAI VERSEY & Co. *v.* AMARCHAND MADHAVJI & Co., 25 Bom. L. R. 713; (1924) A. I. R. (B.) 90 **852**

——— **ss. 34, 151**—*Decree, execution of—Court, whether can allow interest—Inherent power, exercise of.*

If a decree does not allow interest from the date of decree to the date of payment, the Executing Court has no inherent power to allow it under section 151, Civil Procedure Code, having regard to the provisions of section 34 (2), Civil Procedure Code.

The Courts cannot have inherent power to do any thing which has the effect of nullifying an express provision of law. **R** MAUNG PE *v.* MA HNIT, 3 Bur. L. J. 58; (1924) A. I. R. (R.) 275 **427**

——— **s. 47**—*Decree, execution of—Dispossession in execution—Party dispossessed, remedy of—Suit for recovery of possession, whether maintainable.*

A person who has been dispossessed under the terms of a decree to which he was a party is not competent to bring a suit for recovery of possession. His remedy is by way of an application to the Execution Court. **A** DWARKA DASS *v.* DURGA PRASAD, 22 A. L. J. 683; (1924) A. I. R. (A.) 752 **80**

——— **s. 47**—Decree on prior mortgage without impleading puisne mortgagee—Fresh mortgage to discharge decree—Suit by last mortgagee—Subrogation—Priority—Section 47, whether bars suit. *See* MORTGAGE **846**

Civil Procedure Code—1908—contd.

——— **s. 47**—*Execution of decree—Inquiry into validity of decree.*

Every order or judgment, however erroneous, is good until discharged or declared inoperative. An enquiry into the validity of a decree is outside the functions of an Executing Court subject to the proviso that there is a valid decree in existence which can be executed. **C** SRINATH CHATTERJEE *v.* KEDAR NATH RAI **255**

——— **s. 47** — Mortgage-suit — Preliminary decree—Proceedings for final decree, application of s. 47 in. *See* CIVIL PROCEDURE CODE, s. 11 **452**

——— **s. 47**—Restitution order under s. 144, whether order in execution. *See* COURT FEES ACT, SCH. I, ART. 1 **321**

——— **s. 47**—Satisfaction of decree—Legal representative, position of—Objection to liability—Executing Court, duty of. *See* CIVIL PROCEDURE CODE, s. 2 (11) **803**

——— **s. 47, O. XXI, r. 16**—*Assignment of decree to two persons—Execution by one—Objection by other—Appeal, whether lies.*

No appeal lies against an order allowing one of the two assignees of a decree to execute it to the exclusion of the other.

The word 'parties' as used in section 47 of the Civil Procedure Code contemplates that the parties are ranged on opposite sides and not as co-decree-holders on one side only. **N** RADHABAI *v.* BHIMRAO **734**

——— **s. 47 (3)**—Decree, execution of—Disputes as to applicant being representative of party to decree—Determination of question, whether decree—Appeal. *See* CIVIL PROCEDURE CODE, s. 2 **604**

——— **s. 48**—*Mortgage-decree for sale of properties and for recovery of balance from person of mortgagor—Execution of latter part of decree—Limitation.*

Where a mortgage-decree directs the mortgaged properties to be sold and the balance to be realised from the other properties and person of the judgment-debtor, the period of 12 years, under section 48, Civil Procedure Code, for an execution of the latter part of the decree must be calculated from the date of the mortgage-decree. **M** SAMINATHA ODAYAR *v.* THISGARASWAMI **827**

——— **s. 60 (1) (k)**—*Provident Funds Act (IX of 1897), ss. 2 (4), 4 (1)—State Railway Open Line Code, Vol. II, App. I, rr. 22, 30—"Compulsory deposit", what is—Deposit, whether ceases to be compulsory on death or retirement—"Discharged" in r. 30, meaning of—Deposit, whether liable to attachment after retirement.*

The State Railway Provident Institution is governed by the Rules contained in the State Railway Open Line Code, Volume II, Appendix I, and the General Fund Rules have no application to it.

The word "discharged" in rule 30 of the Rules contained in the State Railway Open Line Code, Volume II, Appendix I, does not necessarily mean "dismissed"; it is wide enough to include the case of a servant who has been permitted to retire or take his discharge.

A compulsory deposit is a deposit which goes into the fund as a compulsory deposit, within the meaning of section 4 (1) of the Provident Funds Act, and is at that date received and classified as such, and so long as such a deposit subsists in the fund it continues to be a compulsory deposit, irrespective of the fact that it is liable to withdrawal on the death or retirement of the depositor under rule 22 of the Rules contained in Appendix I, Volume II of the State Railway Open Line Code.

Such deposits as the above are protected from attachment under section 60 (1) (*k*) of the Civil Procedure Code read with section 4 (1) of the Provident Funds Act.

A compulsory deposit includes the sums deposited by the depositor himself and the contributions in respect of those deposits made by the Railway and the interest or increment accrued on them.

Per *Ghose, J.*—A deposit cannot be said to be payable on demand by reason of the fact that it becomes payable under the Rules on the death or retirement of the depositor. **C** SECRETARY OF STATE FOR INDIA *v.* RAJ KUMAR, (1923) A. I. R. (C.) 585 **69**

——— **s. 66**, *applicability of.*

Section 66 of the Civil Procedure Code applies only when the plaintiff attempts to assert his secret title as against a certified purchaser. **A** JAMBU DASS *v.* JAI PRAKASH **344**

——— **s. 66**—*Execution sale—Decree-holder instructing third person to bid for him after obtaining permission—Purchase by third person in his own name—Suit for possession by decree-holder, whether barred.*

If a person purchases property in his own name disregarding the instructions of the decree-holder to bid at the sale for him after obtaining permission of the Court, the purchase is *benami* for the decree-holder whose suit for possession of the property from the certified purchaser is barred under section 66 of the Civil Procedure Code. **N** MAHARAJ BAHADUR *v.* NAWALKISHORE **541**

——— **ss. 89, 92**—*Sale, setting aside of—Auction-purchaser, if necessary party—Mention of auction-purchaser's name in petition, if sufficient—Notice on parties.*

There is no provision in the law that the auction-purchaser must be made a party in an application to set aside the sale. It is enough for the purposes of an application under O. XXI, r. 89, Civil Procedure Code, that the auction-purchaser should be mentioned by name.

Obiter :—It is desirable that in an application for setting aside a sale, the Court, without reference to the parties mentioned in the petition, should direct the issue of notice of the application upon the decree-holder, the auction-purchaser and any other party who may appear to have been affected by the sale. **C** RAJ CHANDRA DAS *v.* KALI KANTA DAS, (1923) A. I. R. (C.) 394 **776**

Civil Procedure Code—1908—contd.

——— **s. 92,** *scope of*—Chatram—*"Interest in the trust," meaning of—Consent of Advocate-General, whether sufficient—Descendants of founder, whether can maintain suit—Hindu temples, whether open to all Hindus—Muhammadan worshippers at mosque, whether have "direct interest"—Surviving descendant of founder of* chatram, *whether can appoint manager—Trust property described as private property—Appointment of manager of such property, validity of.*

The consent in writing of the Advocate-General to the institution of a suit will not bring the suit within the meaning of section 92 of the Civil Procedure Code, unless the plaintiffs have an interest in the trust. The object of the section is to prevent people interfering in the administration of charitable trusts merely in the interests of others and without any real interest of their own.

The fact that plaintiffs in a suit are descendants though only in the female line, of the founder of a *chatram*, gives them an interest in the proper administration of the trust sufficient to enable them to maintain the suit although they themselves may never use the *chatram*.

Hindu temples are *prima facie* to be taken to be dedicated for the use of all Hindus resorting to them.

That the bare possibility, however remote, that a Hindu might desire to resort to a particular temple gives him an "interest in the trust" would defeat the object with which the Legislature inserted these words in section 92, Civil Procedure Code.

The last survivor of the descendants in the male line of the founder of a *chatram* has a right to appoint a trustee of the charity but if he falsely describes the property to be his own property, an appointment by him of the manager of such property is invalid.

Obiter.—Muhammadans who live in a village and worship regularly in the mosque of the village have a direct interest in the trust relating to the mosque. **P C** VAIDYANATHA AYYAR *v.* SWAMINATHA AYYAR, 47 M. L. J. 361; 35 M. L. T. 189; (1924) A. I. R. (P. C.) 221; (1924) M. W. N. 749; 10 O. & A. L. R. 1076; 26 Bom. L. R. 1121; 20 L. W. 803; 22 A. L. J. 983; 40 C. L. J. 454; 29 C. W. N. 154 **804**

——— **s. 94**—Attachment before judgment of immoveable property—Small Cause Court, whether can order attachment. *See* CIVIL PROCEDURE CODE, s. 7 **109**

——— **s. 100**—*Findings of fact—Custom—Evidence, insufficient—High Court, whether can interfere.*

Though a High Court cannot in second appeal interfere with findings of fact, it can consider whether the facts found are sufficient to support an alleged custom. **N** BASHIRBI *v.* ABDUL SATTAR **815**

——— **s. 100**—*Suit for specific performance or damages—Damages, award of—Suit whether of small cause nature—Second appeal.*

In deciding the question whether a suit is of a small cause nature or not, attention has to be paid to the nature of the suit as it was presented in the First Court and not to the subsequent shape that it may have taken as a result of the findings of the lower Courts.

A suit for specific performance of a contract relating to immoveable property or in the alternative for damages was decreed by awarding of Rs. 160 as damages, but was dismissed in appeal:

Held, that the suit was not one of a small cause nature within the meaning of section 100 of Civil Procedure Code and a second appeal, therefore, lay to the High Court against the decree. **M** SUNKAR PEDDAPPA *v.* VENKATAPPA, 20 L. W. 321; (1924) M. W. N. 691 **123**

——— **s. 104**—Order staying suit under section 19, Arbitration Act—Appeal, whether lies. *See* ARBITRATION **81**

——— **s. 109**—*Order appointing or refusing to appoint Receiver—Application for leave to appeal to Privy Council.*

An order refusing or granting the appointment of a Receiver does not fall within the provisions of section 109, Civil Procedure Code.

As the appointment of a Receiver is in no way a matter which finally determines the rights of the parties, an order of appointment does not fall under section 109 (*a*). **Pat** MAGNI RAM BUNGAR *v.* SRIDHAR CHOWDHURY **178**

——— **s. 110**—*Suit for rent at enhanced rate—Subject-matter of suit, value of.*

In a suit for recovery of rent at an enhanced rate, the value of the subject-matter of the suit is not the value of the holding but the value of the plaintiff's claim to recover the enhanced rent. **C** PROMODA NATH ROY *v.* BASIRUDDIN QUAZI **744**

——— **s. 115**—Compromise decree—Time fixed for payment of money—Forfeiture on default—Extension of time—Power of Court—Revision. *See* COMPROMISE DECREE **505**

——— **s. 115**—Court, failure of, to exercise jurisdiction—High Court, whether can interfere. *See* ARBITRATION **16**

——— **s. 115**—*Interlocutory orders, revision of—High Court, if and when can interfere.*

The settled practice of the High Court is to interfere as little as possible with interlocutory orders where an alternative remedy exists. But it cannot be laid down as a hard and fast rule that the Court will under no circumstances interfere. The High Court can and will interfere with such orders when they may lead to a failure of justice or to irreparable injury. **C** SARAJU BALA DEBI *v.* MOHINI MOHAN GHOSE, 28 C. W. N. 991; 40 C. L. J. 191 **1008**

——— **s. 115**—Order refusing to stay suit—Revision—High Court, whether can interfere. *See* CIVIL PROCEDURE CODE, s. 10 **234**

——— **s. 115**—*Plaint presented out of Court hours—Discretion of Judge—Revision.*

The discretion of the Judge of a Civil Court in declining to accept a plaint presented out of office hours at his club cannot be interfered with

in revision by the High Court. **M** SINNAPPA NADAN *v.* SINNAPPA NAICKEN, 20 L. W. 655; 35 M. L. T. 116 **928**

——— **s. 115**—*Revision—Discretion exercised by lower Court—Interference.*

The High Court does not usually interfere in revision in cases where there is a real exercise of discretion in the lower Court but in rare cases interferences are justified. **R** CHAPPLE *v.* MAMSA BROTHERS, 3 Bur. L. J. 97 **827**

——— **s. 115**—*Revision—Limitation.*

The High Court will not interfere in revision upon a technical question of limitation where substantial justice has been done.

Where it was open to argument whether limitation in a suit for recovery of debt should run from one date or another but the debt was really due, the High Court refused to interfere in revision and upheld the decree in favour of the creditor.

In a suit brought against the defendant by one *K*, plaintiff stood surety for the defendant that the latter would pay the price of coal sold to him by *K*. *K* obtained a decree against the plaintiff as surety. In order to obtain a review of judgment plaintiff deposited the amount of the decree in Court on the 5th September 1919 but the application for review was dismissed and *K*. withdrew the amount on 21st April 1920. The plaintiff then brought his suit on the 20th April 1923 to recover the money from the defendant his principal. It was contended that the date of payment to the creditor was the date of deposit, and, therefore, the suit was barred by limitation under Art. 81 of the Limitation Act:

Held, that as the creditor was not entitled to withdraw the money immediately it was deposited by the plaintiff in Court and before the application for review was dismissed, the date of deposit in Court was not the date of payment to the creditor. **A** MOHAMMAD NAQI *v.* HARGU LAL **1011**

——— **s. 115**—*Revision—Provision of law disregarded.*

Where a Court has applied its mind to the law and decides wrongly, there is no ground for revision but where it disregards some provision of law and has not applied its mind to that provision, there is ground for revision. **R** RASU *v.* KATTARA, 2 R. 202; (1924) A. I. R. (R.) 349 **658**

——— **s. 115, O. XLI, r. 5**—*Decree—Stay of execution—Application made long after appeal—Court, duty of—Revision.*

Petitioner applied for stay of execution of a decree against which an appeal was pending. The application was dismissed by the District Judge on the ground that the application was made very late. Petitioner applied for revision of the order:

Held, (*Graham, J.* dissenting), that the District Judge did not give proper consideration to the matter and though he had jurisdiction over the subject-matter he exercised it in an irregular way;

(2) that the High Court had jurisdiction to interfere with the order in revision under section 115, Civil Procedure Code, and the order was liable to be set aside.

Per *Suhrawardy, J.*—When an application is presented to a Court, it is its duty to look into the matter to give its consideration to it and to come to decision on all the materials which have been placed before it. If the Court does not do so, though it may have jurisdiction over the subject-matter of the litigation, it fails to exercise that jurisdiction in a regular way, and the High Court has power to interfere to set it right.

Per *Graham, J.*—The power conferred by O. XLI, r. 5 of the Civil Procedure Code upon Appellate Courts is discretionary, though of course that discretion must be judicially exercised. The rule contemplates that an application for stay of execution should be made as soon as possible after the filing of the appeal. **C** BIRESH CHANDRA DAS *v.* HARI DASI BOSE **435**

——— **s. 144**—Restitution order—Appeal—Court-fee payable. *See* COURT FEES ACT, SCH. I, ART. 1 **321**

——— **s. 148**—*High Court, whether can extend time fixed for doing particular act.*

Under section 148 of the Civil Procedure Code, the High Court can extend the time fixed by the decree of a Subordinate Court for the doing of any particular act. **A** BALGOBIND *v.* SHEO KUMAR, 22 A. L. J. 791; (1924) A. I. R. (A.) 818 **184**

——— **s. 151,** *applicability of—Remedy not availed of.*

Section 151, Civil Procedure Code, does not apply to a case where another remedy was open and was not availed of. **R** SAMSON *v.* SILVARAN, 3 Bur. L. J. 47; (1924) A. I. R. (R.) 274 **418**

——— **s. 151**—*Arbitration—Award out of Court—Some property left undivided—Application to file award—Application mentioning particular individual to carry out division—Decree in terms of award—Refusal of person nominated to act—Decree, whether executable—Powers of Court.*

Where in an arbitration out of Court the arbitrator makes an award, but leaves certain items of property undivided, and the parties apply to Court for filing the award, at the same time naming a particular individual to carry out the division of the remaining property, and the Court draws up a decree in terms of the award, if the person nominated by the parties refuses to act, the decree does not thereby become incapable of execution. If the parties do not agree to nominate any other person, the Court must appoint some one to carry out the award, or if no one suitable can be found, proceed to carry it out itself.

Under section 151, Civil Procedure Code, every Court has the power to enforce its own orders, and to vary a matter of detail in an order made by the consent of the parties when by the accident of circumstances the carrying out of such detail according to the agreement can no longer be achieved. **A** PARSOTAM DASS *v.* SHIAM LAL, (1923) A. I. R. (A.) 460 **513**

——— **s. 151**—Decree, execution of—Court, wheher can allow interest—Inherent power, exercise of. *See* CIVIL PROCEDURE CODE, s. 34 **427**

Civil Procedure Code—1908—contd.

——— **s. 151**—*High Court, inherent power of, to correct mistake—Interests of justice.*

The High Court has inherent power under section 151 of the Civil Procedure Code to correct a mistake for the purpose of preventing a miscarriage of justice appearing on the face of the proceedings and to make such orders in the nature of consequential orders, as may be necessary for the ends of justice and to prevent an abuse of the process of the Court, which includes the idle multiplicity of proceedings. **A** BALGOBIND *v.* SHEO KUMAR, 22 A. L. J. 791; (1924) A.. I. R. (A.) 818 **184**

——— **s. 151**—Inherent jurisdiction, scope of —Suit, when to be stayed—Transfer—Test for —Suit, vexatious and oppressive. *See* CIVIL PROCEDURE CODE, s. 25 **852**

——— **s. 151**—Small Cause Court, whether has inherent powers. *See* CIVIL PROCEDURE CODE, s. 7 **109**

——— **s. 151, O. XX, r. 3**—*Partition, suit for—Court-fee, dispute as to—Decision not appealed against—Sale by plaintiff of portion of property —Vendees, addition of, as co-plaintiffs—Nature of suit, whether altered—Additional Court-fee, whether payable—Earlier decision, when can be altered—Court, jurisdiction of.*

Section 151 of the Civil Procedure Code cannot confer jurisdiction on the Court to do what is prohibited by positive law.

The devolution of interest in property in a suit pending the suit can make no difference in the Court-fee to be paid.

In a suit for partition the defendant contended that the Court-fee paid on the plaint was insufficient. The Court decided this issue in favour of the plaintiff and no appeal was made against this order. Meanwhile the defendant died and his sons were brought on the record as his legal representatives and the vendees from the plaintiff of a portion of the property were added as plaintiffs. The suit came on before another Judge who decided that the plaintiff should pay *ad valorem* fee. The plaintiff applied to the High Court in revision :

Held, (1) that the Judge had no jurisdiction to alter the order of his predecessor except in accordance with law;

(2) that the addition of the plaintiff's vendees as co-plaintiffs did not alter the nature of the suit, and made no difference in the Court-fee payable. **Pat** HARIHAR PRASAD *v.* MAHESHWARI PRASAD, 3 Pat. 654 **813**

——— **s. 151, O. XXVI, r. 16, O. XLVII, r. 1**—*Commissioner for taking accounts—Review, power of—Enquiry, when can be re-opened—Party aggrieved, remedy of—Practice.*

A Commissioner appointed by the Court to take accounts of the dealings and transactions between the parties has no power to "review" in the technical sense, either under section 151 or under O. XLVII, r. 1 of the Civil Procedure Code.

The Commissioner, however, may, in his discretion, record his finding on each item of the account objected to during the progress of the reference or he may record his findings after he has heard evidence on all objections and surcharges. He is not bound to record his finding on any one objection before he proceeds to deal with the next. But if he does so his finding on any of the objections is not final. He may, on proper grounds, re-open the inquiry into any one or more of the items before his report is made. Until then he decides nothing that is final and conclusive.

But where every opportunity is given to a party to prove his objection to a particular item, and the Commissioner has after hearing the parties recorded his finding, it is highly undesirable that he should re-open the enquiry merely because he is invited to do so by the party.

If the Commissioner does re-open the enquiry, it must be on grounds similar to those mentioned in O. XLVII, r. 1, Civil Procedure Code, not because the provisions of O. XLVII, r. 1, apply to proceedings before him but because that rule affords the best guide in a matter of this kind. If he re-opens the inquiry on grounds which are not proper, the party aggrieved can object only by way of exceptions to his report. **B** FERNANDEZ *v.* RODRIGUES, 25 Bom. L. R. 280; 47 B. 593; (1924) A I. R. (B.) 231 **593**

——— **s. 151, O. XLV, r. 13**—*Certificate for appeal to Privy Council, application for—Stay of execution—Inherent jurisdiction, exercise of.*

The High Court has inherent power under section 151, Civil Procedure Code, in appropriate circumstances, to stay execution on receipt of an application for leave to appeal to the Privy Council, pending the passing of orders on the application.

This inherent power should, however, be sparingly exercised in view of the provisions of O. XLV, r. 13 of the Civil Procedure Code and the onus is on the applicant to establish good grounds for staying execution. **S** NARUMAL *v.* JAGATMAL **739**

——— **s. 152**—*Clerical mistake—Party, whether entitled to correction—Court, discretion of.*

Under section 152 of the Civil Procedure Code, there is no right in any party to have a clerical or arithmetical mistake corrected. The matter is left to the discretion of the Court and the discretion has to be exercised in view of the peculiar facts of each case. **A** KISHORI MOHAN *v.* CHHANGA LAL **1030**

——— **s. 152**—*Dower-decree—Form defective—Execution—Decree, whether can be amended.*

A dower-decree was drawn up in general terms and did not specify the exact shares in which the decree-holder was entitled to succeed against the several defendants (heirs of the plaintiff's deceased husband). In execution it was contended that all the defendants were jointly and severally responsible :

Held, that the Execution Court was bound to construe the decree in the light of the admitted fact that both parties were fighting over a dower-decree, and if the decree itself created any obstacle, justice could be done by amending it so that the shares of the various defendants may be

specifically apportioned as between them. **A** MUHAMMAD ASHIQ ALI *v.* HAJRA BIBI **627**

——— **s. 153, O. VI, r. 17, O. XXXIV, r. 6**—*Amendment of pleadings, object of—Pending suit—Fresh defence, whether can be taken—Court, discretion of—Recovery of balance due on mortgage—Application for personal decree against mortgagor, form of.*

When a suit is pending, a defendant, with the permission of the Court, may be allowed to take a fresh defence to the suit.

The object of amendment of pleadings is to determine the real question in controversy between the parties.

The matter of allowing amendment of pleadings is entirely within the discretion of the Court.

There is nothing in O. XXXIV, r. 6 of the Civil Procedure Code which requires that an application for a personal decree against the mortgagor should be in writing, much less is there anything to show that the application should be signed by anybody.

Even assuming that a written application is necessary, such application may be allowed to be signed at any stage of the proceedings under section 153 of the Code. **A** SANTI LAL *v.* RAJ NARAIN (1924) A. I. R. (A.) 804 **65**

——— **O. I, rr. 8, 10**—*Representative suit—Plaintiff not possessing common interest with other members—Other members whether constructively parties—Parties, addition of*—Bona fide *mistake—Suit by wrong person.*

Under O. I, r. 8, Civil Procedure Code, it is not any person that may sue on behalf of a class, but it is that person who has an interest which is the same as that possessed by the whole body of persons. Given a common interest and a common grievance, a representative suit is in order, if the relief sought is in its nature beneficial to all whom the plaintiff proposes to represent. If this condition is found wanting, and if the plaintiff turns out not to be a member of the class on whose behalf he professed to institute the suit, the suit is wrongly constituted, and is not a representative suit and no member of the class is constructively a party to it.

On an application under O. I, r. 10, Civil Procedure Code, to add a person as party plaintiff to a suit under O. I, r. 8, it must be alleged and proved that the suit was instituted originally in the name of the wrong person through a *bona fide* mistake. **M** KRISHNA IYER *v.* PACHAPPA CHETTY, (1924) M. W. N. 522; 47 M. L. J. 540; (1924) A. I. R. (M.) 883 **492**

——— **O. I, r. 9, O. XXXIV, r. 1**—*Mortgage suit—Necessary parties—Non-joinder of all persons interested, effect of—Mortgage-debt, whether may be split up—Mortgaged property, extent of, liability of—Decree proportionate to defendant's share, whether legal.*

In all cases, save those excepted under O. XXXIV, r. 1, Civil Procedure Code, all persons interested in the equity of redemption should be joined as parties to a suit relating to a mortgage.

The omission to make a puisne mortgagee or a subsequent transferee of the mortgaged property a party to a mortgage suit is not fatal to the suit.

A mortgage suit in which all the persons interested in the equity of redemption have not been joined need not necessarily fail. The provisions of O. I, r. 9, Civil Procedure Code, are just as applicable to a mortgage suit as to any other suit.

In special circumstances a mortgage-debt can be split up.

Every part or item of the mortgaged property is not liable for the whole mortgage-debt and where the heirs of one of several mortgagors have not been joined in a suit on the mortgage, a decree may be passed against the defendants proportionate to their shares in the mortgaged properties at the date of the suit. **C** KHIRADAMOYI DASI *v.* HABIB SHAHA, 29 C. W. N. 51 **638**

——— **O. I, r. 10 (2)**—*Addition of parties to suit, when permissible—Court, discretion of.*

The provisions of O. I, r. 10 (2), Civil Procedure Code, confer a discretion on the Court to add parties to a suit. This discretion must be exercised in view of the special circumstances of the particular litigation, subject, however to the general rule that parties cannot be added so as to alter the nature of the suit.

A person may be added as a party to a suit only in two cases, first, when he ought to have been joined and has not been so joined, or, secondly, when without his presence the question in the suit cannot be completely decided. **C** ABDUL GAFUR *v.* ALI MIAH, 28 C. W. N 805 **369**

——— **O. I, r. 10**—*Transfer of plaintiff to category of defendants—Court, power of.*

Under O. I, r. 10, Civil Procedure Code, a Court has power to pass an order transferring a plaintiff from the category of plaintiffs to that of defendants. **C** PADMA LOCHAN PAL *v.* KALI KAMAL PAL **649**

——— **O. II, rr. 3, 4, 5, 6**—*Different sales in favour of same vendee by different owners—Single suit for pre-emption, whether competent—Joinder of all vendors and vendee, whether bad—Decree—Appellate Court, whether can interfere.*

Plaintiff brought a suit for pre-emption against the vendee of four different plots, sold to him by different owners at different times. The objection as to misjoinder of causes of action and parties was overruled by the Trial Court and the suit was decreed in respect of all the four plots. The Appellate Court, however, directed the institution and trial of four separate suits. Against this order of remand, the vendor preferred a second appeal to the High Court :

Held, (1) that the suit was properly instituted ;

(2) that the lower Appellate Court should not have interfered with the discretion of the Trial Court in the matter. **L** PIARA RAM *v.* KESHO NATH, 6 L. L. J. 349 **605**

——— **O. II, r. 3, O. VI, r. 2**—*Inconsistent pleadings—Alternative relief—Intention to defraud Court—*"In pari delicto," *maxim of.*

Order VI, r. 2, Civil Procedure Code, does not exclude the pleading of inconsistent facts. This rule is the same as r. 4 of O. XIX of the Rules of the

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Supreme Court in England. Under it an alternative relief may, subject to certain regulations, be asked and several causes of action joined in the same statement of claim, as laid down in O. II, r. 3, Civil Procedure Code.

Mere intention to defraud will not deprive the true owner from recovering his property. When, however, the fraudulent purpose has been effected the maxim "*in pari delicto potior est conditio possidentis*" applies and the Court will help neither party. A guilty party cannot be permitted to defeat a judgment by showing that in obtaining it he had practised a fraud on the Court. **O** BANSIDHAR *v.* AJUDHIA PRASAD, 10 O & A. L. R. 01; 27 O. C. 175; 11 O. L. J. 619 **333**

——— **O. III, r. 1, O. V, r. 1, cl. (2), O. IX**—*Absence of party—Vakil having no instructions—"Appearance" of party—*Ex parte *decree—Formal withdrawal of Vakil, if necessary.*

Where a Pleader appears for a party in default and states that he has no instructions, there is no "appearance" of the party, and the provisions of O. IX, Civil Procedure Code, are applicable.

When a Pleader appears and says he has no instructions, he intends to inform the Court that though he has filed an appearance he does not propose to appear for his client. It is not necessary for him to say that he severs his connection with the case or that he withdraws his *vakalat.* No set form of words is necessary to convey to the Court the information that he has ceased to appear.

Failure to appear and *refusal to appear* stand on the same footing. In neither case is there an "appearance." **M** ARUNACHALA GOUNDAN *v.* KATHA GOUNDAN, 47 M. L. J. 514; (1924) M. W. N. 835; 20 L. W. 795; (1924) A. I. R. (M.) 842 **107**

——— **O. III, r. 4**—*"Appearance," meaning of—Pleader reporting no instructions except to apply for adjournment—Endorsement on back of plaint—Adjournment refused—Withdrawal of* vakalat *—Leave of Court.*

Where a Pleader for the plaintiff in a case asks for an adjournment and states that, if the adjournment is refused, he has no further instructions to go on with the case, and makes an endorsement to that effect on the back of the plaint, there is no "appearance" and the endorsement by the Vakil is a perfectly good written withdrawal from his duties and obligations under the *vakalat.*

Where a Court assents to such conduct of the Vakil and raises no question about his withdrawal, it must be taken to have given its consent.

Order III, r. 4, Civil Procedure Code, does not require the writing containing the withdrawal by a Pleader of his *vakalat* to be in any specified form, nor is any formality necessary for the leave of Court.

Per *Coutts-Trotter, J.—Quære:*—Whether the withdrawal of *vakalat* under O. III, r. 4 must be in writing? **M** MANICKAM PILLAI *v.* MAHADUM BATHUMMAL, 20 L. W. 427; 47 M. L. J. 398; (1924) M. W. N. 689; 47 M. 819 **102**

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——— **O. V, r. 1, cl. (2)**—Absence of party—Vakil having no instructions—"Appearance" of party. *See* CIVIL PROCEDURE CODE, O. III, R. 1 **107**

——— **O. V, r. 1 (b), O. IX, r. 13, O. XVII, rr. 2, 3**—*Decree passed in absence of defendant but presence of his Pleader, whether* ex parte—*Application to set aside decree, whether maintainable.*

If the Pleader for an absent defendant is not duly instructed, and takes no part in the conduct of the case on the date of the hearing, the hearing of the case is *ex parte* even though the Pleader is present in Court, and an application to set aside the decree is maintainable. But if the defendant appears properly as required by O. V, r. 1 of the Civil Procedure Code, that is, by a Pleader duly instructed and able to answer all material questions relating to the suit, the hearing is not *ex parte,* and the application would not be maintainable. **B** MOTILAL RATANCHAND *v.* NANDRAM DALPATRAM, 25 Bom. L. R. 1222; (1924) A. I. R. (B.) 139 **124**

——— **O. V, r. 17**—*Service to be personal—Substituted service, when allowed—Process-server, duty of.*

The service of a summons should be personal unless there is an agent empowered to accept service and it is only when personal service cannot be effected that a process-server is justified in proceeding in accordance with the other provisions of O. V, r. 17, Civil Procedure Code.

When, therefore, the notice of an appeal was sent to a village S, but the peon on arriving at S did not find the plaintiffs there, or any other male member of the family upon whom the service could be effected, and was told that they had gone to village J, some two or three miles distant from S, but instead of proceeding to J, the peon purported to effect service by affixing the notice at the entrance of the house at S and the appeal was heard *ex parte:*

Held, (1) that the service was not good service under the provisions of the Civil Procedure Code;

(2) that it was the duty of the peon to endeavour to effect personal service upon the plaintiffs either by proceeding to J or returning to the Court and stating the facts in order that fresh notice should issue. **C** DINA NATH PATI *v.* UPENDRA NANDAN DAS MAHAPATRA, 40 C. L. J. 154; (1924) A. I. R. (C.) 1004 **703**

——— **O. VI, r. 2**—Inconsistent pleadings—Alternative relief—Intention to defraud. *See* CIVIL PROCEDURE CODE, O. II, r. 3 **333**

——— **O. VI, r. 17**—*Amendment of plaint—Fresh allegations of fraud, whether permissible.*

If either party to a suit seeks to amend his pleadings by introducing for the first time allegations of fraud, etc., the Court must ask why this new case was not presented originally and may require to be satisfied as to the truth and substantiality of the proposed amendment. **M** KRISHNA IYER *v.* PACHAIPPA CHETTY, (1924) M. W. N. 522; 47 M. L. J. 540; (1924) A. I. R. (M.) 883 **492**

——— **O. VI, r. 17**—Amendment of pleadings, object of—Pending suit—Fresh defence, whether can be taken—Court, discretion of. *See* CIVIL PROCEDURE CODE, s. 153 **65**

——— **O. VI, r. 17**—*Suit against Agent of Railway Company—Defence by Railway Company—Amendment of plaint—Prejudice.*

In a suit against a Railway Company, the defendant was described as the Agent of the Railway Company, but all the parties were perfectly aware that the suit was against the Railway Company and the relief asked was against the Railway Company who defended the suit as such:

Held, that the amendment of the plaint by striking out the word "Agent" would not prejudice any rights acquired by the Company by virtue of the Statute of Limitation. **N** BULAKIDAS *v.* AGENT, B. N. RY. CO **177**

——— **O. VII, rr. 1 (f), 4**—*Representative suit—Contents of plaint—Provisions of O. VII, r. 1 (f), nature of.*

If a suit is brought in a representative character the plaint must contain a statement to that effect, under O. VII, r. 4, Civil Procedure Code.

The provisions of O. VII, r. 1, clause (f), Civil Procedure Code, are imperative. **N** HARBAX *v.* LACHMAN **201**

——— **O. VII, r. 6**—*Plaint originally presented within time—Return for presentation to proper Court—Suit time-barred—Rule, if applicable—Amendment of plaint, if necessary—Limitation Act (IX of 1908), s. 14.*

The provisions of O. VII, r. 6, Civil Procedure Code, have no bearing on a case which at the time of its institution is within time, though the plaint having been returned, it is time-barred at the time of its presentation to proper Court.

Where, therefore, in a suit instituted within time the plaint is returned for presentation to proper Court and the circumstances enabling the plaintiff to claim benefit of section 14, Limitation Act, appear on the face of the record and there is an order of the Court that the suit is not cognizable by it, along with an endorsement showing the date of the return of the plaint, it is not necessary for the plaintiff to amend the plaint by adding a statement showing the ground upon which exemption from limitation is claimed, if at the time of presentation of plaint to proper Court the suit is time-barred. **L** SUKHBIR SINGH *v.* PIARE LAL, (1923) A. I. R. (L.) 591 **866**

——— **O. VIII, r. 5**—*Defendant specifically denying allegation—Subsequent admission by alleged* mukhtar—*Court, whether can put matter in issue.*

The admission of a fact by a *mukhtar* of the defendant in a suit prior to the framing of issues does not debar the Court from putting the matter in issue when the defendant himself in his written statement specifically denies the same fact. **L** VIR SINGH *v.* BHOLA SINGH, 6 L. L. J. 358; (1924) A. I. R. (L.) 744 **617**

——— **O. VIII, r. 5**—*Plaint alleging death of person on specified day—Defendant's denial—No counter-allegation — Admission — Evasive denial, what is.*

In a suit by a reversioner for recovery of properties after the death of the widow, the plaintiff alleged that the widow died on a specified day, thus bringing the suit in time. The defendant in his written statement pleaded that the plaintiff should prove that the widow died on the date alleged and that he did not admit that date as the date of her death:

Held, that there was a clear denial of the plaint allegation of the widow's time of death, and the fact that there was no counter-allegation as to what that date exactly was could not be deemed to amount to an admission within the meaning of O. VIII, r. 5, Civil Procedure Code. **M** RAJAGOPALACHARIAR *v.* BASHYACHARIAR, 20 L. W. 399; 47 M. L. J. 520; (1924) M. W. N. 788; (1924) A. I. R. (M.) 838 **584**

——— **O. VIII, r. 6**—*Set-off—'Ascertained sum', meaning of.*

The words 'ascertained sum' used in O. VIII, r. 6 of the Civil Procedure Code are used to exclude such items as liquidated damages and mesne profits the amount of which is not ascertainable until the Court determines them.

Where a defendant says that there were definite sums of debit and credit between the parties and that on the date of suit a definite known balance, the amount of which is given in the written statement, was due to the defendant from the plaintiff, the sum so claimed is an 'ascertained sum' for which a set-off is allowed. **A** HAR PRASAD *v.* FIRM RAM SARUP-RADHA KISHEN, 22 A. L. J. 844; (1924) A. I. R. (A.) 872 **340**

——— **O. IX**—Absence of party—Vakil having no instructions—"Appearance" of party—*Ex parte* decree—Formal withdrawal of Vakil, if necessary. *See* CIVIL PROCEDURE CODE, O. III, r. 1. **107**

——— **O. IX, r. 13**—Decree passed in absence of defendant but presence of his Pleader, whether *ex parte*—Application to set aside decree, whether maintainable. *See* CIVIL PROCEDURE CODE, O. V, r. 1 (*b*) **124**

——— **O. IX, r. 13, O. XVII, r. 3**—*Vakil stating "no instructions", effect of—Appearance—Decree on merits—Remedy.*

The mere fact that a Vakil says he has no instructions, after he has appeared for the party at many hearings, does not mean that he withdraws from the undertaking in his *Vakalatnama*, unless it is so stated.

Where after many hearings, the Vakil for the defendants stated on the final hearing day that he had no instructions, but the Court disposed of the case on the merits, on an application to set aside the decree as *ex parte*:

Held, (1) that there was an appearance and O. XVII, r. 3 of the Civil Procedure Code applied to the case;

(2) that the defendant ought to have filed an appeal against the decree;

(3) that the filing of an application to set aside the decree as if it had been made under O. IX, r. 13 was wrong. **M** BALAKRISHNA AIYAR *v.* MUTHAMMAL **1028**

——— **O. IX, r. 13, O. XXXIV, r. 4**—*Decree, form of—Mortgage suit—Preliminary decree for*

foreclosure—Decree not in accordance with judgment, effect of—Subsequent proceedings, whether valid—Summons, when "duly served"—Mortgagor misled by Court's agent—Foreclosure decree, whether can be enforced.

The decree which is drawn up by a Court must be in accordance with the judgment. Where, therefore, the judgment gives a decree for sale but the decree drawn up is a preliminary decree for foreclosure, it is not in accordance with the judgment, is invalid and vitiates all subsequent proceedings in the case.

A summons cannot be said to be "duly served" within the meaning of O. IX, r. 13, Civil Procedure Code, if it is a misleading document having no relevance to the real proceeding which is contemplated.

It is incumbent on the Court to be scrupulous n the extreme, and very careful to see that no taint or touch of fraud or deceit, or misrepresentation is found in the conduct of its ministers. It must at any rate not fall below the standard of honesty which it exacts from those on whom it has to pass judgment. The slightest suspicion of trickery or unfairness must affect the honour of the Court and impair its usefulness.

Therefore, a Court must not enforce against a mortgagor or any one interested in the equity of redemption, a foreclosure decree when he has been misled by its duly accredited agent through the issue of a notice for a decree for sale. **A** BALGOBIND *v.* SHEO KUMAR, 22 A. L. J. 791; (1924) A. I. R. (A.) 818 **184**

——— **O. XII, r. 6**—*Suit for recovery of money—Judgment on admission—Admission, nature of—Discretion of Court.*

In order to entitle a plaintiff, in a suit for recovery of money, to a judgment on admission there must be a clear admission that the money is due and recoverable in the action in which the admission is made.

The power of Court to give judgment on admission is discretionary and its exercise cannot be claimed as a right. **C** GALSTAUN *v.* SASSOON & Co., 27 C. W. N. 783; (1924) A. I. R. (C.) 190 **348**

——— **O. XVI**—Witness summoned under Presidency Towns Insolvency Act, position of—Court, jurisdiction of—Witness residing more than 200 miles away. *See* PRESIDENCY TOWNS INSOLVENCY ACT, s. 36 **76**

——— **O. XVII, rr. 2, 3**—Decree passed in absence of defendant but presence of his Pleader, whether *ex parte*—Application to set aside decree, whether maintainable. *See* CIVIL PROCEDURE CODE, O. V, R. 1 (*b*) **124**

——— **O. XVII, r. 3**—Vakil stating "no instructions", effect of—Appearance—Decree on merits—Remedy. *See* CIVIL PROCEDURE CODE, O. IX, R. 13 **1028**

——— **O. XVIII, r. 2 (1)**—*General Rules (Civil), Ch. 21, r. 1—"Day fixed for hearing of suit," meaning of—Payment of Pleaders' fee—Certificate when should be filed.*

The "day fixed for the hearing of the suit" in O. XVIII, r. 2 (1) of the Civil Procedure Code does not mean or include the day on which issues are framed.

For the purpose of determining, whether a certificate of payment of Pleader's fee has been filed in time according to rule 1 of Chapter 21 of the General Civil Rules, the first day of hearing is to be interpreted as the first day fixed for hearing after the framing of issues. **A** MADHO LAL *v.* BANARSI DAS **73**

——— **O. XX, r. 3**—Partition, suit for—Court-fee, disputes as to—Decision not appealed against—Sale by plaintiff of portion of property—Vendees, addition of, as co-plaintiffs—Nature of suit, whether altered—Additional Court-fee, whether payable—Earlier decision, when can be altered—Court, jurisdiction of. *See* CIVIL PROCEDURE CODE, S 151 **813**

——— **O. XX, r. 7, O. XXI, r. 2**—*Certification of payment out of Court—Decree not drawn up, effect of.*

Order XX, r. 7 of the Civil Procedure Code lays down that the decree shall bear the date, the day on which the judgment was pronounced. Therefore, the date of the decree may be held to be not the date on which the decree is reduced to writing and signed by the Court but the date on which the Court delivers its judgment and expresses what the decree is.

When a person has a judgment of the Court in his favour, it may be said that he then obtains his decree and that the decree when subsequently drawn up relates back to that time.

An application for certifying payment of a decree and satisfaction out of Court is maintainable even though the decree is not formally drawn up. **C** GIRIBALA DASSI *v.* BISWAMBHAR HALDAR, 40 C. L. J. 87; (1924) A. I. R. (C.) 1064 **746**

——— **O. XXI, r. 2, O. XXXII, r. 6**—*Satisfaction of decree—Recognition by Court—Certificate and recording, whether necessary—Payment to decree-holder for himself and minor brothers—Leave of Court, absence of—Decree, whether legally satisfied—Joint decree-holders—Payment to one—Discharge of his share.*

Under O. XXI, r. 2, Civil Procedure Code, in order that a payment to a decree-holder should be recognised by the Court executing the decree, it is not necessary that the payment should be both certified and recorded. A certificate on the warrant of arrest by the plaintiff's authorised Pleader that the decree was satisfied complies with the requirements of the rule.

Where a manager of a Hindu joint family is himself on the record as the next-friend or guardian of a minor party to suit, his powers are controlled by O. XXXII, r. 6, Civil Procedure Code, and he cannot do any act in his capacity of father or managing member which he is debarred from doing as next friend or guardian without leave of the Court.

A payment, therefore, to a decree-holder as guardian although made and certified cannot be recognised by the Court executing the decree when leave of Court was not previously obtained under O. XXXII, r. 6, Civil Procedure Code.

A payment to one of several joint decree-holders will not be satisfaction of the decree even in part unless the payee is an agent of the others entitled in law to receive the whole amount on their behalf, or the distinct shares of each joint decree-holder are determined and known.

Where in execution of a decree by the plaintiff for himself and as guardian of his minor brothers, plaintiffs Nos. 2 and 3, the judgment-debtor was arrested and taken to Court and the plaintiff's Vakil endorsed on the warrant that the decree had been fully satisfied and that the judgment-debtor may be released, but the Executing Court refused to record satisfaction on the ground that two of the plaintiffs were minors, and no further steps were taken by either party thereon, and some time later the plaintiff for himself and as guardian of the minor plaintiffs again applied to execute the decree :

Held, that the previous leave of Court to the payment to the guardian not having been obtained, such payment was inoperative and was not binding either on the minors or even on the guardian himself and the decree not having been legally satisfied to any extent a fresh execution application was maintainable. **M** PICHCHAKKUTTIYA PILLAI *v.* DORASWAMI MOOPANAR, 47 M. L. J. 498; (1924) M. W. N. 815 **588**

——— **O. XXI, r. 11 (2)**—*Creditor and debtor—Payment of debt—Method of payment.*

It is the intention of the law that debtors should be compelled to pay their just debts but it is not reasonable to compel them to do so by means which will deprive them of their means of livelihood if there is available an alternative method of enforcing payment which will be reasonably fair to the creditor, *e.g.*, payment by instalments. **R** CHAPPLE *v.* MAMSA BROTHERS, 3 BUR. L. J. 97 **827**

——— **O. XXI, r. 16**—Assignment of decree to two persons—Execution by one—Objection by other—Appeal, whether lies. *See* CIVIL PROCEDURE CODE, s. 47 **734**

——— **O. XXI, r. 16, Proviso 2**—*Decree for payment of money—Mortgage-decree for sale.*

The second proviso to r. 16 of O. XXI, Civil Procedure Code, does not apply to a mortgage-decree for sale which in essence is not a decree for payment of money. **M** RAJARATHNA NAIDU *v.* RAMACHANDRA NAIDU, 47 M. L. J. 434; 20 L. W. 465; (1924) M. W. N. 747; (1924) A. I. R. (M.) 901 **948**

——— **O. XXI, r. 52**—*Order, whether administrative or judicial.*

An order passed under O. XXI, r. 52 of the Civil Procedure Code is not an administrative order but a judicial order binding upon the parties concerned. **C** JITENDRA NATH *v.* ASUTOSH DEY **240**

——— **O. XXI, rr. 58, 62**—*Objection by mortgagee to attached property—Order in objector's favour—Subsequent proceedings by mortgagee objector—Decree-holder auction-purchaser, whether can circumvent order.*

A decree-holder cannot circumvent the order in an objection case under O. XXI, r. 58, Civil Procedure Code, by himself becoming an auction-purchaser.

When, therefore, an objection under O. XXI, r. 58, Civil Procedure Code, is allowed and the attached property is sold subject to the objector's mortgage, the decree-holder by becoming an auction-purchaser cannot challenge the mortgage in a subsequent suit by the mortgagee for foreclosure of the mortgage and is bound by the order made in the objection case. **N** GOVIND *v.* DHEKLU, (1923) A. I. R. (N.) 282 **771**

——— **O. XXI, r. 63**—*Claim petition—Prayer to notify contents—Dismissal—Order against claimant.*

An order upon a claim petition, which expresses no final judgment on the rights put forward, but simply directs the sale after notifying the claim is an order against the claimant for the purposes of O. XXI, r. 63 of the Civil Procedure Code.

Where an order on a claim petition adverse to the defendant is not set aside, he cannot take advantage of a suit filed by the plaintiff to re-agitate the question of his title. **M** RAMALINGAPPA *v.* ALLURU NARAYANAPPA **737**

——— **O. XXI, rr. 95, 97**—*Auction-purchaser—Delivery of possession—Obstruction—Suit for recovery of possession—Limitation—Limitation Act (IX of 1908), Sch. I, Art. 11A.*

The resistance or obstruction contemplated in O. XXI, r. 97, Civil Procedure Code, is some overt act of resistance or obstruction to the giving of possession by some person who is present at the time.

Where, therefore, an auction-purchaser applies under O. XXI, r. 95, Civil Procedure Code, and gets possession from the tenants of the person in possession without any resistance, a suit against the auction-purchaser for recovery of possession is not governed by Art. 11A, Schedule I of the Limitation Act. **R** T. C. BOSE *v.* O. R. CHOWDHURY, (1924) A. I. R. (R.) 261; 3 Bur. L. J. 71 **865**

——— **O. XXI, r. 103**, suit under—Onus of proof. *See* ADVERSE POSSESSION **861**

——— **O. XXII, rr. 3, 4, 10**—*Two devolutions—Assignment and death—Assignee's rights.*

Where there are two devolutions—the death of a party and the transfer by him of his interest in the suit—the transferee has the right to be brought on the record in place of the deceased transferor. Therefore, the death of a plaintiff after the assignment of his interest does not take away the assignee's right to be substituted in the suit. **C** PROKASH CHANDRA DAS GUPTA *v.* SHAMA CHARAN DUTT **991**

——— **O. XXII, r. 4**—Partnership suit—Money-decree against partners—Appeal by some only—

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Legal representative of non-appealing partner—Abatement of appeal. *See* CIVIL PROCEDURE CODE, O. XLI, R. 4 **420**

——— **O. XXII, rr. 4 (3), 11**—*Several respondents in appeal—One respondent dying during pendency of appeal—Representatives of deceased not made parties in time—Court passing decree against all respondents—Decree, whether null and void against all—Test—Contradictory decrees not permissible.*

Where during the pendency of an appeal one of the several respondents dies and no application is made in time to have his legal representatives made parties, if the interests of the several respondents can be distinguished and separated, then the appeal shall abate as against the deceased respondent only, but if no such determination is possible, it shall abate against them all.

Therefore, where several persons buying property jointly by a joint sale-deed are sued for recovery of possession and during the pendency of appeal against them one of them dies, and the Court passes a decree against all of them, without representatives of the deceased being made parties, the decree is null and void against all of them and not only against the deceased, otherwise there will be two inconsistent or contradictory decrees relating to the same subject-matter. A BIKRAMAJIT RAI *v.* DARSHAN DAS, 22 A. L. J. 1033 **26**

——— **O. XXII, r. 6,** scope of—Death of party after hearing and before judgment—Decree against minor representative—Abatement of suit, if prevented—Procedure, rules of—Breach, effect of. *See* MINOR **516**

——— **O. XXIII, rr. 1, 2**—*Withdrawal of suit—Permission for fresh suit on payment of costs—Second suit without payment of costs, whether maintainable.*

Order XXIII, r. 2 (*b*), Civil Procedure Code, must be read as referring not to permission to withdraw a suit as well as permission to institute a fresh suit, but merely as allowing the Court to give permission to institute a fresh suit in place of the one which has been withdrawn. Inasmuch as the withdrawal of the suit does not require the permission of the Court, it must be taken that the first suit is withdrawn when the order is passed and is no longer pending and the permission granted refers only to the filing of the subsequent suit on certain conditions. Therefore, where an order has been made under O. XXIII, r. 1 of the Civil Procedure Code, giving to a plaintiff, who withdraws a suit, permission to institute a fresh suit on condition of paying the costs, a subsequent suit instituted without paying such costs is barred. M GOOLAPUDI SESHAYYA *v.* NADENDLA SUBBIAH, 20 L. W. 642; 47 M. L. J. 646; (1924) M. W. N. 887 (1924) A. I. R. (M.) 877 **499**

——— **O. XXVI, r. 16**—Commissioner for taking accounts—Review, power of—Enquiry, when can be re-opened. *See* CIVIL PROCEDURE CODE, S. 151 **593**

Civil Procedure Code—1908—contd.

——— **O. XXXII, r. 6**—Decree obtained by Hindu father and minor sons—Discharge by father—Execution application—Limitation. *See* LIMITATION ACT, S. 7 **785**

——— **O. XXXII, r. 6**—Satisfaction of decree—Payment to decree-holder for himself and minor brother—Leave of Court, absence of—Decree, whether legally satisfied—Joint decree-holders—Payment to one—Discharge of his share. *See* CIVIL PROCEDURE CODE, O. XXI, R. 2 **588**

——— **O. XXXIV, r. 1.** *See* CIVIL PROCEDURE CODE, O. I, r. 9 **638**

——— **O. XXXIV, r. 4**—*Decree for sale, effect of—Mortgagee-decree-holder allowed to remain in possession—Receiver appointed subsequently—Receiver's right to remove decree-holder from possession.*

Once the holder of a mortgage-decree, under O. XXXIV, r. 4, Civil Procedure Code, asks for and obtains a decree for sale, he must be deemed to have given up all rights under the mortgage and the judgment.

If the holder of a mortgage-decree remains by arrangement in possession of the mortgaged property and subsequently a Receiver is appointed, who is directed specifically to take charge of all properties of the judgment-debtor, he is entitled to remove the decree-holder and obtain *khas* possession of the property, especially if its income exceeds the amount with which the decree-holder was debited under his arrangement. P C RAMESHWAR SINGH *v.* HITENDRA SINGH, 47 M. L. J. 294; (1924) A. I. R. (P. C.) 206; 20 L. W. 437; 35 M. L. T. 179; 26 Bom. L. R. 1161; 40 C. L. J. 444 (P. C.) **794**

——— **O. XXXIV, r. 4**—Decree, form of—Mortgage-suit—Preliminary decree for foreclosure—Decree not in accordance with judgment, effect of—Subsequent proceedings, whether valid. *See* CIVIL PROCEDURE CODE, O. IX, R. 13 **184**

——— **O. XXXIV, r. 6**—Recovery of balance due on mortgage—Application for personal decree against mortgagor, form of. *See* CIVIL PROCEDURE CODE, S. 153 **65**

——— **O. XXXIV, r. 14**—*Mortgage and lease back—Decree on lease—Property whether can be sold—Omission to object, effect of.*

Where a mortgage with possession and lease back form part of the same transaction, though the mortgagee may obtain a decree for rent on the lease document alone, his claim is one arising under the mortgage and within the mischief of O. XXXIV, r. 14, Civil Procedure Code, and the mortgagee is not entitled to bring the property to sale in execution of such a decree.

The fact that the judgment-debtor submitted to execution proceedings prior to the order for sale does not estop him from raising the plea at the time of sale.

A decree-holder cannot demand that the Court shall infringe a statutory provision merely because the judgment-debtor has omitted to

demand that it shall not infringe it. As soon as a Court is aware of an irregularity, it must avoid it *suo moto* irrespective of the intervention of the parties or their right to intervene. M LAKSHMIKUTTI AMMA *v.* MARIATHAMMA, (1924) M. W. N. 771; 20 L. W. 649; 47 M. L. J. 798; 35 M. L. T. 118 **504**

——— **O. XXXVIII, r. 5**—*Attachment before judgment—Security bond, execution of—Dismissal of suit—Decree in appeal—Security bond, if effective.*

There is no general rule in all cases that whenever a bond is given as security to a Court for any decree that may be passed by that Court, it should be construed as meaning that the security is available for the proceedings not only in that Court but also in the Courts of Appeal.

On an application for attachment before judgment, the judgment-debtor executed a security bond under O. XXXVIII, r. 5, Civil Procedure Code, agreeing to give certain properties as security and bound himself and his property as responsible for the decree amount "in case the aforesaid suit" was decided in favour of the plaintiff. The suit was subsequently dismissed by the First Court but was decreed in appeal. On an application to enforce the security bond:

Held, that the bond which really took the place of the attachment before judgment was intended to take effect only if the attaching Court passed a decree and since the suit was dismissed, the bond ceased to have any further effect and the decree-holder was not entitled to any charge on the property on the strength of the bond. M SUBARAMA IYYAR *v.* SOMALINGA SUBBA IYYAR, (1924) M. W. N. 495; 47 M. L. J. 523 **461**

——— **O. XXXVIII, rr. 5, 6**—*Attachment before judgment of immoveable property—Small Cause Court, whether can order attachment.* See CIVIL PROCEDURE CODE, s. 7 **109**

——— **O. XLI, rr. 4, 17, O. XXII, r. 4**—*Partnership suit—Money-decree against partners—Appeal by some only—Legal representative of non-appealing partner—Abatement of appeal.*

No order can be made to the prejudice of any person who is interested in a common interest, such as a partnership, without that person or his legal representative being on the record.

It is not necessary in every appeal arising out of a suit for partition or dissolution of partnership to have all the parties on the record, especially for the purpose of setting aside a money-decree where no taking of accounts *inter se* is required and no relief is claimed from the party not on the record. But if the Court of Appeal finds it necessary to have a party on the record, the Court may order him or his legal representative to be joined and may dismiss the appeal if the appellant fails to comply with the order. M NAMININI CHENGAMA NAIDU *v.* GANGULU NAIDU, 20 L. W. 402; (1924) M. W. N. 789 **420**

——— **O. XLI, r. 5**—*Decree—Stay of execution—Application made long after appeal—Court, duty of.* See CIVIL PROCEDURE CODE, s. 115 **4 3**

——— **O. XLI, r. 19**—*Appeal—Dismissal for default—Application for re-admission of appeal—Proper procedure—Court, duty of.*

An application for re-admitting an appeal dismissed for default should be treated as a miscellaneous matter and the Court should give the applicant an opportunity to show that he was prevented by sufficient cause from being present when the appeal was called on for hearing. C KRISHNACHARAN *v.* CHINIBASI **330**

——— **O. XLI, rr. 20, 33**—*Appellate Court whether can bring parties on record—Limitation—Court of Second Appeal, powers of.*

There is no period of limitation provided for bringing the parties to a suit upon the record in an appeal from a decision in that suit.

The ordinary rules of limitation relating to appeals ought not to apply where in the course of an appeal the Court finds that in order to do justice between the parties it is necessary to bring one of them who was a party to the suit upon the record in the appeal.

The Court in second appeal has power under O. XLI, r. 20, Civil Procedure Code, to bring parties upon the record in order to carry out the powers granted to the Court under r. 33 of that Order. Pat PADARATH MAHTON *v.* HITAN SINGH, (1924) Pat. 249; 5 P. L. T. 509; (1924) A. I. R. (Pat.) 773 **600**

——— **O. XLI, r. 21**—*Appeal, ex parte hearing of—Application for re-hearing—Unrebutted oath of applicant, effect of.*

An unrebutted oath of a respondent alleged to have been served with summons that he never was served and knew nothing of the appeal is sufficient to justify the re-opening of the appeal. R MAUNG SHWE HLA *v.* SOOLAY NAIDU, 3 Bur. L. J. 101; (1924) A. I. R. (R.) 356 **812**

——— **O. XLI, r. 23**—*Specific provisions meeting necessities of case—Remand, whether should be made—Practice.*

Where the Code of Civil Procedure contains specific provisions which would meet the necessities of the case in question the Court should not exercise its powers of remand. C RAJANI KANTA SAHA *v.* RAJENDRA KUMAR BOSE **663**

——— **O. XLI, r. 25**—*Remand for determination of value of suit—Court, whether bound to direct local enquiry.*

When a case is remanded for enquiry and report as to the value of subject-matter of the suit, it is within the discretion of the Court to determine whether there should be a local enquiry or not. C PROMADA NATH ROY *v.* BASIRUDDIN QUAZI **744**

——— **O. XLI, r. 27**—*Defendant's status, question of—Record of Rights not produced in lower Courts—Due diligence—Second appeal—Finding of fact, whether can be disturbed.*

In a suit for recovery of possession of the property in dispute the District Judge on appeal found that the defendants were neither occupancy nor under-*raiyats* and on this finding decreed the suit. The defendants having preferred a second appeal to the High Court, it was urged

Civil Procedure Code—1908—contd.

(1) that the finding was not based on legal evidence, and (2) that the Record of Rights which raised a presumption in favour of the defendants could not be placed before the lower Appellate Court owing to its late publication and the case should be re-tried in the light of this record :

Held, (1) that the findings of fact of the lower Appellate Court could not be disturbed in second appeal ;

(2) that as the defendants could not produce the Record of Rights in the lower Appellate Court in spite of all due diligence it should be admitted in evidence under O. XLI, r. 27 of the Civil Procedure Code ;

(3) that the case should be remitted to the Court of first instance in order that that Court may try the question of the status of the defendants after admitting the Record of Rights as evidence in the case. **C** INDRA BHUSAN SAHA *v.* JANARDHAN SAHA, 28 C. W. N. 945; (1924) A. I. R (C.) 1071 **104**

——— **O. XLI, r. 31**—*Appellate judgment, what should contain.*

It is desirable in appealable cases that the Courts should pronounce their opinion on all important points in order to enable the Appellate Courts to dispose of the cases finally and thus avoid delay and expenses of a remand. **C** HARISADHAN PATARI *v.* DINANATH BANERJEE **318**

——— **O. XLI, r. 33**—*Appellate Court's power to interfere in matter not appealed against.*

The object of O. XLI, r. 33 of the Civil Procedure Code is to enable the Appellate Court, where its decision interferes with or modifies or extends the decision of the lower Court, to give effect to that decision by interfering, if necessary, even with the rights and liabilities of those who were not in fact appealing from that decision of the Trial Court. Unless it is necessary in the interests of justice to give effect to the Appellate Court's decision by interfering in some way or other with the rights of those parties which are not the subject of appeal before the Appellate Court, the Appellate Court has no right whatever to interfere.

Rule 33 of O. XLI, Civil Procedure Code, has no application to a case in which a plaintiff whose claim is decreed in part prefers an appeal with regard to the part not decreed and the defendant files neither an appeal nor a cross-objection. In such a case it is not open to the Court of Appeal to enter into the question whether the plaintiff is entitled or not to any decree at all and to dismiss his suit *in toto*. **Pat** KESHO PRASAD SINGH *v.* NARAYAN DAYAL **984**

——— **O. XLV, r. 13**—Stay of execution—Inherent jurisdiction of High Court, execrise of. *See* CIVIL PROCEDURE CODE, s. 151 **739**

——— **O. XLVII, r. 1**—*"Any other sufficient cause," meaning of—Compromise—Consent obtained by fraud—Review—Procedure.*

The words "any other sufficient reason" in O. XLVII, r. 1 of the Civil Procedure Code, must be taken to refer to something *ejusdem generis* with the words that precede them,

Civil Procedure Code—1908—concld.

Semble.—Where the attention of a Court is invited to the fact that some fraud has been practised upon a party in connection with a petition of compromise which has been accepted by the Court, it may apply the provisions of O. XLVII, r. 1 of the Civil Procedure Code, to set aside the order accepting the compromise, if satisfied that the alleged fraud has been practised, but the matter is one which should ordinarily be litigated in a separate suit. **A** DWARKA DHISH PRASAD SINGH *v.* KESHVA PRASAD SINGH, 22 A. L. J. 118; 46 A 245; (1924) A. I. R. (A.) 398 **1022**

——— **O. XLVII, r. 1**—Commissioner for taking accounts—Review, power of—Enquiry, when can be re-opened. *See* CIVIL PROCEDURE CODE, s. 151 **593**

——— **O. XLVII, r. 1**—*Review, grounds for—"Other sufficient reason," meaning of—Failure to refer to particular piece of evidence.*

The only ground upon which a review can be obtained according to O. XLVII, of the Civil Procedure Code is the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made, or some mistake or error apparent on the face of the record or for any other sufficient reason.

The words "any other sufficient reason" in r. 1 of O. XLVII of the Civil Procedure Code mean a reason sufficient on grounds analogous to those specified immediately previously.

The mere fact that a Judge has not in terms referred to certain of the evidence in favour of one party or the other is not a sufficient reason entitling that party to come before the Court subsequently and seek to have a review of that judgment. **Pat** RAGHU SINGH *v.* KRISHNA DAYAL, 2 Pat 765; (1924) A. I. R. (Pat) 258 **502**

Companies Act (VII of 1913), s. 136 (1)—*Banking Company—Duty to publish statements on specified dates—Omission in good faith, whether justified.*

The omission of a limited Banking Company to publish the statements specified in section 136 (1) of the Companies Act on the dates indicated in the section, cannot be justified by the fact that the omission was due to a change in the closing date of the financial year of the Company and that the officers of the Company imagined in good faith that this justified a change in the dates on which the statements were required to be published. The officers of the Company are in such a case liable to be dealt with under sub-section (4) of section 136. **B** SHAMDASANI, *In re*, 26 Bom. L. R. 68; 48 B 305; (1924) A. I. R. (B.) 308 **58**

Company—*Director's position—Director's duty—Agent—Fiduciary relation—Remuneration—Articles of Association—Company formed to promote other Companies—Directors, whether entitled to extra remuneration for doing promoting work,*

Company—concld.

The Directors of a Company are agents of the Company, and, therefore, stand in the same position as an agent to the principal. They stand in special fiduciary relations to the shareholders, and, therefore, it is highly incumbent on them to act without raising the slightest suspicion of dishonesty, and not to claim any remuneration for doing something which it is their duty to do.

Where one of the objects of a Company is to promote other Companies and consequently it takes upon itself the promotion of another Company a Director is not entitled to claim any remuneration for performing any duties in connection with the promotion of the new Company, over and above what has been fixed as his remuneration by the Articles of Association. **A** DIKSHIT & Co., LTD., *v.* MATHURA PRASAD, 22 A. L. J. 883 **21**

——— Directors preventing co-Director from acting—Suit for injunction, whether maintainable. *See* JURISDICTION OF COURT **405**

Compromise decree—*Fraud—Decree set aside—Rights of parties.*

When a compromise decree is set aside on the ground that it was obtained by fraud, the Court is bound to proceed with the original case, as the effect of setting aside the decree is to remit both parties to their original rights. **Pat** ASHARFILAL MAHTHA *v.* SURAJMAYA MISHRAIN, (1924) Pat. 253; (1924) A. I. R. (Pat.) 758 **181**

——— *Time fixed for payment of money—Forfeiture on default—Extension of time—Power of Court—Revision—Civil Procedure Code (Act V of 1908), s. 115.*

Where an agreement of compromise is for the payment of money on a prescribed date and upon default of payment on that date money or land is to be forfeited, time is not of the essence of the contract and the Court has power, even after the compromise has been embodied in a decree, to extend the time for payment on the application of one party without the consent of the other.

In every case the Court must determine upon the facts of that case whether relief against forfeiture is to be given or not.

Where the Court decides that time is not of the essence of the contract in any particular case and extends the time for payment, the High Court will not interfere with the decision under section 115 of the Civil Procedure Code. **Pat** NAND RANI KUER *v.* DURGA DASS NARAIN, 2 Pat 996; (1924) Pat 122; 5 P. L. T. 401; (1924) A. I. R. (Pat.) 387 **505**

Confession—Retracted confession of co-accused—Conviction for murder—Independent corroboration, necessity of. *See* APPROVER **135**

Consideration—Bond—Want of consideration, whether can be proved. *See* EVIDENCE ACT, s 92 **347**

——— Pro-note—Consideration, failure of. *See* NEGOTIABLE INSTRUMENTS ACT, s. 43 **789**

Conspiracy to cheat. *See* PENAL CODE, s. 120 B **545**

——— to cheat—False claim against Insurance Company. *See* PENAL CODE, s. 107 **39**

——— to overawe Government by killing Europeans—Conviction for conspiracy to overawe Government—Subsequent trial for conspiracy to kill Europeans, maintainability of. *See* CRIMINAL PROCEDURE CODE, s. 403 **169**

Construction of document—*Covenant to reconvey—Rule against perpetuities, applicability of—Contract Act (IX of 1872), s. 37, scope of.*

The law in England and in India is substantially the same with regard to the enforcement of contracts in respect of lands; the only difference is that in England the owner of the equitable interest is considered as the owner of the property contracted to be conveyed. But no such result can follow from a contract creating an executory interest. If such a contract purports to do by indirect means what the law forbids to be done directly, it is void, and the principle is the same in India as in England.

Although contracts for the sale of land which can be specifically enforced immediately, or contracts creating a right of pre-emption which cannot be specifically enforced until the proper occasion arises in the future, do not, according to the law in India, create an interest in land either equitable or executory, they do create rights which are capable of being enforced with regard to the land in certain circumstances against third parties, and to that extent they are not ordinary personal contracts and stand in a category by themselves. The principle which underlies the rule against perpetuities applies to this class of contracts.

A covenant in a sale-deed that, "if the vendee, his heirs or representatives, desire to sell the house purchased, they shall, in such a case, first ask the executant, his heirs or representatives for the time being to purchase it. If the executant, or his heirs or representatives refuse to purchase, the vendee, his heirs or representatives shall have a right to transfer it to some one else. In case they make breach of this covenant, the executant, his heirs and representatives will be entitled to the specific performance of the contract," offends against the rule against perpetuities and is, therefore, unenforceable.

Quære.—Whether the provisions of section 37 of the Contract Act enable an owner of immoveable property to enter into an agreement imposing a restrictive covenant for an indefinite period on the disposition of the property so as to bind his heirs and representatives. **A** GOPI RAM *v.* JEOT RAM, 21 A. L. J. 430; 45 A. 478; (1923) A. I. R. (A.) 514 **646**

——— Intention of parties—Duty of Court. *See* TRANSFER OF PROPERTY ACT, s. 14 **628**

——— *Intention of parties, when considered.*

Where a document is not itself ambiguous, the intention of the parties should not be taken into consideration. **C** PROHLAD CHANDRA DAS *v.* BISWA NATH, 28 C W. N. 894; 40 C. L. J. 79; (1924) A. I. R. (C.) 1079 **411**

Construction of document—contd.

——— *Landlord and tenant—Abatement of rent.*

Where a *kabuliyat* provided that "any loss arising from leaving the lands fallow or from floods or drought will be mine..... nor shall I be entitled to abatement of the stipulated rent on any account whatsoever; any such claim will not be entertained":

Held, that the words "on any account whatsoever" must be read as a whole along with what preceded them and should be taken as meaning that abatement would not be claimable in the case of loss by reason of causes *ejusdem generis* with those specified, and that they did not include a case of deficiency in area due to compulsory acquisition. **C** GOSTA BEHARI PRAMANIK *v.* HEM CHANDRA DAS DE, 29 C. W. N. 124 **315**

——— Mercantile document — General words following specified words — Construction — *Ejusdem generis*, doctrine of. *See* PRESIDENCY TOWNS INSOLVENCY ACT, s. 7 **702**

——— *Name given by parties, effect of*—Amaldari *lease—Registration.*

The mere name of a document decides nothing. It is really what the document purports to do that is of importance and the question must be determined on that basis.

An *amaldari* lease which contains all the essential terms of a lease requires registration and is not admissible in evidence without registration. The real test is whether the document purports to be a lease or an agreement to lease or not. If it does not amount to a lease, it does not require registration. **C** SABDI BEPARI *v.* BUDHAI **949**

——— Sale-deed — Agreement to reconvey— Mortgage or option of re-purchase. *See* REGISTRATION ACT, s. 17 **606**

——— *Sale or mortgage—Surrounding circumstances.*

In construing a document, surrounding circumstances may be taken into consideration in order to show in what manner the language of the document is related to existing facts.

In August, 1908, *A.*, a judgment-debtor, in order to prevent a Court sale of his property, consisting of several villages, executed a document by which he purported to sell the property absolutely to *B*, with a condition of reconveyance. *A*, however, reserved his rights to the minerals in the land. The rents were to be enjoyed by *B*, from the date of purchase. The price paid was absurdly small, and the property would have fetched a larger sum even at public auction. Under a separate document expressed to be entered into for reconveyance of the property, *B* agreed to sell and *A* to purchase the villages for the amount paid for them on 31st August 1912, 31st August 1913, or 31st August 1914, and not earlier. In case *A* paid the sum to *B*, and a conveyance in due form was executed, he was to become entitled to the rents of the villages as from the date of payment. If before the deed of conveyance was executed, any portion of the land was acquired by Government, the compensation awarded was to be deemed equivalent to 20 years' rent of the land acquired, and both *A* and *B* were to be entitled each to his proportionate share, the share of money due to *A* being, if needed, given credit for towards the sale price:

Held, that the transaction though ostensibly a sale with a right of re-purchase in the vendor was in reality merely a mortgage by conditional sale. **P C** NARASINGERJI GYANAGERJI *v.* PANUGANTI PARTHASARADHI, (1924) A. I. R. (P. C.) 226; 47 M. 729; 20 L. W. 701; 10 O. & A. L. R. 1172; 47 M. L. J. 809; (1924) M. W. N. 915; 40 C. L. J. 481 (P. C.) **993**

——— *Will by Hindu in favour of son's daughter —Absolute or limited estate.*

The words "You shall enjoy after my death all the properties moveable and immoveable.....you can enjoy all the said properties attending to my obsequies after my death and settling the matters of the debts, etc., incurred by me" in a Will by a Hindu testator in favour of his son's daughter are of sufficient amplitude to convey the fullest rights of ownership and an absolute estate passes to the legatee. **M** YELLAPPA *v.* GOHA SWAMI, 20 L. W. 579; (1924) M. W. N. 895; (1924) A. I. R. (M.) 855 **490**

Contempt—*Breach of undertaking given to Court —Penalty—Procedure—Undertaking to pay deficit Court-fees, failure to carry out—Appeal, maintainability of.*

The breach of an undertaking given to the Court by a litigant, pending proceedings, on the faith of which the Court sanctions a particular course of action or inaction, is misconduct amounting to contempt.

When a person is guilty of such contempt he places himself in a perilous situation so as not to be heard by the Court till he has purged his contempt.

But the rule imposing such a penalty is limited to the proceedings in which the contempt occurs.

Plaintiff's suit was held to have been undervalued and he undertook to make up the deficiency in Court-fees before the decree was drawn up. The Court, thereupon, proceeded to try the suit on the merits and it was eventually dismissed. The plaintiff failed and refused to carry out his undertaking with respect to the payment of deficit Court-fees. He preferred an appeal against the decree of the Trial Court with respect to costs:

Held, that the plaintiff was guilty of contempt and his appeal could not, therefore, be entertained. **C** RAJ RAJESWARI JIU *v.* GATI KRISHNA, 39 C. L. J. 217; (1924) A. I. R. (C.) 953 **292**

Contract, *performance of—Benefit taken under contract—Partial repudiation.*

A party to a contract enjoying the benefit under it cannot, when the right to get either rescission or reformation of the contract is barred say that he is not bound by one of its terms. **C** SASI KANTA ACHARJEE BAHADUR *v* GENDA SHEIKH **970**

Contract Act (IX of 1872), s. 11—*Lease by minor, validity of—Lessee's position—Specific Relief Act (I of 1877), s. 41—Improvements—Compensation.*

Contract Act—contd.

A lease by a minor is void and a lessee under such a lease is liable to be ejected but is entitled to compensation under section 41 of the Specific Relief Act for improvements done on the property on the basis of the estimated value at the time of erection, and is also entitled to remove the standing crops, if any. **R** Doo Doo Meah *v.* Kasim Ali, 3 Bur. L. J. 76; (1924) A. I. R. (R.) 288 **250**

——— **s. 16**—*Transaction, how should be considered—Undue influence*—Onus—*Urgent need of money—Usurious interest—Presumption, whether arises—Interpretation of Statutes—Reference to legislation of other countries.*

The unconscionableness of a bargain is not the first thing to be considered in order to determine whether a case falls within the terms of section 16 of the Contract Act. The first thing to be considered is the relations of the parties and in order to bring the transaction within the section it must be proved that one party was in a position to dominate the will of the other.

The burden of proving that the contract was not induced by undue influence then lies on the person who was in a position to dominate the will of the other.

Urgent need of money on the part of the borrower does not place the lender in a position to dominate his will.

The exaction of excessive and usurious interest does not by itself raise any presumption of undue influence until the question has first been settled as to the lender being in a position to dominate the borrower's will.

The question whether a bargain is unconscionable is to be settled by section 16 of the Contract Act and not by reference to the legislation of other countries, *e.g.*, the English Money-lenders Act It is accompanied with danger to invoke as authority in an Indian case expressions which merely connote the principles which underlie a particular English Statute, and form a guide to its interpretation.

It is not right that where there is ample security, the exaction of excessive and usurious interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate. There is no such presumption until the question has first been settled as to the lender being in a position to dominate the borrower's will. **P C** Raghunath Prasad *v.* Sarju Prasad, (1924) A. I. R. (P. C.) 60; 5 P. L. T. 72; 22 A. L. J. 105; 2 P. L. R. 87; 19 L. W. 470; 34 M. L. T. 57; 46 M. L. J. 610; 3 Pat. 279; 26 Bom. L. R. 595; 28 C. W. N. 834; 11 O. L. J. 122; (1924) M. W. N. 638 (P. C.) **817**

——— **s. 23**—*Bail-bond—Agreement to indemnify surety—Forfeiture of bond—Suit to recover amount, whether competent.*

Any agreement, whether express or implied, to indemnify a surety, who has given a bail-bond for the appearance of the principal, is void under section 23 of the Contract Act and if the bail is forfeited on account of the failure of the principal to appear, the surety cannot sue to recover the amount. **N** Jodhraj Marwari *v.* Bisanlal, 20 N. L. R. 166 **1036**

Contract Act—contd.

——— **s. 23**—*Gift for immoral purpose—Immorality carried out—Property, whether can be recovered.*

If a person transfers his property to another for an illegal or immoral purpose, he cannot get the transfer annulled, if the intended purpose has been carried out.

Therefore, if a person gifts his property to his concubine in consideration of past and future cohabitation he is not entitled to recover the property. **M** Ivaturi Brahmayya Lingam *v.* Kamisetti Mallamma, 20 L. W. 323; 47 M. L. J. 652; (1924) A. I. R. (M.) 849 **14**

——— **s. 28**, *scope of—Fire Insurance Policy—Forfeiture clause limiting time for suit—Suit after time, whether maintainable.*

A clause in a Fire Insurance Policy forfeiting all benefit under the policy on action not being brought within three months of the rejection of a claim, is valid and not within the scope of section 28 of the Contract Act. **R** Rainey *v.* Burma Fire & Marine Insurance Co. Ltd., 3 Bur. L. J. 104 (1924) A. I. R. (R.) 351 **814**

——— **s. 37**, scope of. *See* Construction of Document **646**

——— **s. 59**—*Payment—Appropriation.*

If a creditor does not agree to appropriate and apply a payment according to the debtor's specific directions, he should reject the payment at once, otherwise he is bound to apply it as directed. This will be so even if he were to tell the debtor at the time of payment that he will not apply it in accordance with the latter's directions. **R** Foster *v.* R. M. A. L. Chetty Firm, 2 R. 204 **660**

——— **s. 62**—Novation. *See* Landlord and Tenant—Grant **205**

——— **s. 70**—Hindu widow—Debt of husband—Discharge by third person at her request—Liability of widow—Assets of deceased. *See* Hindu Law—Widow **586**

——— **s. 74**—*Partition between family members—One member agreeing to take annuity instead of his share—Stipulation to resume share if annuity not paid—Penalty—Question of law—Second appeal.*

If by an agreement of partition one of the several members of a family agrees to receive an annuity in lieu of his proper share, but reserves the right to resume his share on default of payment of annuity, the stipulation regarding resumption of share is not penal within the meaning of section 74 of the Contract Act and can be enforced.

The question whether a stipulation is one by way of penalty is one of law and can be raised in second appeal.

If under a stipulation the contracting parties are merely remitted to their original position there can be no question of penalty, neither does the mere

withdrawal of a privilege constitute a penalty. M RAJAGOPALA PADAYACHI v. VARADARAJA PADAYACHI, 47 M. L. J. 605; (1924) M. W. N. 861 751

——— s. 76—*Shares, whether goods—Property in shares, how passes—Delivery of share certificates, effect of—Unpaid vendor, position of—Lien—Suit to recover purchase-money.*

Plaintiff sold 129 shares to defendant No. 1. Defendant sold 25 of these to a third party and pledged 104 along with 201 similar shares to defendant No. 2. Defendant No. 2 put forward defendant No. 3 as a party who was willing to advance money. In fact defendant No. 3 was a mere nominee of defendant No. 2. Defendant No. 2 got possession of these 305 shares by fraudulently representing that he would use their shares for the purpose of raising a loan for defendant No. 1 which he did not do and which he did not intend to do, his real object being to secure himself from loss as regards the moneys due to him by defendant No. 1. Plaintiff thereupon sued to recover the shares or their price and by way of damages the difference in the price of those shares on the date on which they were demanded back and the price on the date of decree :

Held, (1) that the plaintiff had no cause of action against defendants Nos. 2 and 3 ;

(2) that all that plaintiff was entitled to was a decree against defendant No. 1 for the unpaid purchase-money as he had no lien for it ;

(3) that the plaintiff had no title either in law or in equity to the shares and could not get back the share certificates or claim damages.

Per *Macleod, C. J.*—Shares are goods within the meaning of section 76 of the Contract Act. They are, however, a peculiar kind of moveable property which cannot pass from hand to hand. The property in these shares belongs to the registered share-holder and cannot be transferred to another except according to the articles of the Company.

The only inquiry which a holder of shares can be put to by reason of the nature or character of the documents which come into his possession is with regard to the action of the registered holder. He cannot be put to enquiry with regard to the rights and liabilities of intermediate holders.

Per *Crump, J.*—Delivery of the transfers and share certificates passes not the property in the shares but a title legal and equitable which will enable the holder to vest himself with the shares. B VADILAL SARABHAI v. MANEKJI PESTONJI, 25 Bom. L. R. 414; (1923) A. I. R. (B.) 372 977

——— s. 78—Sale of goods taken on approval with condition to pay cash—Passing of property in goods. *See* PENAL CODE, s. 406 163

——— s. 91—*Purchase of goods through commission agent—Consignment by Railway, uninsured—Loss in transit—Agent's liability.*

A purchase of goods by a commission agent, implies as between the principal and agent, only a contract of agency and not one of purchase and sale, though it will attract to the commission agent certain reliefs ordinarily open to a vendor *viz.*, the right of stoppage in transit. The property in the goods passes to the principal immediately on purchase by the agent irrespective of the manner of delivery. To such a case section 91 of the Contract Act does not apply.

The measure of reasonableness as to the method of delivery of goods as between agent and principal has to be decided on what the parties themselves in their usual course of business and trade custom consider reasonable. It is not the same as that laid down in section 91, Contract Act, as between vendor and purchaser.

Where a comission agent for a buyer was usually sending goods to him uninsured without objection and certain goods so consigned were lost in the way :

Held, that the property in the goods on purchase passed to the buyer, and non-insurance being the implied customary method, the agent by sending goods uninsured was not guilty of any negligence and was not liable to bear the loss. M VENKATACHALAM CHETTIAR v. PONNUSAMI AYYANGAR, (1921) M. W. N. 199; 20 L. W. 195; 47 M. L. J. 312 536

——— ss. 95, 96, 107—*Sale of goods—Vendee's failure to take delivery—Repudiation of contract—Vendor's lien on goods sold—Re-sale.*

If a sale of goods is on credit and no time is fixed for delivery, the vendor has no lien and the vendee is entitled to immediate delivery. But where the vendee fails to take delivery within the time fixed and repudiates the contract, he cannot take advantage of the provisions of section 96, Contract Act. The general provision of section 95 of the Act giving the seller a lien on sold goods remaining in his possession has effect unless some exception applies, and the vendor in such a case has a right under section 107, to re-sell the goods and recover the loss from the vendee. M MULKI NARAYANA KAMMATHU v. KOLATHINGAL KUNHI MOYI, 20 L. W. 486; (1924) M. W. N. 748; (1924) A. I. R. (M.) 866 850

——— s. 151—Bailment of goods—Station Master retaining goods—Liability of Railway—Bailee, duty of. *See* RAILWAYS ACT, s. 72 772

——— s. 178—War Bonds, purchase of, through broker—Broker pledging bonds with Bank by forged endorsement—Pledge, validity of—Conversion. *See* NEGOTIABLE INSTRUMENTS ACT, s. 9 730

——— s. 178, proviso—*Negotiable Instruments Act (XXVI of 1881), ss. 58, 85—Forged endorsement, whether confers title—Pledge—Pawnor's possession—Juridical possession—Custody.*

The proviso to section 178 of the Contract Act applies to a case where a person in possession of a document, even though he has obtained it lawfully in the first instance, creates a right to it in his favour by forging the endorsement and after doing so pledges it.

To create a valid pledge the pledger must be in juridical possession of the goods as distinguished from a bare custody.

No person can claim title to any negotiable instrument through a forged endorsement except in cases mentioned in section 85 of the Negotiable Instruments Act. Such an instrument is a nullity

Contract Act—concld.

and must be taken as if no such endorsement was on the instrument.

Section 58 of the Negotiable Instruments Act deals with cases of defective title only. **S** KARACHI BANK *v.* KODUMAL KALUMAL, (1923) A. I. R. (S.) 54 **998**

Co-sharer — Adverse possession — Limitation—Declaratory decree for unknown share. *See* EVIDENCE ACT, s. 13 **392**

——— —*Exclusive possession—Ouster.*

The possession of one co-sharer enures to the benefit of the other co-sharers and does not, except under exceptional circumstances, amount to an ouster of other co-sharers. **C** JINNATTENNESSA *v.* ABDUL HALIM **822**

——— *Joint land*—Hat *started by two co-sharers —Subsequent improvement by one—Other co-sharer whether excluded from profits.*

When a *hat* is started on a joint land by two co-sharers, the fact that after the *hat* has been established one co-sharer makes improvements in the *hat* at his own expense, does not give him the right to exclude the other co-sharer from the *hat* that had been started for their joint benefit. **C** MUHAMMAD SAFAR JAMA KHAN *v.* SATYA NIRANJAN **290**

——— *Joint possession, decree for—Court, discretion of—Exclusive possession, effect of—Co-owner, when can be turned out—Putting up,* tappar *whether implies ouster—Ouster, how determined—Suit for demolition of* tappar*—Special damage.*

The granting of a decree for joint possession is quite discretionary with Courts.

A co-owner who has taken up the exclusive occupancy should not be deprived of such exclusive occupation except on very strong grounds.

The sole occupation of a part of the joint estate by one co-owner does not inevitably imply an ouster of the other co-owner, nor does the erection of substantial building by one co-owner upon a portion of joint property without the assent of the other co-owner constitute conclusive evidence of ouster.

What constitutes ouster in each particular case must depend upon its special facts.

Where one co-owner puts up a *tappar* on joint land without the consent of the other co-owner the Court will not order the demolition of the *tappar* unless the plaintiff proves special damage. **N** KUVERJEE *v.* RAMA **432**

——— *Lease by one co-owner, operation of—Suit for ejectment of trespasser—Plaintiff, what has to prove—Material date.*

In a suit by one co-owner for ejectment of a trespasser from the entire premises, the burden of proof lies on him to show that he had an unrestricted authority to eject him on the date of the suit. The mere fact that he had such authority at some point of time in the past is not sufficient to show that he continued to be clothed with that authority at the date of the suit, as to be alone entitled to call upon the defendant to vacate the entire premises, in spite of the fact that his other co-owner had manifested his intention to the contrary by granting him a fresh lease of the entire premises.

Co-sharer—concld.

A lease by one of two co-owners can operate only on the lessor's half interest and is voidable as against the other co-owner. **N** VITHAL *v.* SADASHEO **1041**

———, meaning of—Proprietor not having specified share, whether co-sharer—Right to pre-empt. *See* CUSTOM—PRE-EMPTION **196**

——— *Ouster—Restoration of possession—Partition—Equity.*

The equitable principle that one co-sharer cannot disturb possession of the other cannot be called in aid unless it is found that the co-sharers are in possession of separate portions by mutual arrangement for the sake of convenience. Unless such mutual arrangement is proved a co-sharer who is dispossessed cannot recover possession and his only remedy lies in a suit for partition. **C** EKABAR ALI SHAH *v.* KON ALI **31**

——— *Tenants-in-common—Exclusive occupation —Equitable principles—Decree for joint possession and mesne profits.*

If there be two or more tenants-in-common and one of them *A.* be in actual occupation of part of the estate and engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and another tenant-in-common *B.* attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which *A.* is engaged and the profitable use by him of the said part, and *A.* resists and prevents such entry, not in denial of *B*'s title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of *A.* would not entitle *B.* to a decree for joint possession.

Prima facie, co-owners are entitled to hold joint possession of joint property and consequently if one co-sharer seeks to defeat the claim of another co-sharer to joint possession to joint property, special circumstances must be alleged and established so as to justify exclusive occupation of the joint property by one of the co-sharers.

The mere setting up of a rival claim or a hostile title in the written statement would not entitle the plaintiff to allege that there was ouster and, on that footing, to seek for a decree for joint possession. It must be proved that there was a setting up of hostile title or ouster prior to the filing of the written statement.

Therefore, where some of the co-sharers set up an exclusive or adverse right in joint lands, the above principles shall apply. **C** RAJENDRA NARAYAN RAI *v.* BHAIRABENDRA NARAYAN ROY **235**

Cotton Duties Act (II of 1896), ss. 16, 25 (9) *—Meaning of word "place" in definition of "mill"—Inspector of Cotton Excise—Right of free access to godown—Owner refusing to have locked-up godown opened—Wilful obstruction—Subsequent offer of access, whether condones obstruction.*

Cotton Duties Act—concld.

Under section 16 of the Cotton Duties Act, the Inspector of Cotton Excise has a right of free access to the godown of a mill, inasmuch as, the definition of the word "mill" in the Act contains the wide word "place", which (supposing the godown is not in the particular building where the machinery is) is wide enough to cover the premises containing accessories to the manufacture of cotton goods in the mill.

Therefore, if the owner of a mill does not, after due notice, get the locked door of a godown of the mill opened to give access to the Inspector of Cotton Excise, the owner is guilty of wilful obstruction under section 25 (9) of the Cotton Duties Act, the particular purposes for which the Inspector wanted access being immaterial so long as his object was to perform a duty under the Cotton Duties Act.

Once access is refused, and thus intentional obstruction is caused, a subsequent offer to give access is not sufficient to condone the obstruction. **B** MUKUNDLAL BANSILAL *v.* EMPEROR, 26 Bom. L. R. 721; (1924) A. I. R. (B.) 492; 25 Cr. L. J. 1281 **353**

Counsel and client—*Admission by Counsel in point of law—Minor party, whether affected.*

An admission on a law point by a Pleader cannot affect the interest of a minor. **N** LAXMI *v.* VENKATRAO **1052**

Court Fees Act (VII of 1870), s. 12 (2)—*Additional Court-fee, when to be levied—Interpretation of Statutes—Fiscal Statutes.*

A provision of the character of that contained in clause (2) of section 12 of the Court Fees Act should be strictly construed and additional Court-fees should be levied from a party litigant only in exact conformity with the precise words of the Statute, although provisions in fiscal Statutes should not be so construed as to furnish a chance of escape and a means of evasion. **C** RAJ RAJESWARI JIU *v.* GATI KRISHNA, 39 C. L. J. 217; (1924) A. I. R. (C.) 953 **292**

——— **s. 19-I,** *applicability of—Provident Fund—Probate duty—Exemption.*

Provident Fund money is exempt from Probate or Administration duty, as it passes to a nominee, and even in the absence of an Administrator it does not form an asset of the estate of the deceased. **N** AGNES *v.* JAMES WILLIAM **128**

——— **s. 31**—Direction to accused to pay complainant's Court-fees—Enhancement of sentence. *See* CRIMINAL PROCEDURE CODE, s. 423 **141**

——— **Sch. I. Art. 1**—*Civil Procedure Code (Act V of 1908), ss. 47, 144—Restitution order—Appeal—Ad valorem Court-fee.*

An appeal from an order passed on an application for restitution under section 144, Civil Procedure Code, must be stamped *ad valorem* under Article 1, Schedule I of the Court Fees Act as an appeal from a decree and cannot be filed as an appeal from an order in execution of a decree with a fixed Court-fee stamp.

An order under section 144, Civil Procedure Code, is not an order in execution falling under section 47, Civil Procedure Code. **A** BAIJ NATH DAS *v.* BALMUKAND, 22 A. L. J. 881 **321**

——— **Sch. I, Arts. 4, 5**—*Bengal Court Fees (Amendment) Act (IV of 1922), s. 5—'Leviable', meaning of—Review, application for—Court-fee payable—Fiction, legal, when permissible.*

A legal fiction has no place where substantial justice does not require its interference, still less where substantial justice would suffer from its operation. The Court will not endure that a mere form or fiction of law, introduced for the sake of justice, should work a wrong, contrary to the real truth and substance of the thing.

The use of the term "leviable" in Article 5 of Schedule I to the Court Fees Act does not justify the inference that the Legislature intended to introduce a fiction into the law, namely, an imaginary representation of the plaint or memorandum of appeal at the time when the application for review is filed.

As soon as a suit has been instituted, the amount of Court-fee payable on a possible application for review of the prospective judgment in the suit becomes fixed.

Neither under the Court Fees Act as originally framed in 1870 nor under the Court Fees Act as amended in 1922, can a petitioner for review of judgment be called upon to pay Court-fee on the basis of the fee which would be payable on the plaint or memorandum of appeal if it were to be filed on the date of the application for review. The amount must be calculated on the basis of the fee leviable (which, in the normal course of events, is the fee actually levied) on the plaint or memorandum of appeal according to the law in force when the plaint or memorandum was filed in Court. **C** NANDA LAL *v.* JOGENDRA CHANDRA, 39 C. L. J. 222; 28 C. W. N. 403; (1924) A. I. R. (C.) 881 **297**

Criminal Procedure Code (Act V of 1898), ss. 4, 190—*Report of Police Officer, meaning of—Allegation of non-cognizable case by Police Officer also Public Prosecutor, whether "complaint"—Court, whether can take cognizance.*

The words "report of a Police Officer" as used in the Criminal Procedure Code mean the report of a Police Officer in cases in which he is authorized to investigate by the Code.

Therefore, a written allegation of a non-cognizable case made by a Police Officer who is also a Public Prosecutor with a view to the Court's taking action is not the report of a Police Officer but is a "complaint" as defined in section 4 of the Criminal Procedure Code and the Court is competent to take action thereon.

The Criminal Procedure Code does not prohibit a Police Officer from presenting a complaint to the Magistrate in a case non-cognizable by the Police. **L** EMPEROR *v.* GHULAM HUSSAIN, 25 Cr. L. J. 1361 **753**

——— **ss. 30, 337 (2A)**—*Pardon to approver by s. 30 Magistrate—Trial of case.*

A Magistrate with powers under section 30 of the Criminal Procedure Code who has tendered a pardon to an approver cannot try the case in which the approver is to be examined as a witness,

Criminal Procedure Code—contd.

but must commit the accused to Sessions Court or High Court if he is satisfied that there are reasonable grounds for believing that the accused is guilty of the offence. **N** KISHORE *v.* EMPEROR, 25 Cr. L. J. 1341 **573**

——— **ss. 54, 60, 61**, *scope of.*

The precautions laid down in sections 54, 60 and 61 of the Criminal Procedure Code seem to be designed to secure that within not more than 24 hours of the arrest of an accused person, some Magistrate shall have seisin of what is going on and some knowledge of the nature of the charges against the accused, however, incomplete the information may be. **C** DWARKADAS HARIDAS *v.* AMBALAL GANPATRAM, 28 C. W. N. 850; (1924) A. I. R. (C.) 893; 25 Cr. L. J. 1203 **131**

——— **ss. 89, 561A**—*Application for restoration of attached property two years after attachment—Inherent jurisdiction of High Court—Proper remedy—Application to Government.*

If an application for the restoration of property attached under section 88, Criminal Procedure Code, is not made within two years, as prescribed by section 89 of the Code, the High Court has no jurisdiction, under section 561A of the Code, to order the restoration of property, as such an order, if made, would conflict with section 89. The proper remedy is an application to Government. **B** GURUNATH NARAYAN BETGERI *v.* EMPEROR, 26 Bom. L. R. 719; (1924) A. I. R. (B.) 485; 25 Cr. L. J. 1293 **365**

——— **ss. 110, 439**—*Security for good behaviour—Evidence, nature of—Prosecution, what must prove—Failure to furnish security—Order directing imprisonment of accused—Revision—High Court, when will interfere.*

It is very difficult for the High Court to interfere in revision in cases under section 110 of the Criminal Procedure Code, but when a person is sentenced to imprisonment for failure to furnish security under that section, the High Court has to be satisfied that the evidence is of a character which will reasonably support the inference that it is necessary in the interests of public security to send the accused to prison or to bind him down. **A** ALIMUDDIN *v.* EMPEROR, 22 A. L. J. 678; (1924) A. I. R. (A.) 569; 25 Cr. L. J. 1172 **36**

——— **ss. 112, 118**—*Prevention of offences—Sureties, production of—Imposition of fresh conditions—Good faith of sureties—Court, jurisdiction of.*

The object of Chapter VIII of the Criminal Procedure Code is not the punishment of a suspect for past unproved crimes but to prevent him from committing offences and to afford him an opportunity of reforming himself.

When once a Magistrate has, while passing orders under section 112, Criminal Procedure Code, imposed conditions as to the nature of sureties and the amount of their liability, he cannot, when making the order absolute under section 118 of the Code, vary his previous order and impose fresh conditions, and he cannot reject as unfit sureties who comply with conditions originally laid down and are not personally unfit.

Criminal Procedure Code—contd.

Sureties are not unfit because it is alleged that the suspect cannot be controlled by them, nor can it be made a condition precedent for acceptance of sureties that they should show their good faith and influence over the suspect, *e.g.*, by producing his father who is absconding. **S** EMPEROR *v.* MANU, 25 Cr. L. J. 1226 **154**

——— **s. 144**, *object of—Liberty of individual, respect for—Magistrate, duty of—Proper procedure—Vague and indefinite order.*

Section 144, Criminal Procedure Code, is not intended to restrict the liberty of an individual if there is no apprehension of a breach of the peace on account of any act to be done by him.

The object of section 144 is to enable a Magistrate in cases of emergency to make an immediate order for the purpose of preventing an imminent breach of the peace; but it is not intended to relieve him of the duty of making a proper enquiry into the circumstances which make it likely that such breach of the peace will occur.

If it is found that a man is doing that which he is legally entitled to do and that his neighbour chooses to take offence thereat and to create a disturbance in consequence, it is clear that the duty of the Magistrate is, not to continue to deprive the first person of the exercise of his legal right but to restrain the second from illegally interfering with that exercise of legal right.

An order under section 144, Criminal Procedure Code, merely reciting that in the opinion of the Magistrate there is sufficient ground for proceeding under that section does not sufficiently comply with the requirements of the law.

A vague and indefinite order which does not state any facts relating to the case or does not define the limits within which it is to operate is bad in law. **Pat** BLONG *v.* EMPEROR, (1924) Pat. 262; 25 Cr. L. J. 1178; (1924) A. I. R. (Pat.) 767 **42**

——— **s. 144**—*Time-expired order—Revision.*

The High Court will not in revision interfere with an order under section 144, Criminal Procedure Code, which has expired by lapse of time, and adjudicate upon matters which have no practical effect. **M** KUPPU ODAYAR *v.* POOMALAI GOUNDAN, 47 M. L. J. 439; (1924) M. W. N. 675; 25 Cr. L. J. 1304; (1924) A. I. R. (M.) 896 **472**

——— **s. 145**, proceedings under, relevancy and admissibility of, in civil cases. *See* EVIDENCE ACT, s. 13 **392**

——— **s. 145**—*Limitation Act (IX of 1908), Sch. I, Art. 47—Proceedings under s. 145, nature of—Breach of peace, likelihood of—"Parties concerned in dispute," meaning of—Compromise by some parties—Magistrate, jurisdiction of, to deliver possession—Civil suit—Limitation—Want of jurisdiction—Error—Vice affecting whole proceedings—Mutation order, effect of.*

The words "parties concerned in such dispute" in section 145, Criminal Procedure Code, are intended to include all persons claiming to be in possession, and proceedings under the section are not without jurisdiction merely because some of those parties are not likely to cause a breach of the peace.

Criminal Procedure Code—contd.

The mere fact that in proceedings under section 145, Criminal Procedure Code, a compromise is filed by some of the parties does not preclude the Magistrate from putting such parties into possession, although it may be that if all the parties filed a compromise the jurisdiction of the Magistrate would cease and he could only cancel the proceedings under clause (5) of the section.

In questioning the effect of proceedings under section 145, Criminal Procedure Code, as regards limitation, for the civil suit under Art. 47 of Schedule I to the Limitation Act, the proceedings must be shown to be without jurisdiction in the strictest sense of the term. It is not every error which would make the result invalid, and before want of jurisdiction can be established, a vice must be clearly established which infects the whole proceedings.

An order in mutation proceedings is not a final decision as to ownership and has no effect whatsoever on an order passed by a Magistrate in proceedings under section 145, Criminal Procedure Code, in so far as that order limits the period within which a civil suit may be brought by any of the parties. **O** ABADI BEGAM *v.* AHMAD MIRZA BEG **691**

——— **s. 145,** proceedings under, whether bar suit—"Eviction in due course of law", meaning of. *See* AGRA TENANCY ACT, s. 34 **651**

——— **ss. 145, 146**—*Court, duty of—Collection of evidence as to possession—Attachment of property.*

Under section 145, Criminal Procedure Code, a Magistrate should be extremely reluctant to attach the property in dispute and it is his duty to collect information about possession whether false or true and to sift it before making use of section 146, Criminal Procedure Code, as an order under this section is almost the same as an act of confiscation. **Pat** RAM BAHAL SINGH *v.* RANG BAHADUR SINGH, 5 P. L. T. 589; 25 Cr. L. J. 1295; (1923) A. I. R. (Pat.) 804 **367**

——— **s. 146**—*"Competent Court," meaning of—Mutation order—Person entitled to possession, whether determined.*

The words "competent Court" in section 146 of the Criminal Procedure Code are not confined to mean only a "competent Civil Court."

An order of a Revenue Court directing mutation to be made in favour of a certain person is an order of a competent Court determining the person entitled to possession within the meaning of section 146 (1) of the Criminal Procedure Code. **A** RAM SRI *v.* SRI KISHUN, 22 A. L. J. 803; 25 Cr. L. J. 1212; (1924) A. I. R (A.) 777 **170**

——— **s. 171,** *scope of—Magistrate demanding bail from accused on Police request to appear before another Court—Order, propriety of—Criminal breach of trust—Offence, where triable.*

The Secretary of a limited Company carrying on business at Ahmedabad presented a petition of complaint before the Deputy Inspector-General of Police of the Poona Criminal Investigation Department against one *D*, alleging that *D* as commission agent of the Company in Calcutta committed criminal breach of trust in respect of sale proceeds of the goods belonging to the Company. The C. I. D. Officer appointed to investigate into the matter obtained a search warrant from a First Class Magistrate at Ahmedabad for the books and documents, came to Calcutta and in execution thereof took charge of the books, etc. from the house and office of *D* after making a search list. Having arrested *D* under the provisions of section 54 of the Criminal Procedure Code, he produced him before the Chief Presidency Magistrate, Calcutta, asking that *D* might be forwarded under proper escort to the First Class Magistrate, Ahmedabad. On *D* applying for bail the Chief Presidency Magistrate granted bail for Rs. 50,000 "to appear before the First Class Magistrate, Ahmedabad" on the date specified. *D* thereupon moved the High Court:

Held, (1) that the charge was triable only in Calcutta where the offence alleged under section 409, Penal Code, was committed;

(2) that the Chief Presidency Magistrate ought to have refused to act on the mere statement of the investigating Police Officer but should have required him to produce a warrant from Ahmedabad, releasing *D* in the meantime on bail to appear when called on before himself. **C** DWARKADAS HARIDAS *v.* AMBALAL GANPATRAM, 28 C. W. N. 850; 25 Cr. L. J. 1203; (1924) A. I. R. (C.) 893 **131**

——— **s. 190**—Allegation of non-cognizable case by Police Officer also Public Prosecutor whether "complaint"—Court, whether can take cognizance. *See* CRIMINAL PROCEDURE CODE, s. 4 **753**

——— **ss. 191, 476**—*Magistrate instituting proceedings—Jurisdiction to try case—Omission to inform accused of privilege of transfer.*

Where a Magistrate instituting proceedings under section 476, Criminal Procedure Code, takes cognisance of the offence himself without informing the accused under section 191 of the Code that he is entitled to have his case tried by another Court, the omission is more than a mere irregularity and vitiates the whole trial. **O** EMPEROR *v.* NAIPAL, 10 O. & A. L. R. 735; 11 O. L. J. 532; 25 Cr. L. J. 1224; (1924) A. I. R. (O.) 448 **152**

——— **ss. 195, 236**—*Penal Code (Act XLV of 1860), s. 193—Perjury—Contradictory statements in civil and criminal proceedings—Alternative charge—Series of acts—Sanction to prosecute—Application to both Courts, whether necessary.*

It is only when the contradictory statements in respect of which a prosecution for perjury is instituted, constitute a "series of acts" that an alternative charge can be framed under section 236 of the Criminal Procedure Code.

The series of acts referred to in section 236 of the Criminal Procedure Code implies two or more acts connected by some more intimate relation than that of mere consecutiveness of time.

Two contradictory statements recorded in two utterly unconnected cases, the accused being, at the time when he gave one deposition, an approver in the Sessions Court, and when he gave the second, a defendant in a civil suit, cannot form the basis of an alternative charge of perjury

Criminal Procedure Code—contd.

under section 236 of the Criminal Procedure Code.

Semble.—Where an alternative charge of giving false evidence is based on contradictory statements made before different Courts, it is necessary that sanction of each of those Courts must be obtained under section 195, Criminal Procedure Code, before a Court can take cognizance of the charge. **S** SALEH SHAH *v.* EMPEROR, (1924) A. I. R. (S.) 1; 16 S. L. R. 285; 25 Cr. L. J. 1195 (1924) A. I. R. (A.) 865] **59**

——— **ss. 195, 476, 476A**—*Application for sanction to prosecute made before amendment of Code—Application kept pending till after its amendment—Pendency of application, whether rejection of application—Jurisdiction of superior Court to order prosecution.*

An application for sanction to prosecute, filed under section 195, Criminal Procedure Code, before the amendment of the Code in 1923, remained pending in the lower Court till sometime after the Code was amended. Then the District Court, to which the lower Court was subordinate, acting under section 476A ordered prosecution under section 476 of the Code:

Held, that, as the pendency of the application for sanction did not mean rejection of the application within the meaning of section 476A, the District Court was competent to order prosecution. **B** RAMDAS VISHNUDAS *v.* EMPEROR, 26 Bom. L. R. 713; (1924) A. I. R. (B.) 511; 25 Cr. L. J. 1287 **359**

——— **ss. 209, 253, 436**—*Inquiry preliminary to commitment—Accused, when to be committed—Magistrate, duty of—Order discharging accused, reasons for—Sessions Judge, powers of.*

A Magistrate is not compelled to commit to Sessions any case in which he considers that conviction is impossible.

A Magistrate must however exercise a proper discretion in ordering the discharge of any person charged with an offence triable only by a Court of Session. It is not enough for the Magistrate merely to doubt some portions of the prosecution evidence. He must be satisfied that the prosecution will fail and rightly fail in the Sessions Court.

The report made to the Police of a dacoity mentioned, among others, one *C* but the senior investigating officer dropped proceedings against *C*, and certain other persons were committed to Sessions and convicted. On appeal the Judicial Commissioner passed an order directing that the charge against *C* be enquired into and dealt with according to law. The Magistrate who held the enquiry, after recording the prosecution evidence, discharged *C*, but the Sessions Judge set aside the order of discharge and committed *C* to Sessions. *C* filed a petition of revision:

Held, that in the face of the Judicial Commissioner's order directing that the accused should be put on his trial, the Magistrate was ill-advised in refusing to commit the accused to Sessions, and that it was a case in which a definite pronouncement should be given by the Court empowered to try the offence with which the accused was charged. **O** CHHEDA KHAN *v.* EMPRROR, 10 O. & A. L. R. 722; 25 Cr. L. J. 1189 **53**

Criminal Procedure Code—contd.

——— **ss. 209, 437, 439**—*Magistrate refusing to charge accused with offence triable by Court of Session—Discharge or acquittal—District Magistrate's order of committal to Sessions, legality of—Revisional powers, exercise of.*

Certain persons were charged before a Magistrate of the First Class under sections 424 and 506, Part II, of the Penal Code and acquitted. Subsequently the complainant made several applications to him to frame a charge against the accused under section 395, Penal Code, and commit the accused to the Court of Session. The Magistrate put the applications on record but declined to entertain them. The complainant, thereupon, moved the District Magistrate who acting under section 437 of the Criminal Procedure Code, framed a charge against the accused and committed them to take their trial before, the Court of Session. On its being contended, on revision, that the order of the District Magistrate was illegal on the ground that the accused had been acquitted and not discharged:

Held, that the order of the Magistrate was in substance an order discharging the accused in respect of an alleged offence under section 395, Penal Code, and that the District Magistrate had jurisdiction to make the order sought to be revised.

Where a discretion has been exercised by a Court of competent jurisdiction which is not on the face of it arbitrary, the practice of the High Court is that as a revisional Court, it will neither enquire into the reasons nor interfere with the exercise of the discretion. **S** KHANU *v.* EMPEROR, 25 Cr. L. J. 1368 **760**

——— **ss. 233, 537**—*Penal Code (Act XLV of 1860), ss. 149, 326—Charge under ss. 326, 149, Penal Code—Conviction under s. 326—Legality—Prejudice.*

When a charge has been framed under sections 326, 149, Penal Code, a conviction under section 326 is not necessarily bad but it depends on whether the accused has or has not been materially prejudiced by the form of the charge.

Obiter dicta.—Section 149, Penal Code, creates no offence, but is, like section 34, merely declaratory of a principle of the common law, and its object is to make it clear that an accused who comes within that section cannot put forward as a defence that it was not his hand which actually committed the offence. A person could not be tried and sentenced under section 149 alone, as no punishment is provided by the section. Therefore, the omission of section 149 from a charge does not create an illegality by reason of section 233, Criminal Procedure Code, which provides that for every distinct offence of which any person is accused there shall be a separate charge.

When a person is charged with being a member of an unlawful assembly, one of the members of which caused grievous hurt in pursuance of the common object, there is no necessary implication that that particular member is not himself. **M** THEETHUMALAI GOUNDER *v.* EMPEROR, 47 M. L. J. 221; 20 L. W. 261; 35 M. L. T. 21; 47 M. 746; 25 Cr. L. J. 1297 **465**

Criminal Procedure Code—contd.

——— **s. 236**—Perjury—Contradictory statements in civil and criminal proceedings—Alternative charge—Series of acts. *See* CRIMINAL PROCEDURE CODE, s. 195 **59**

——— **ss. 236, 237, 238**—*Charge, alteration of—Penal Code (Act XLV of 1860), ss. 34, 325—Conviction under s. 325 set aside—Re-trial for offence under ss. 34, 325.*

Where an accused person has been tried for and convicted of an offence under section 325, Penal Code, on the charge that he himself struck blows to another person which resulted in the latter's death, but the witnesses against him are disbelieved by the Court of Appeal and, therefore, his conviction cannot be upheld on that charge, the Court cannot alter the charge and maintain his conviction by reading section 34, Penal Code, with section 325, on the ground that some member of the party of the accused, though not the accused himself, had struck blows to the deceased in pursuance of the common intention of the party, even if there is evidence to this effect on the record, nor can the case be sent back for re-trial, under section 325 read with section 34, as such a course would mean inviting the Court below to believe on the amended charge the very witnesses who are held by the Appellate Court to have committed deliberate perjury against the accused in stating that he had struck blows to the deceased. **A** CHIDDA SINGH *v.* EMPEROR, 25 Cr. L. J. 1292; (1994) A. I. R. (A.) 766 **364**

——— **s. 237**—Evidence sufficient to prove attempt to cheat—Accused, whether can be convicted of attempt. *See* PENAL CODE, s. 120B **545**

——— **s. 250**—*Compensation without examination of all prosecution witnesses.*

Compensation under section 250, Criminal Procedure Code, can be awarded only after the complainant has had an opportunity of producing all his evidence.

Where, therefore, the Court refuses to examine all the witnesses produced by the complainant whether their names appear in the list filed or not, the order for compensation is illegal. **R** SYA KYAW *v.* EMPEROR, 3 Bur. L. J. 26; (1924) A. I. R. (R.) 293; 25 Cr. L. J. 1280 **288**

——— **s. 250**—*Discharge of accused—Compensation, order for—Notice to complainant.*

An order directing a complainant to pay compensation to an accused person who has been discharged, without giving him an opportunity of showing cause why such order should not be made is bad in law and should be set aside. **L** MUGHLA *v.* MUHAMMAD, (1923) A. I. R. (L.) 458; 25 Cr. L J. 1312 **480**

——— **s. 253**—Inquiry preliminary to commitment—Accused, when to be committed—Magistrate, duty of—Order discharging accused, reasons for. *See* CRIMINAL PROCEDURE CODE, s. 209 **53**

——— **s. 257**—*Defence witness unable to attend on account of illness—Examination on commission—Procedure.*

Criminal Procedure Code—contd.

One of the two persons stated by the prosecution to be the ring-leaders of an affray which was the subject of the trial pleaded *alibi* and asked permission to call a certain witness to prove it. This witness wrote to the Court stating his inability to attend on account of ill-health and sent medical certificate to that effect. On the date of the hearing the accused applied to the Court for the issue of a Commission to examine this witness at his house. The Magistrate was of opinion that the case being important, the witness should be examined in Court and as it was not known when the witness would be well enough to attend the Court, he dismissed the application:

Held, (1) that some effort should have been made to ascertain as to whether it would, within a reasonable time, be possible for the witness to come to Court and if not then to take the evidence on Commission;

(2) that the Magistrate, therefore, should now take this evidence, if possible, and re-consider in the light of this evidence the case of all the accused before him. **Pat** JAMUNA SINGH *v.* EMPEROR, 3 Pat. 591; 25 Cr L. J. 1255 **263**

——— **s. 263**, *scope of—Summary trial of appealable case—Charge not framed—Conviction, legality of.*

Section 263 of the Criminal Procedure Code is restricted in its application to cases in which no appeal lies, and exempts a Magistrate from framing a charge in such cases. But in a case tried summarily in which the sentence passed is appealable, there is no such exemption. The conviction of a person, therefore, in such a case without framing a charge is illegal. **C** NATABAR KHAN *v.* EMPEROR, 27 C. W. N. 923; (1924) A. I. R. (C.) 63; 25 Cr. L. J. 1270 **278**

——— **s. 288**—Statement before Committing Magistrate transferred to Sessions record, value of—Statement, whether "testimony"—Statement before Police, whether can be used in corroboration. *See* EVIDENCE ACT, s. 157 **129**

——— **s. 307**—*Judge disagreeing with Jury—Reference to High Court—High Court, when will interfere.*

The real test that has to be applied in a Reference under section 307 of the Criminal Procedure Code, when the Judge disagrees with the verdict of the Jury, is to see whether the verdict is so unreasonable that seven reasonable men could not have arrived at that verdict.

The High Court will not, therefore, interfere in a case unless it can be said that it was not possible for the Jury to have arrived at the verdict at which they did arrive. **C** EMPEROR *v.* GOLAM KADER, 28 C. W. N. 876; 25 Cr. L. J. 1284; (1924) A. I. R. (C.) 956 **356**

——— **s. 307**—*Reference by Sessions Judge—High Court, duty of—Unanimous verdict, when can be reversed—Punishment.*

Section 307 of the Criminal Procedure Code requires the High Court to give due weight to the opinion of the Sessions Judge and of the Jury after considering the entire evidence and then to convict or acquit the accused. It does

Criminal Procedure Code—contd.

not require the High Court to reconstruct the verdict of the Jury.

In giving due weight to the opinion of the Jury the High Court should always hesitate to reverse a unanimous verdict unless it holds it to be unreasonable. **C** EMPEROR *v.* SAGARMAL, 26 C. W. N. 947; 40 C. L. J. 135; 25 Cr. L. J. 1217; (1924) A. I. R. (C.) 960 **145**

——— **s. 337** *Evidence Act (I of 1872), s. 114, illus. (b)—Accomplice—Evidence, whether worthy of credit—Corroboration, necessity of—Sufficient corroboration—Discovery list, whether evidence.*

The evidence of an accomplice may be deemed to be unworthy of credit unless it is corroborated in material particulars.

The mere fact, that the accused were seen with the approver a few days before the dacoity is not material corroboration of the evidence of the approver to the effect that the accused joined him in the dacoity.

Lists of discovery of stolen property can no doubt be used by the persons who actually wrote them in order to refresh their memory at the time of giving evidence, but they are not themselves evidence. **L** HAZARA SINGH *v.* EMPEROR, 6 L. L. J. 370; 25 Cr. L. J. 1347; (1924) A. I. R. (L.) 727 **707**

——— **s. 337 (2A)**—Pardon to approver by section 30 Magistrate—Trial of case. *See* CRIMINAL PROCEDURE CODE, s. 30 **573**

——— **as amended by (Act XVIII of 1923) ss. 339, 339 (2)** — *Approver, proceedings against—Certificate of Public Prosecutor, whether essential—Provision, whether retrospective—"Statements" in s. 339 (2), whether include statements before pardoning Magistrate—Approver not examined about such statements—Use against him whether legal.*

Under section 339, Criminal Procedure Code, 1898, as amended in 1923, the certificate by the Public Prosecutor that in his opinion the approver has not complied with the conditions on which the tender of pardon was made, is a condition precedent to the validity of trial of the approver. But this does not apply to a case in which the pardon had been declared forfeited by the Magistrate and the proceedings against the approver, after the forfeiture, commenced before the amended section came into force.

The words "the statement made by a person who has accepted the tender of pardon" in sub-section (2) of section 339 of the Code are wide enough to cover a statement before the pardoning Magistrate.

It is not, however, fair to use such statements of approver against him unless they are put to him in his examination as accused person and he is asked if he has any explanation to offer regarding them. **N** GANGARAM *v.* EMPEROR, 25 Cr. L. J. 1355 **715**

——— **ss. 342, 349, 540**—*Examination of accused after examination of Court witnesses—Submission of case after conviction.*

Section 342 of the Criminal Procedure Code cannot be brought into play after a Court witness is examined, be he the complainant or any other witness.

Criminal Procedure Code—contd.

A case under section 349, Criminal Procedure Code, is not to be submitted after conviction but only after expression of opinion that the accused is guilty. **Pat** PRAYAG GOPE *v.* EMPEROR, (1924) Pat. 247; 5 P. L. T. 571; 3 Pat 1015; 25 Cr. L. J. 1276 **284**

——— **s. 342 (2)**—*Accused making false charge against Police Officer to Magistrate not trying his case, whether protected.*

Section 342 of the Criminal Procedure Code protects an accused person from punishment for giving false answers to Court, but does not protect him when he goes out of his way to a Court which is not trying him and makes a false charge against other persons. **O** MAKHDUM *v.* EMPEROR, 10 O. & A. L. R. 1139; 25 Cr. L. J. 1194 **58**

——— **ss. 367, 421**—*Appeal—Summary dismissal—Judgment—Appellate Court, duty of.*

An Appellate Court is not required by law to write a judgment when dismissing an appeal summarily, but it is necessary that it should give reasons for dismissing the same. **Pat** JAGARNATH SINGH *v.* EMPEROR, 25 Cr. L. J. 1237 **165**

——— **s. 397**—*Sentence, when begins to run—"Already undergoing sentence of imprisonment," meaning of—Separate sentences on same day.*

An accused under custody begins to undergo a sentence of imprisonment passed on him from the moment the sentence is pronounced and if a second sentence of imprisonment is passed on him on the same day subsequently in a separate trial, he is "already undergoing sentence of imprisonment" within the meaning of section 397, Criminal Procedure Code. **R** EMPEROR *v.* NGA PO THAUNG, 3 Bur. L. J. 32; (1924) A. I. R. (R.) 307; 25 Cr. L. J. 1310 **478**

——— **s. 403**—*Penal Code (Act XLV of 1860), ss. 120B, 121A—Conspiracy to overawe Government by killing Europeans—Conviction for conspiracy to overawe Government—Subsequent trial for conspiracy to kill Europeans, maintainability of.*

A person, who has already been convicted of an offence under section 121A, Penal Code, for a conspiracy to overawe the Government of India by means of criminal force, to wit, by causing bombs to be thrown at British officers, cannot, on the same facts, be subsequently convicted under section 120B, Penal Code, for a conspiracy to kill the Europeans, having regard to section 403 of the Criminal Procedure Code, for in such a case there are not two conspiracies, one to overawe the Government of India and another to kill the Europeans; but the conspiracy is one, the killing of Europeans being the means to be employed for carrying out the object of overawing the Government of India. **L** HUSSAIN *v.* EMPEROR, 25 Cr. L. J. 1241 **169**

——— **ss. 414, 562**—*Order under s. 562 passed in summary trial—Sentence—Appeal.*

An order passed under section 562, Criminal Procedure Code, in a summary trial, is appealable.

Section 414, Criminal Procedure Code, says in what cases there shall be no appeal. It does not say in what cases there shall be an appeal.

Obiter:—An order under section 562, Criminal

Procedure Code, does not amount to a sentence. A HIRA LAL v. EMPEROR, 22 A. L. J. 751; 25 Cr. L. J. 1244 (1924) A. I. R. (A.) 765; 46 A. 828 172

——— s. 421—Appeal—Summary dismissal—Judgment—Appellate Court, duty of. *See* CRIMINAL PROCEDURE CODE, s. 367 165

——— ss. 421, 430—*Jail appeal, rejection of—Appeal through Counsel, whether maintainable.*

Where an appeal has once been presented by a prisoner in Jail through an officer in charge of the Jail and dismissed, it is no longer open to him to file another appeal through Counsel. The order on the first appeal is final and cannot be re-opened. O RAM AUTAR v. EMPEROR, 10 O. & A. L. R. 739; 11 O L. J. 536; 25 Cr. L. J. 1313; (1924) A. I. R. (O.) 425 545

——— s. 423—*Appellate Court, powers of—Alteration of sentence amounting to enhancement.*

The Trial Court sentenced the accused to rigorous imprisonment for two months and a fine of Rs. 50 or in default one month's rigorous imprisonment. On appeal the District Magistrate changed the sentence to one of one month's rigorous imprisonment and a fine of Rs. 200 or in default to two months' rigorous imprisonment. On an application for revision:

Held, that the sentence awarded by the District Magistrate amounted to an enhancement of the sentence passed by the Trial Court and could not be allowed to stand. Pat BHOLA SINGH v. EMPEROR, 3 Pat. 638; 5 P. L. T. 622; (1924) A. I. R. (Pat.) 563; 25 Cr. L. J. 1186 50

——— s. 423—*Court Fees Act (VII of 1870), s. 31—Direction to accused to pay complainant's Court-fees—Enhancement of sentence.*

Section 31 of the Court Fees Act provides that all fees ordered to be re-paid under the section shall be recoverable "as if they were fines", but does not thereby make them part of the sentence.

The making of an order by an Appellate Criminal Court, under section 31 of the Court Fees Act, does not ordinarily amount to an enhancement of sentence within the meaning of section 423 of the Criminal Procedure Code but it may be made as an incidental order to bring the judgment into conformity with the law. M EDIGA THIMMIAH, *In re*, (1924) M. W. N. 489; 20 L. W. 293; 47 M. L. J. 355; 25 Cr. L. J. 1213 141

——— s. 423—*Right of accused to reply.*

An accused has no right of reply under section 423, Criminal Procedure Code, but the privilege of replying should never be refused by an Appellate Court. O BAHRA v. EMPEROR, 25 Cr. L. J. 1173 37

——— s. 423—*Right of appellant's Counsel to reply—Practice.*

The Counsel for the appellant in a criminal appeal has no right to reply to the arguments addressed on behalf of the opposite party, but permission to do so is a privilege which should not ordinarily be refused by the Court. O PRAG v. EMPEROR, 10 O. & A. L. R. 871; 25 Cr. L. J. 1169 33

——— ss. 423, (1) (b), (c), 439—*Order of commitment, whether can be quashed in revision.*

Under section 439 of the Code of Criminal Procedure, a Court has jurisdiction to exercise the powers of an Appellate Court conferred by section 423 (1) (c) and *a fortiori* to reverse or alter an order of commitment passed by a Sessions Judge under section 423 (1) (b), Criminal Procedure Code. O RAM SAMUJH LAL v. EMPEROR, 10 O. & A. L. R. 957; 25 Cr. L. J. 1375 767

——— ss. 435, 439, 497, 498, 561-A—*Case pending before Sub-Divisional Magistrate—Order of bail by Sessions Judge—High Court, whether can interfere—"Any proceedings" in s. 439, scope of—Passage prejudicial to fair trial of case—Power of High Court to expunge.*

A High Court has no jurisdiction to entertain an application under section 497 (5) or section 498 of the Criminal Procedure Code against an order granting bail, passed by a Sessions Judge in a case pending before a Subordinate Magistrate. The powers of the High Court under section 497 (5) of the Code are restricted to the cases of persons released by the Trial Magistrate; and those under section 498 enable the High Court to release an accused on bail but not to order the arrest and commission to custody of persons already released on bail by the Sessions Judge.

But proceedings in which it is or has been determined whether bail from the accused person should be taken or not fall within the definition of "any proceedings" under section 439 of the Criminal Procedure Code and the High Court has powers under that section to interfere and thus to control the propriety as well as the regularity of orders in such proceedings.

At any rate, the High Court can interfere with an order granting bail passed by a Sessions Judge under its inherent powers under section 561-A, Criminal Procedure Code.

The High Court has powers under section 561-A of the Criminal Procedure Code to order the expunging of passages in the order of a Sessions Judge granting bail if such passages are likely to prejudice the Magistrate in the impartial trial of the case. N LOCAL GOVERNMENT v. GULAM JILANI, 25 Cr. L. J. 1353 755

——— ss. 435 (4), 476—*Court, whether includes successor-in-office—Jurisdiction—Direct reference by District Magistrate, whether competent.*

A successor in a Court is the same Court as his predecessor in that Court and, therefore, the predecessor who has departed for another Court can no longer be held to be a presiding officer of the first Court.

There should be no judicial action by an inferior Court by way of criticism of its superior Court.

The High Court will not ordinarily accept a reference direct from the District Magistrate. He should submit it through the proper channel, *i.e.*, the Legal Remembrancer A EMPEROR v. BALDEO PRASAD, 22 A. L. J. 772; 25 Cr. L. J. 1277; (1924) A. I. R. (A.) 770 285

——— s. 436—Inquiry preliminary to commitment—Accused, when to be committed—Magistrate, duty of—Order discharging accused, reason for—Sessions Judge, powers of. *See* CRIMINAL PROCEDURE CODE, s. 209 53

——— **ss. 437, 439**—Magistrate refusing to charge accused with offence triable by Court of Session—Discharge or acquittal—District Magistrate's order of committal to Sessions, legality of—Revisional powers, exercise of. *See* CRIMINAL PROCEDURE CODE, s. 209 **760**

——— **s. 439**—Improper admission of evidence—Revision—Remand—Finding on admissible evidence. *See* EVIDENCE ACT, s. 167 **283**

——— **s. 439**—*Reformatory Schools Act (VIII of 1897), s. 16—Penal Code (Act XLV of 1860), s. 411—Dishonestly receiving stolen property—Youthful first offender—Sentence of six months' rigorous imprisonment or detention in Reformatory School—High Court, whether can interfere.*

A sentence of six months' rigorous imprisonment on a youthful first offender aged 14½ years for an offence of dishonestly receiving stolen property under section 411, Penal Code, is improper, and where in lieu of this sentence the offender has been ordered to be detained in a Reformatory School, the High Court has jurisdiction to interfere with the order for detention. **Pat** JAGARNATH CHAUBEY *v.* EMPEROR, (1923) A. I. R. (Pat.) 297; 1 P. L. R. 177 Cr.; 25 Cr. L. J. 1312 **480**

——— **s. 439**—*Revision against acquittal—Interference, when justified—Police report, use of—Final report of investigating officer used without examining him, effect of—Error of law—Ground for setting aside acquittal.*

The power of interference in revision with a judgment of acquittal is sparingly exercised and ordinarily only in cases where it is urgently demanded in the interests of public justice. But it is neither possible nor expedient to lay down general principles. The High Court will interfere where circumstances require it.

The final report and diary of an investigating officer, who was not called as a prosecution witness, might be used to suggest means of further elucidating points which needed clearing up but only of elucidating them by legal evidence. The use of such a report as evidence is an error in law but it is not by itself a good ground for setting aside an acquittal.

An error of procedure of a grave character would afford ground for interference but not a mere error of improper admission of evidence, which was not essential to the result which might have been come to wholly independently of it. **Pat** GANGA SINGH *v.* RAMBHAJAN SINGH, 25 Cr. L. J. 1266 **274**

——— **s. 439**—*Revision—High Court, power of to quash pending proceeding, exercise of.*

The High Court has power to quash a criminal proceeding in its early stages before any evidence has been recorded, but this is a power which will be only exercised in exceptional cases.

Per *Cuming, J.*—The High Court has the power of interfering with criminal cases whilst they are still pending before the subordinate Courts, but the exercise of this power is sometimes fraught with considerable danger to the due administration of criminal justice. If parties are to be allowed to come up at every and any stage of a criminal prosecution to challenge the order of the Magistrate, a very powerful weapon is at once placed in the hand of the well-to-do to defeat the ends of justice and to protract indefinitely a criminal trial.

It is for the Magistrate before whom the case is pending to determine whether the facts proved or the facts alleged do or do not constitute a criminal offence. The accused party has then his remedy by way of appeal or revision, when the case has been finally decided.

Per *C. C. Ghose, J.*—It is the bounden duty of the High Court to interfere with a proceeding pending in a subordinate Court when it is brought to its notice that a person has been subjected, or is about to be subjected, to the harassment of an illegal prosecution. **C** NRIPENDRA BHUSAN *v.* GOBINDA BANDHU, 39 C. L. J. 236; 25 Cr L. J. 1258; (1924) A. I. R. (C.) 1018 **266**

——— **s. 439**—*Revision—Incorrect view of evidence.*

Ordinarily the Judicial Commissioner's Court does not interfere in revision in criminal cases where the only question to be decided is whether the lower Court has not taken a correct view of the evidence.

The principle *falsus in uno falsus in omnibus* cannot be universally applied in India. **O** PRAG *v.* EMPEROR, 10 O. & A. L. R. 871; 25 Cr. L. J 1169 **33**

——— **s. 439**—Security for good behaviour—Failure to furnish security—Order directing imprisonment of accused—Revision—High Court, when will interfere. *See* CRIMINAL PROCEDURE CODE, s. 110 **36**

——— **s. 439**—*Two persons tried together—One person acquitted and other convicted—Appeal by convicted person—Appellate Court's right to express opinion against acquitted person—Remarks, expunging of.*

In disposing of the appeal of one of two co-accused, who were tried together, and one of whom was acquitted, the Appellate Court has no right to make use of expressions which amount to a finding that the acquitted accused was wrongly acquitted. Once a person is tried and acquitted of an offence by due process of law and no appeal is preferred against his acquittal, he must be deemed to be innocent of the charge upon which he was tried, and a Court superior to that which tried him has no right to express the opinion that he is in fact guilty although acquitted by the Trial Court. The High Court will not allow such expressions to remain on record. **L** ABDUL AZIZ *v.* EMPEROR, 25 Cr. L. J. 1245 **173**

——— **s. 439, cls. (1), (5)**—*Appeal competent—Revision—High Court, whether can interfere on its own motion.*

When an appeal lies against any criminal proceedings but no appeal is brought, no proceedings by way of revision can be entertained at the instance of the party who could have appealed, having regard to section 439 (5) of the Criminal Procedure Code; and if proceedings by way of revision are instituted by such a party, the High Court cannot interfere even on its own motion under clause (1) of that section. **S** NURAN *v.* EMPEROR, 25 Cr. L. J. 1362 **754**

Criminal Procedure Code—contd.

——— **s. 476**—Magistrate instituting proceedings—Jurisdiction to try case—Omission to inform accused of privilege of transfer. *See* CRIMINAL PROCEDURE CODE, s. 191 **152**

——— **ss. 476, 476A**—Application for sanction to prosecute made before amendment of Code—Application kept pending till after its amendment—Pendency of application, whether rejection of application. *See* CRIMINAL PROCEDURE CODE, s. 195 **359**

——— **s. 488**—*Application on behalf of child, in whose name should be made—"Maintenance," meaning of—"Educational expenses", whether come within "maintenance".*

An application, under section 488, Criminal Procedure Code, by the mother of a child against the father of the child for the "educational expenses" of the child, should be made by her in the name of the child as the guardian of the child and not in her own name.

The "educational expenses" of a child do not come within the term "maintenance", as used in section 488, Criminal Procedure Code.

Obiter.—The object of proceedings for maintenance is to prevent vagrancy, and that object is attained by the provision of lodging, food and clothing. A husband is bound to "maintain" his wife but he is not bound to do more than supply her with lodging, food and clothing, he is not bound to maintain her "as his wife." **A** KUMLI *v.* EMPEROR, 25 Cr. L. J. 1249 **257**

——— **s. 488**—*Order for maintenance, form of—Magistrate, whether can direct separate residence for wife.*

Under section 488 of the Criminal Procedure Code a Magistrate is not allowed to make any other order except a monthly cash allowance.

An order directing the husband to give his wife 12 maunds of grain each harvest and to provide her with a separate house is illegal. **L** ATRU *v.* MAHOU, 25 Cr. L. J. 1271 **279**

——— **s. 488 (3) proviso**—*Restitution of conjugal rights, decree for—Subsequent ill-treatment—Order for maintenance—Wife, whether can be absolved from living with husband—Decree, how far binding—Court, discretion of.*

The weight to be attached to a decree must depend upon the particular circumstances of the case and no hard and fast rule can be laid down that a decree of a Civil Court is for ever and always binding on the Magistrate or that his discretion is never fettered.

Where in an application for maintenance under section 488 of the Criminal Procedure Code it appeared that some 13 months before the application the husband had obtained a decree for restitution of conjugal rights but soon after taking the wife to his house had turned her out with blows:

Held, that the Magistrate was justified in exercising his discretion in favour of the woman and in favour of absolving her from the condition that she must live with her husband. **A** RAJPATI *v.* EMPEROR, 22 A. L. J. 806; 25 Cr. L. J. 1246; (1924) A. I. R. (A.) 784 **174**

——— **ss. 497, 498**—Case pending before Sub-Divisional Magistrate—Order of bail by Sessions Judge—High Court, whether can interfere. *See* CRIMINAL PROCEDURE CODE, s. 435 **755**

——— **s. 520**—*Sessions Judge's power to vary order of Sub-Divisional Magistrate passed in appeal—Courts of Appeal, Revision, Reference, or Confirmation, what are.*

A Sessions Court has no power under section 520, Criminal Procedure Code, to vary or revise an order of a Sub-Divisional Magistrate passed in appeal against a conviction by a Sub-Magistrate, as in respect of such orders, the Sessions Court is neither a Court of Appeal or Revision nor a Court of Reference or Confirmation.

A Court of Reference means a Court to which references are made and which on reference is entitled to go into the matters and dispose of them. **M** SOMU PILLAI *v.* KRISHNA PILLAI, 47 M. L. J. 481; 20 L. W. 521; (1924) M. W. N. 806; 25 Cr. L. J. 1247; (1924) A. I. R. (M.) 899 **175**

——— **s. 526**—*Complainant or his Pleader disallowed to examine witnesses—Court examining witnesses itself—Reasonable apprehension—Transfer of case.*

Generally, it is not the province of the Court to examine witnesses, and as a rule the Court should leave the witnesses to the Pleaders, to be dealt with as is provided for in section 138 of the Evidence Act or in section 495, sub-section (3), of the Code of Criminal Procedure.

Where a Magistrate does not permit the complainant or his Pleader to examine his witnesses but proceeds to examine them himself, the procedure adopted by him is one that is likely to raise a reasonable apprehension in the mind of the complainant that he will not obtain a fair trial in his Court and constitutes a sufficient ground for transfer of the case to some other Court. **O** JANKI *v.* SHEO NARAIN SINGH, 10 O. & A. L. R. 342; 11 O. L. J. 333; 25 Cr. L. J. 1226; (1924) A. I. R. (O.) 371 **154**

——— **s. 526**—*Expression of opinion by District Magistrate in favour of accused—Transfer of case.*

A complaint was lodged against *A* and certain other persons on a charge of murder in the Court of the Sub-Divisional Officer of a District. Within a few days of the alleged occurrence, the District Magistrate in a public speech addressed to the Sub-Divisional Officer and other officials referred to the high services of *A* and the baselessness of the charges made against him:

Held, that the speech amounted to a decided opinion about the charges in question and was likely to create a reasonable apprehension in the mind of the complainant that he will not have a fair and impartial trial and that it was expedient

Criminal Procedure Code—contd.

for the ends of justice that the case be transferred to another district. O RUP NARAIN v. ABDUL HAMID KHAN, 10 O. & A. L. R. 782; 11 O. L. J. 657; 25 Cr. L. J. 1374 **766**

——— s. **526**—*Transfer—Magistrate, cross-examining witnesses and disallowing questions of complainant—Reasonable apprehension of not receiving justice.*

A Magistrate should not cross-examine frequently the prosecution witnesses, nor should he disallow as irrelevant the questions which the complainant may wish to put to defence witnesses with a view to show their partiality. However, even if he acts in such a manner, it cannot be held that his conduct gives rise to a reasonable apprehension in the mind of the complainant that his case will not receive a fair trial at the hands of the Magistrate. O ABDUL AZIZ v. GANESH PRASAD, 25 Cr. L. J. 1185 **49**

——— s. **537**—*Charge, frame of—Defect in form—Prejudice to accused—Defect, whether cured.*

A charge stating that the accused did a particular act in order to commit a certain offence "or any other offence punishable with imprisonment" is improper as the accused should know the specific offence with which he is charged.

When, however, the accused does not suffer any prejudice the defect in the form of the charge is curable by the provisions of section 537 of the Criminal Procedure Code. C BALARAM KUNDU v. EMPEROR, 25 Cr. L. J. 1186 **50**

——— s. **537**—Charge under ss. 326, 149, Penal Code—Conviction under s. 326—Legality—Prejudice. *See* CRIMINAL PROCEDURE CODE, s. 233 **465**

——— s. **539B**—*Inspection note, record of—Provision whether mandatory.*

It is obligatory on a Magistrate under the second clause of section 539B of the Criminal Procedure Code to make his inspection a part of the record.

This provision is mandatory and the failure to comply with this express direction of law is an illegality and not an irregularity which can be cured. C HRIDAY GOVINDA SUR v. EMPEROR, 40 C. L. J. 149; 25 Cr. L. J. 1375; (1924) A. I. R. (C.) 1035 **767**

——— s. **561-A**—Application for restoration of attached property two years after attachment—Inherent jurisdiction of High Court. *See* CRIMINAL PROCEDURE CODE, s. 89 **365**

——— s. **561-A**—Case pending before Sub-Divisional Magistrate—Order of bail by Sessions Judge—High Court, whether can interfere—Passage prejudicial to fair trial of case—Power of High Court to expunge. *See* CRIMINAL PROCEDURE CODE, s. 435 **755**

——— s. **562**, *applicability of—Court, what must consider.*

Criminal Procedure Code—concld.

Before applying section 562 of the Criminal Procedure Code, the Court must consider whether there is a good case for its application or not, and must guard against two things, *viz.*:—one, danger to the public and the other, danger to the accused himself, which may result from the applicability of the section.

Where a juvenile offender has shown criminality rather than mere thoughtlessness and a general character of craft and deceit, section 562 of the Criminal Procedure Code should not be applied. S DARYALAL v. EMPEROR, 25 Cr. L. J. 1224 **152**

——— s. **562**—Order under s. 562 passed in summary trial—Sentence—Appeal. *See* CRIMINAL PROCEDURE CODE, s. 414 **172**

Criminal proceedings—Res judicata.

An order passed by a Criminal Court unless set aside in due course of law, remains in force and its validity cannot be questioned in a subsequent prosecution based on the disobedience of that order. R ON PE v. EMPEROR, 3 Bur. L. J. 27; (1924) A. I. R. (R.) 295; 25 Cr. L. J. 1303 **471**

Criminal trial—*Prolonged proceedings—Sentence.*

However guilty an accused person may be, it is most undesirable that he should be subjected to the strain and anxiety of prolonged proceedings unless it is absolutely unavoidable, and such delay may be legitimately taken into consideration in passing the sentence. C BILLINGHURST v. EMPEROR, 27 C. W. N. 821; (1924) A. I. R. (C.) 18; 25 Cr. L. J 1313 **545**

Custom—Evidence, insufficient—High Court, whether can interfere. *See* CIVIL PROCEDURE CODE, s. 100 **815**

——— —*Landlord and tenant—House built by tenants in* abadi—*Tenant's right to transfer such house—Burden of proof.*

An agricultural tenant allowed to build a house on a site belonging to a *zemindar* in the village *abadi*, has, in the absence of proof of some contract or custom to the contrary, only a right to use the house so long as he maintains it, without any right to transfer it.

The burden of proving the existence of a custom which gives a tenant a right of transfer lies on the tenant and it is not for the *zemindar* to prove a custom of forfeiture or escheat if the house is transferred. O BHIKARI LAL v. HADI LAL, 10 O. & A. L. R. 1159 **810**

——— of primogeniture—Succession how governed. *See* OUDH ESTATES ACT, s. 15 **691**

———, *proof of.*

Evidence is required to prove a custom opposed to the personal law of the parties.

A custom cannot be established by a few instances or by instances of recent date. N BASHIRBI v. ABDUL SATTAR **815**

——— *or Muhammadan Law—Pathans of Kutel, District Karnal—Government Notification that*

Custom—contd.

tribe is agricultural, value of—Rule of custom, applicability of.

Pathans of the village Kutel in the Tahsil and District of Karnal are governed by Muhammadan Law in matters of succession.

A Notification by Government that a tribe is an agricultural tribe does not raise the presumption that it is governed by custom. **L** KHAN MOHAMMAD KHAN *v. Musammat* NUR JAHAN BEGAM, 6 L. L. J. 340; (1924) A. I. R. (L.) 731 **609**

——— **Alienation**—*Alienation by non-proprietor of site of house—Sarhali Kalan,* Tahsil *Tarn Taran, District Amritsar—Sale, proof of, effect of.*

There is no custom in the village of Sarhali Kalan in the Tarn Taran *Tahsil* of the Amritsar District whereby a non-proprietary resident has an unrestricted power to dispose of the site on which his house is built.

As regards sales by non-proprietors in a village, proof of particular sales having taken place without objection would be very good evidence of the title of the purchaser to the lands actually sold. But while such sales would give a good title to individuals in particular portions of the village site, they would not prove that the rights of the proprietary body over the remainder of the site had been extinguished, and that possession whether by proprietors or non-proprietors had come to be the only measure of right. **L** SEWA SINGH *v.* GHULAM, (1923) A. I. R. (L.) 467 **522**

——— ———*Declaratory suit by reversioner—Alienor in collusion—Decree, whether can be passed.*

A declaratory decree may be given in a suit to contest an unnecessary alienation by a person governed by Punjab custom, if the suit is brought honestly on behalf of a minor reversioner to protect his interests. But a decree cannot be given in a case where the minor is merely a figure-head and the real plaintiff is the alienor himself who has caused the suit to be instituted for the purpose of undoing his own act. **L** DAD *v.* LAL, 6 L. L. J. 334; 5 L. 389 **626**

——— **Pre-emption**—Wajib-ul-arz—*Presumption—Non-existence of custom in neighbouring* mahal, *effect of—Evidence—"Co-sharer," meaning of—Proprietor not having specified share, whether co-sharer—Right to pre-empt.*

Where there is an entry in favour of a custom of pre-emption in the *wajib-ul-arz* of a village prepared at the last Settlement, the presumption raised by the entry cannot be rebutted by the circumstance that there is an express entry as to freedom of transfer in the *wajib-ul-arz* of one of the other *mahals*, which was carved out of the original village prior to the Settlement, for it may well be that the co-sharers of the other *mahal* had agreed to abrogate the custom which might have been in existence from before.

A person who, although a proprietor does not own a specified fractional share in a *mahal*, can-

Custom—concld.

not be called a co-sharer and is, therefore, not entitled to pre-empt. **A** IMDAD HUSAIN *v.* HAIDER BEG **196**

Debtor and creditor—Payment of debt—Method of payment. *See* CIVIL PROCEDURE CODE, O. XXI, R. 11 (2) **827**

Decree, *consent, whether can be varied.*

The general rule that a decree by consent can only be varied by consent has exceptions. **S** RAMJI HANSRAJ *v.* CHINAI **73**

Ejectment. *See* ALSO LANDLORD AND TENANT.

——— Lease by *raiyat*—Recital that grantee shall be *raiyat*, effect of—Ejectment. *See* EVIDENCE ACT, *s.* 115 **90**

———, suit for, of trespasser—Plaintiff, what has to prove—Material date. *See* CO-SHARERS **1041**

Equity—"*He who seeks equity must do equity*", *meaning and application of.*

He who seeks equity must do equity, that is to say, the plaintiff in equity must come with perfect propriety of conduct or with clean hands. Fraud or misrepresentation or matters of that description stand in the way of a plaintiff's obtaining an equitable relief by virtue of this principle. It has hardly any application in a case when he has simply tried, without the Court's intervention, to abate a nuisance of which he complains. **C** BANESWAR *v.* AMULYA CHARAN **309**

———, *when can be invoked.*

Equity will not assist where there has been undue delay on the part of one party to a contract, and the other has given him reasonable notice that he must complete within a definite time. **N** ABDUL MAJID KHAN *v.* BALAPPA **105**

Estoppel. *See* APPEAL, SECOND—QUESTION OF FACT **309**

——— *See* ALSO EVIDENCE ACT, *s.* 115

——— Endorsement not to proceed against particular property of judgment-debtor—Estoppel. *See* EXECUTION OF DECREE—EXECUTING COURT **434**

——— *on point of law—Transfer invalid—Duty of Court.*

The rule that the grantor cannot derogate from his grant, does not operate in a case where the transaction is expressly forbidden by Statute.

There is no estoppel on a point of law.

There is no rule of law which can prevent a party from asking the Court to hold that a particular transaction which, as a matter of fact, is invalid should be held to be invalid. In fact, it is the duty of the Court as soon as the invalidity of a transaction is pointed out, if it is satisfied that there is such an invalidity, to set aside the transaction. **N** KESARBAI *v.* JAMADAR, 20 N. L. R. 162 **126**

——— *Wrongful act of Court, whether creates estoppel.*

There can be no estoppel against a litigant arising out of the wrongful acts of the Court, permitted or performed by its own officials.

Estoppel—concld.

The object of Courts is to decide the rights of parties, and not to punish them for mistakes they may make in the conduct of their case, by deciding otherwise than in accordance with their rights. **A** BALGOBIND *v.* SHEO KUMAR, 22 A. L. J. 791 (1924) A. I. R. (A.) 818 **184**

Evidence Act (I of 1872), ss. 8, 157—*Penal Code (Act XLV of 1860), s. 376—Rape, offence of—Woman crying and weeping—Statement to persons, admissibility of—Explanation of conduct—Corroboration—Ravished woman, evidence of, value of—Punishment, measure of.*

A statement by a girl, alleging that she was raped, made immediately after the rape, to witnesses who saw her crying and asked her the reason thereof, is admissible, as an explanation of her act of crying, under section 8 of the Evidence Act, as also under section 157 of the said Act by way of corroboration.

In the case of the rape of an innocent girl of tender age, the evidence of the ravished girl is of great value and where she makes a statement by way of disclosure immediately after the occasion, it is a strong piece of evidence corroborating her credibility and proving the consistence of her conduct and also as negativing consent on her part.

In a case of rape the punishment should be proportioned to the greater or less atrocity of the crime, to the conduct of the criminal and to the defenceless and unprotected state of the injured female, whether she is a low native or a high European. **N** SOOSALAL *v.* EMPEROR, 25 Cr. L. J. 1214 **142**

——— **ss. 11 (2), 13 (b)**—*Ownership of house, dispute as to—Direct evidence not available—Old documents mentioning name of builder, whether admissible.*

In the case of a house said to have been built over half a century ago direct evidence as to who constructed it may not be easily available, and old documents mentioning by whom it was built are admissible in evidence. **A** RAGHUNATH *v.* BINDESHWARI, (1924) A. I. R. (A.) 526 **582**

——— **s. 13**—*Judgment not* inter parties, *whether relevant—Probative value.*

A judgment in a previous suit to which one of the parties in a subsequent suit was not a party is relevant under section 13 of the Evidence Act.

The legal effect of the judgment as between the parties to the previous suit has to be determined from the judgment itself and, when determined, it does not become conclusive, as between the parties to the subsequent suit, but is a fact to be weighed in the balance like any other fact. **C** GOPI SUNDARI DASI *v.* KHEROD GOBINDA, 28 C. W. N. 942 **99**

——— **s. 13**—*Criminal Procedure Code (Act V of 1898), s. 145, proceedings under, relevancy and admissibility of, in civil cases — Co-sharer—Adverse possession — Limitation — Declaratory decree for unknown share.*

In a suit for possession the fact that there was a proceeding under section 145, Criminal

Evidence Act—contd.

Procedure Code, that there was an inquiry into the matter and that there was a decision adverse to the allegations of the plaintiff, is a relevant fact and is admissible in evidence on general principles as well as under section 13 of the Evidence Act.

In order to establish title by adverse possession in favour of one co-sharer against another, it must be established by unambiguous evidence that there was a complete ouster to the knowledge of the co-sharer. That is to say, the possession of one co-sharer can be said to be adverse against another only if there is an open denial of title and limitation can run, if at all, only from that date.

A decree cannot be given for a declaration of title to a share the extent of which cannot be determined on the evidence on the record. **C** HASIM ALI *v.* ABJAL KHAN, 40 C. L. J. 30; (1924) A. I. R. (C.) 1046 **392**

——— **s. 25**—*Excise Officers, whether Police Officers.*

Excise Officers are not Police Officers within the scope of section 25 of the Evidence Act. **S** TILLIBAI *v.* EMPEROR, 25 Cr. L. J. 1223 **151**

——— **s. 35**—Alienability of impartible estates, evidence of—Settlement *khewats*, relevancy of. *See* HINDU LAW **286**

——— **ss. 63, 67 to 73**—*Execution of document, whether can be proved by secondary evidence—Ss. 67 to 73, whether deal with secondary evidence.*

A certified copy is sufficient secondary evidence under section 63 of the Evidence Act of the existence, condition and contents of a document but not of its execution.

Sections 67 to 73 of the Evidence Act deal with primary as well as secondary evidence. **A** KARIMULLAH *v.* GUDAR KOERI **306**

——— **s. 72**—*Rent receipt, proof of—Objection to mode of proof, when to be taken.*

Where the genuineness of a rent receipt is sworn to by the tenant by whom the rent has been paid, that is legally sufficient to prove the receipt, notwithstanding that the person whose signature it bears has not been examined.

Objection as to the mode of proof of a particular document should be taken when it is tendered for admission. **C** ABDUL SAMAD *v.* GUNENDRA KRISHNA ROY **974**

——— **s. 90**—*Presumption of genuineness of document—Period of 30 years, computation of.*

In applying the presumption allowed by section 90 of the Evidence Act, the period of 30 years is to be reckoned not from the date upon which the document is filed in Court, but from the date on which it having been tendered in evidence, its genuineness or otherwise became the subject of proof. **M** GOSULA KONDA REDDI *v.* PULCHERLA PICHIREDDI **487**

——— **s. 92, proviso (1)**—*Bond—Want of consideration, whether can be proved,*

Evidence Act—contd.

Under proviso (1) to section 92, Evidence Act, want of consideration for a contract in writing may be proved, even if it is registered. **A** BALDEO PRASAD *v.* RAM AUTAR, 22 A. L. J. 850; (1924) A. I. R. (A.) 865 **347**

——— **s. 92, proviso 1**—*Joint and several pro-note—Signature as surety—Knowledge of promisee—Admissibility of evidence.*

Where a person executes a joint and several pro-note with others and the promisee himself knows at the time of taking his signature that he signs only as surety, proviso 1 of section 92, Evidence Act, will operate to let in the evidence of the fact. **R** MAUNG SEIN *v.* MA SAW, 3 Bur. L. J. 112; (1924) A. I. R. (R.) 360 **816**

——— **ss. 101, 102**—*Suit for possession of land—Encroachment, allegation of—Burden of proof.*

In a suit for possession if the *malguzar* of a village alleges that the defendants have been rightly in possession of some portion of *abadi* but have extended their boundaries and encroached on some other portion, it is for the plaintiff to prove that the area which he claims is not a portion of the plot which the defendants have been holding all along. **N** DAU *v.* HARPRASHAD, (1923) A. I. R. (N.) 283 **645**

——— **ss. 102, 103**—*Burden of proof—Sale on credit or for cash.*

Where the seller of goods avers their sale for credit and the buyer pleads that he bought them for cash, the onus of proving payment is on the latter. **R** RASU *v.* KATTARA, 2 R. 202; (1924) A. I. R. (R.) 349 **658**

——— **ss. 107, 108,** *scope of—Presumption as to person's death—Suit for possession—Burden of proof.*

Where a person sues for possession, the onus of proof is on him to make out his title to the property.

Sections 107 and 108 of the Evidence Act only relate to the date when the suit is brought, that is to say, as to whether a man is alive or dead, as the case may be, at the date of the suit, and not at some particular period anterior to the suit. Thus, when a person has not been heard of for thirty years prior to the institution of a suit, there is no presumption that he was dead at any time within the period in question. **B** RAMACHANDRA SADASHIV *v.* KESHAV DHONDU, (1923) A. I. R. (B.) 208 **27**

——— **s. 114, illus. (b)**—Accomplice—Evidence, whether worthy of credit—Corroboration, necessity of—Sufficient corroboration. *See* CRIMINAL PROCEDURE CODE, s. 337 **707**

——— **s. 115**—*Estoppel—Knowledge of both parties—Alteration of position—"Act upon such belief," meaning of.*

Where the true facts are within the knowledge of both parties there is no scope for the application of the doctrine of estoppel.

The phrase "act upon such belief" in section 115 of the Evidence Act, means that the party to whom the representation was made must have altered his position with reference to the subject-matter of the representation. The mere filing of a suit, which would have been filed even if the representation had not been made, does not amount to such alteration of position.

Plaintiff demised certain premises to the defendant for manufacturing purposes. On the expiry of the lease he served the latter with one month's notice to quit. Defendant replied by a letter which contained an admission that he was a monthly tenant. In answer to a suit for ejectment filed by the plaintiff, defendant set up a plea that he was entitled to six months' notice under section 106 of the Transfer of Property Act:

Held, that the statement contained in the defendant's letter that he was a monthly tenant did not operate as an estoppel, inasmuch as

(*a*) the facts affecting the tenancy were within the knowledge of both parties; and

(*b*) plaintiff did not alter his position with reference to the subject-matter of the statement. **B** WILLIAM JACKS & CO. *v.* JOOSAB MAHOMED, 25 Bom. L. R. 1170; (1924) A. I. R. (B.) 115; 48 B. 38 **791**

——— **s. 115**—*Estoppel—Lease by* raiyat*—Recital that grantee shall be* raiyat, *effect of—Ejectment.*

Plaintiffs granted a lease to the predecessor-in-title of the defendants for a term of twenty years which recited that the grantee would have the status of a *raiyat*. The grantee continued in possession till after the expiry of the term and after his death the defendants got into possession of the tenancy. Plaintiffs sued to eject the defendants on the allegation that the tenancy was not heritable, the grantee being an under-*raiyat*, as the grantors themselves were only *raiyats*:

Held, (1) that the grantee having acted on the faith of the recital in the grant that he would have the status of a *raiyat* the plaintiffs were estopped from contending that his status was other than what was described in the grant;

(2) that, therefore, the defendants were not liable to ejectment. **C** ISWAR CHANDRA NATH *v.* GOUR SUNDAR NATH, (1923) A. I. R. (C.) 608; 39 C. L. J. 337 **90**

——— **s. 115**—*Mutation—Acceptance of rent—Estoppel.*

The mere mutation of the name of a person in place of that of a deceased under-proprietor in respect of certain land, followed by acceptance of rent from him by the proprietor, without any inquiry as to his title, does not operate as an estoppel against the proprietor.

The law of estoppel is compendiously set forth in section 115, Evidence Act, under which it is necessary that the person sought to be estopped should have intentionally caused or permitted the other party to believe a certain thing to be true and to act upon that belief. **P C** MITRA SEN SINGH *v.* JANKI KUAR, (1924) A. I. R. (P. C.) 213; (1924) M. W. N. 703; 20 L. W. 566; 47 M. L. J. 591; 26 Bom. L. R. 1134; 40 C. L. J. 468; 35 M. L. T. 247; 46 A. 728 **946**

——— **s. 115**—*Subsequent conduct—Estoppel.*

Subsequent conduct or word cannot operate as estoppel. **C** JNANDRA NATH *v.* DUKHIRAM, 28 C. W. N. 865; 40 C. L. J. 90; (1924) A. I. R. (C.) 850 **386**

Evidence Act—concld.

——— **s. 157**—*Criminal Procedure Code (Act V of 1898), s. 288—Statement before Committing Magistrate transferred to Sessions record, value of—Statement, whether "testimony"—Statement before Police, whether can be used in corroboration.*

The statement of a witness recorded by the Committing Magistrate and transferred under section 288 of the Criminal Procedure Code to the Sessions record is the "testimony" of a witness within the meaning of section 157 of the Evidence Act, and, therefore, a statement made by the witness before the Police is admissible to corroborate the statement made in Court. **L** MAM CHAND *v.* EMPEROR, 5 L. 324; (1924) A. I. R. (L.) 609; 25 Cr. L. J. 1201 **129**

——— **s. 167**—*Improper admission of evidence—Revision—Remand—Finding on admissible evidence.*

Under section 167 of the Evidence Act, the improper admission of evidence is not ground of itself for a reversal of any decision if it appears to the Court that, independently of the evidence improperly admitted, there is sufficient evidence to justify the decision.

A Court competent to deal with facts should ignore the evidence wrongly admitted and consider whether there still remains sufficient evidence to support the judgment.

If this has not been done, the High Court on revision will ordinarily remand the case for a finding with reference to admissible evidence only. **M** KURUBA SANKARA *v.* KILLI MANAPPA **283**

Execution of decree—Court, whether can allow interest—Inherent power, exercise of. *See* CIVIL PROCEDURE CODE, s. 34 **427**

——— Dispossession in execution—Party dispossessed, remedy of—Suit for recovery of possession, whether maintainable. *See* CIVIL PROCEDURE CODE, s. 47 **80**

——— Dispute as to applicant being representative of party to decree—Determination of question, whether decree—Appeal. *See* CIVIL PROCEDURE CODE, s. 2 **604**

——— *Executing Court going behind decree—Endorsement not to proceed against particular property of judgment-debtor—Estoppel.*

An Executing Court cannot go behind the decree and rely on a collateral judgment, even of a superior Court, against the decree.

A decree-holder is not estopped from executing his decree against a property merely because, on some previous occasion his agent endorsed on a notice of sale that the property need not be sold. **M** PARTHASARADHI APPA RAO *v.* MUHAMMAD ABDUL WAHEB **434**

——— Inquiry into validity of decree. *See* CIVIL PROCEDURE CODE, s. 47 **255**

——— Payment of process fee for arrest warrant without application therefor—Step-in-aid of execution. *See* LIMITATION ACT, SCH. I, ART. 182 (5) **497**

Execution of decree—contd.

——— Payment out of Court towards decree—Step-in-aid of execution—Payment not certified, effect of. *See* LIMITATION ACT, s. 20 **743**

——— Petition for insolvency by judgment-debtor—Exclusion of time spent in insolvency proceedings. *See* LIMITATION ACT, s. 15 **1**

——— Sale, setting aside of—Auction-purchaser, if necessary party—Mention of auction-purchaser's name in petition, if sufficient—Notice on parties. *See* CIVIL PROCEDURE CODE, s. 89 **776**

——— Satisfaction of decree—Recognition by Court—Certificate and recording, whether necessary—Payment to decree-holder for himself and minor brother—Leave of Court, absence of—Decree, whether legally satisfied—Joint decree-holders—Payment to one—Discharge of his share. *See* CIVIL PROCEDURE CODE, O. XXI, R. 2 **588**

——— Stay of execution—Application made long after appeal—Court, duty of—Revision. *See* CIVIL PROCEDURE CODE, s. 115 **435**

——— Stay of execution—Inherent jurisdiction of High Court, exercise of. *See* CIVIL PROCEDURE CODE, s. 151 **739**

Finance Act (XII of 1922), Sch. III, Part II—Impartible estate—Income to whom belongs—Super tax—Larger deduction, when made. *See* INCOME TAX ACT, s. 66 **653**

Foreign judgment—*Submission to jurisdiction of foreign Court—Power-of-attorney to appear, if amounts to submission—Ex parte foreign decree, whether decision on merits—Notice—Service.*

Where a person executes a power-of-attorney in favour of another empowering the latter to conduct litigation on behalf of the former in foreign Courts, there is a contract binding him to appear in those Courts which amounts to submission to the jurisdiction of such foreign Courts.

An *ex parte* decree obtained in a foreign Court in a summary suit similar to that provided for by O. XXXVII of the Civil Procedure Code, must be deemed to be a decree passed upon the merits when no appearance has been put in on behalf of the defendant.

Ex parte decrees are by no means necessarily decrees not passed upon the merits. It is only when a defence has been raised and for some reason or another has not been adjudicated upon that the decision can be said to be not upon the merits.

Where a foreign Court has held that notice to a defendant was sufficient, that decree must be taken to be correct in the absence of any other evidence to the contrary.

No question as to any irregularity in the service of notice can be raised in the Courts of this country as a ground for questioning the validity of a foreign decree. **M** JANOOTHASSAN *v.* MAHAMAD OHUTHU, 47 M. L. J. 356; 20 L. W. 677; 47 M. 877 **425**

Fraud, anticipatory—Onus of proof—*Bona fides*—*See* PROVINCIAL INSOLVENCY ACT, 1920, s. 53 **450**

Fraud—concld.

——— Compromise decree — Fraud — Decree set aside—Right of parties. *See* COMPROMISE DECREE **181**

———, effect of. *See* NEGOTIABLE INSTRUMENTS ACT, s. 43 **789**

Gift for immoral purpose—Immorality carried out —Property, whether can be recovered. *See* CONTRACT ACT, s. 23 **14**

——— in favour of co-*shebait*, validity of. *See* HINDU LAW—RELIGIOUS ENDOWMENT **840**

——— Subsequent acts, whether relevant. *See* BENAMI TRANSACTION **686**

———, Unregistered deed of—Admissibility in evidence—Nature of donee's possession—Construction of deeds—Maintenance deeds—Gift "with absolute rights". *See* REGISTRATION ACT, s. 49 **67**

Guardian and minor—*Debt due from Hindu father to minor—Pro-note by sons—Suit by guardian on debt—Decree against father—Dismissal against sons—Omission to file pro-note, whether gross negligence—Later suit by minor to re-open first suit, whether maintainable.*

Where a suit is brought by the guardian of a minor against a Hindu father and his sons based upon their ordinary liability under the Hindu Law, in respect of a debt borrowed by the father for an alleged necessity, purposely withholding a pro-note executed by the sons in favour of the minor plaintiff undertaking to share their liability, with a view to get a decree against all the members of the joint Hindu family, and the suit is decreed only against the father, the minor cannot on attaining majority re-open the case against the sons on the basis of pro-note on the ground that the guardian in the previous suit had been guilty of gross negligence in keeping back the pro-note. **M** TUMMALAPALLI ANJANEYULU *v.* PEDASANGANTI CHINNA SUBBIAH, 20 L. W. 529; (1924) M. W. N. 758; (1924) A. I. R. (M.) 860 **952**

——— Ex parte *decree against minor—Guardian* ad litem, *failure of, to defend suit or to file appeal—Suit to set aside* ex parte *decree—Failure of guardian, whether sufficient ground.*

The mere failure on the part of a guardian *ad litem* to defend a suit or to appeal from an *ex parte* decree passed against a minor is not of itself a sufficient ground for holding that there was gross negligence and for setting aside the decree. It would be gross negligence, however, if a valid defence was available to the minor. **L** NAWAB SINGH *v.* GURBACHAN SINGH, 6 L. L. J. 346 **598**

Guardians and Wards Act (VIII of 1890), ss. 29, 31—*Permission to guardian to transfer minor's property—Presumption as to enquiry by Court.*

When a District Judge gives sanction to the guardian of a minor to sell or mortgage the property of the minor it shall be presumed that he made an enquiry in the interests of the minor as to the value of the property and sanctioned

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the transaction only when he found that it was beneficial to his interests. **A** DURGA PRASAD *v.* TAMESHAR PRASAD, (1924) A. I. R. (A.) 897; 46 A. 754 **243**

——— **ss. 29, 31 (2)**—*Sanction for sale—Necessity—Inquiry by purchaser.*

Where a mortgage is made by a certificated guardian of a minor with the sanction of the District Judge recorded under section 31 of the Guardians and Wards Act, that sanction is *prima facie* evidence that the transaction is justified and is sufficient to relieve the creditor of the necessity of making any inquiry as to its being for legal necessity.

It is the duty of the Court to which an application is made under section 29 of the Guardians and Wards Act for sanction of the sale of minor's property, to satisfy itself by inquiry that the transaction is necessary and is for the minor's benefit; and a creditor is entitled to rely on an order of sanction as evidence that the Court has satisfied itself on this point and that the transaction is a proper one.

The mere omission to recite the necessity in an order granting sanction, as required by section 31 (2) of the Guardians and Wards Act, is no more than an irregularity and it does not render the sanction altogether illegal. **A** BUDDHOO *v.* SHEO CHARAN, 22 A. L. J. 851; (1924) A. I. R. (A.) 875 **328**

——— **ss. 43 (1)**—*Persons not guardians, proceedings against—Power of Court to pass orders.*

Under section 43 of the Guardians and Wards Act, it is only the conduct or proceedings of any guardian appointed or declared by the Court which can be called in question. The District Court has, therefore, no power to pass orders against persons not guardians except in certain specified instances.

Therefore, a mother who has been appointed by Court as guardian of her minor daughter is not entitled to apply under the section for return of the child's jewels from a relation, with whom the child was living before her appointment by Court as guardian. **M** KUPPAMMAL *v.* MUNIAPPA CHETTY, 47 M. L. J. 655; (1924) M. W. N. 892; (1924) A. I. R. (M.) 902 **488**

Gujarat Taluqdars' Act (VI of 1888), as amended by Act II of 1905, s. 2 (1) (a)—*Gameti, rights of—Mulgameti, definition of—Sovereign rights, whether essential—Cession of territory—Rights against sovereign how exercised —Burden of proving enforceable right—Talukdari estate.*

Although the Kathis of village Salangpur in the Dhanduka *Taluka* of District Ahmedabad are Mulgametis by reason of their retention of the *jivai* lands and *chauth*, they do not hold lands directly from Government and consequently are not *talukdars* within the meaning of the Gujrat Taluqdars' Act, 1888, as amended by the Act of 1905.

Per *Marten, J.*—Generally speaking a Gameti would have sovereign or *quasi*-sovereign rights but a retention of such sovereign or *quasi*-sovereign rights is not essential to constitute a Mulgameti.

Gujrat Taluqdars' Act--concld.

It is sufficient if the Gameti retains or is re-granted some of his former lands or an interest therein although all his former governing rights pass to others.

A Mulgameti of Salangpur is one who is or is descended from, a former ruler and owner of the village and still retains by re-grant or otherwise some portion of the lands or interests therein of such former ruler and owner, but not necessarily any of his governing rights.

After a cession of territory to British Rule the only enforceable rights against the Sovereign are those conferred by him after the cession either by agreement, express or implied or by legislation. An implied agreement conferring rights may be established by evidence of recognition of rights existing before cession, and of an election express or implied to be bound by them: but the burden of establishing the existence of an enforceable right is upon the subject.

Per *Pratt, J.*—A *talukdari* estate is an estate which connoted rulership in pre-British times but which is now a landlord estate to which some seignorial or subordinate rights may or may not be still attached. **B** DOLATSINGJI JASWANTSINGJI *v.* OGHAD VIRA, 25 Bom. L. R. 726; (1924) A. I. R. (B.) 72 **867**

Hindu Law--*Decree for mesne profits against temple--Endowed property, whether liable.*

A decree passed against a temple for the recovery of mesne profits with respect to property owned by the idol is recoverable from the endowed property. **A** GANESHJI MAHARAJ *v.* LALTA PRASAD, 22 A. L. J. 768; (1924) A. I. R. (A.) 801 **312**

——— **Alienation** *by widow--Reversioners, consent of--Necessity—Presumption, when arises —Recitals in sale-deeds, value of.*

There is no legal presumption of legal necessity in favour of an alienation of property by a Hindu widow when the reversioners who consent to the alienation are ladies or distant relations.

The value to be attached to a recital in a sale-deed as to the existence of legal necessity for the sale depends upon the circumstances of the case. If the circumstances are such as to justify a reasonable belief that an enquiry as to the existence of necessity would have confirmed the truth of the representation made by the vendor, then, when proof of actual enquiry has become impossible, the recital coupled with such circumstances would be sufficient evidence to support the deed. **A** MUHAMMAD NUH *v.* BRIJ BEHARI LAL, 22 A. L. J. 650; 10 O. & A. L. R. 743; 46 A. 656; (1924) A. I. R. (A.) 939 **5**

——— *Lease by widow--Reversioner's suit for possession after widow's death—Declaratory suit before suit for possession, whether necessary.*

Before suing in a Revenue Court for recovery of possession of agricultural property from a tenant in possession under a lease executed by a deceased widow, it is not at all incumbent on a reversionary heir to obtain a declaratory decree in a Civil Court setting aside the lease executed by the deceased widow. **A** RAJ ROOP KUAR *v.* KANDHYA, 22 A. L. J. 846; (1924) A. I. R. (A.) 785 **238**

Hindu Law—contd.

——— **Inheritance**—*Bombay School—Daughter's daughter.*

A daughter's daughter cannot rank as a *sagotra sapinda* under the Bombay School of Hindu Law but she can inherit as a *bhinna gotra sapinda* under that school after all the *sagotra sapindas* are over. **N** GHUNAJI *v.* TULSI, 20 N. L. R. 182 **457**

——— *Division between daughters with full rights—Right of survivorship, whether destroyed.*

Where on the death of a Hindu, his daughters effect a division of his properties arranging that each daughter will enjoy her respective share "with full right, *i.e.*, with right of alienation by sale, etc.," the right of survivorship is destroyed and on the death of any one of them, her share will go to her own heirs and not to her surviving sisters. **M** ADDAKARLU LATCHAMMA *v.* SEETHALA SUBHARAGUDHU **788**

——— **Joint family**--*Acknowledgment by head of family, when binds co-parceners.*

The head of a Hindu joint family cannot bind his co-parceners by an acknowledgment of a time-barred debt, but an acknowledgment by him of a debt within time binds all the other members of the joint family. **L** THAKUR DAS *v.* PUTLI, 5 L. 317; (1924) A. I. R. (L.) 611 **96**

——— Father adjudicated insolvent--Son's interest whether vests in Official Receiver —Nature of father's powers--Suit by sons for partition—Decree, nature of. *See* PROVINCIAL INSOLVENCY ACT, s. 2 **438**

——— *Father's debt—Son's duty to pay —Mortgage-decree against father—Ancestral property sold—Suit to cancel auction sale—Burden of proof—Immoral or illegal debt.*

It is the pious duty of a Hindu son to pay a simple money-debt due from his father even during the lifetime of the father.

Where a Hindu son sues for cancellation of a sale of joint family property in execution of a mortgage-decree against his father, the burden is on him to prove that the debt in respect of which the decree was passed was contracted for illegal or immoral purposes. **A** BISHUNATH RAI *v.* JODHI RAI **180**

——— Letters of Administration--Co-parcener, whether can apply. *See* PROBATE AND ADMINISTRATION ACT, s. 23 **824**

——— *Property in name of female, nature of.*

There is no presumption that a property standing in the name of a Hindu female, who is a member of a joint Hindu family, belongs to the joint family and is not her *stridhan* property. **C** BHUBANMOHINI DASI *v.* KUMUDBALA DASI, 28 C. W. N. 131; 39 C. L. J. 140; (1924) A. I. R. (C.) 467 **934**

——— *property — Alienation — After-born son's right to contest alienation—Son, whether acquires by birth interest in right to sue—Son, whether acquires by birth fresh cause of action—Limitation Act (IX of 1908), s. 6, applicability of.*

Hindu Law—contd.

A Hindu son when he is born in a family is born to all the rights which exist at the time in the family and not to rights which existed in the family a century before. No title derived from a Hindu would be safe under such a contingency.

A son born in a joint Hindu family acquires by birth interest in ancestral property but does not acquire any interest in any right to sue. The cause of action to contest an alienation of joint family property accrues after the alienation when the purchaser takes possession, and a new cause of action does not accrue upon the subsequent birth of a son in the family.

An after-born son does not acquire a fresh cause of action and a fresh period of limitation does not start from the date of his birth. In his case the time from which the period of limitation is to be reckoned is the date of the transfer and as he was not born on that date and was under no disability he cannot obtain the benefit of the provisions of section 6 of the Limitation Act. He can take advantage of any cause of action existing at his birth and sue within the period of limitation but cannot start a fresh period at his birth. **A** SIKANDAR SINGH *v.* BACHCHU PANDE **307**

——— **Joint family** *property — Separation—Minor sons living jointly with father, effect of—Re-union, whether established—After-born sons, rights and liabilities of.*

When a separation has taken place in distinct shares between a father and sons forming a Hindu joint family but the minor sons continue to live jointly with their father (who remains in possession) even after attaining majority and conduct business for him, it is sufficient to establish a re-union as between the father and these sons.

After-born sons are entitled to a share in the property left in the hands of the father after separation and are similarly bound by his acts. **O** ONKARESHWAR PRASAD *v.* DUSHYANT PRASAD **10**

——— *Sale by managing members—Legal necessity for portion of amount—Sale, validity of.*

Where a portion only, for instance, about three-fourth, of the consideration for a sale, effected by the managing members of a joint Hindu family is found to be for legal necessity, the Courts will set aside the sale as regards the share of the property of the member contesting the sale, on his payment of a proportionate share of the amount found to be for necessity. **A** LAKHRAM SINGH *v.* SHEO PRASAD, (1922) A. I. R. (A.) 316 **68**

——— *Widow of pre-deceased co-parcener, adoption by—Estate vested in widow of another co-parcener—Adoption, effect of—Precedents, value of.*

After the death of the last surviving co-parcener in a Hindu joint family, when the estate has vested in the widow of that co-parcener, the widow of a pre-deceased co-parcener cannot adopt validly, and the adoption, if effected, cannot have the effect of divesting the estate vested in the widow of the last surviving co-parcener.

Assuming that the widow of a pre-deceased co-parcener can adopt without the consent of the surviving co-parceners, even in the absence of any specific authority from her husband, during the lifetime of the co-parcener, it does not necessarily follow that even after the death of the last surviving co-parcener, when the joint family has ceased and the property has devolved upon the heirs of the last surviving co-parcener, she can make a valid adoption, so as to divest the estate already vested in the heirs of the last male owner.

A decision is an authority for what it decides, and it is not an authority for what may seem to be a logical consequence of that decision. **B** SHIVBASAPPA *v.* NILAVA, 24 Bom. L. R. 1162; (1923) A. I. R. (B.) 17; 47 B. 110 **618**

——— **Mitakshara**—*Impartible estates—Principle of survivorship, how far applicable—Alienability of impartible estates, evidence of—Settlement* khewats, *relevancy of—Bengal Tenancy Act (VIII of 1885), ss. 102, 103—Evidence Act (I of 1872), s. 35—Co-parcenary in impartible properties—Right to maintenance—Evidence as to usage of family, nature of—Independent opinion.*

The principle of survivorship which governs succession in ordinary joint family under the Mitakshara has to be followed in the case of impartible estates only for a particular purpose, *viz.*, to find out a successor and it is only for the purpose of determining who is entitled to succeed, that the estate is to be treated as the property of the joint family.

In the absence of any custom an impartible estate is alienable by way of transfer *inter vivos*, as well as by testamentary dispositions.

If according to Hindu Law an impartible Raj is not inalienable the burden of proving that by custom the estate is inalienable is on the person who alleges it to be inalienable.

In considering evidence of inalienability it should be seen that if there was any occasion, when having regard to human nature, there was likelihood of alienation and alienation was not effected, it would be evidence of inalienability.

Obiter.—In impartible properties there is no co-parcenary.

The right to maintenance, so far as founded on or inseparable from the right of co-parcenary, begins where co-parcenary begins and ceases where co-parcenary ceases.

It is admissible for a living witness to state his opinion on the existence of a family custom and to state as the ground of that opinion information derived from deceased persons. The weight of such evidence would depend on the position and the character of the witness and of the persons on whose statements he formed his opinion. It must be the expression of independent opinion based on hearsay and not mere repetition of hearsay.

Entries in Settlement *khewats* are presumed to be correct under section 103, Bengal Tenancy Act. Even if they do not come under section 102 of the Act, they are relevant under section 35 of the Evidence Act, being made by a public officer in the discharge of official duties. **C** PROTAP CHANDRA *v.* JAGADISH CHANDRA, 40 C. L. J. 331 **886**

Hindu LaW—contd.

——— **Mitakshara**—*Succession—"Sons", meaning of—Grandson of father's sister, whether* bandhu.

The word "sons" used in the rule of Mitakshara as to the succession of *bandhus*, is used in a generic sense and includes a grandson.

A grandson of father's sister is a *bandhu* and as such within the heritable line.

Per *Kanhaiya Lal, J.—Bandhus* are *sapindas* though of a different *gotra*.

A *bandhu* must, in order to be heritable in a female line, fall within the fifth degree from the common male ancestor and must be so related to the deceased person that they are mutually *sapindas* of one another.

Per *Mukerji, J.*—Where a *bandhu* is related to the deceased through his father seven degrees have to be counted and not five. It is only when the claimant is connected with the deceased through his mother that five degrees have to be counted. **A** HARIHAR PRASAD *v.* RAM DAUR, 22 A. L. J 1012 **1032**

——— **Religious endowment**—Shebait's *appointment—Succession—Rules—Additional endowment—Indication*—Shebait's *position*—Shebait's *office, whether transferable—Gift in favour of co*-shebait, *validity of.*

The appointment and succession to the office of a *shebait* must follow the line laid down in the original grant and in the absence of special direction and usage the heirs of the donor succeed.

A donor is at liberty to alter the appointment of a *shebait* to the office, or the rules regulating the worship, except on the ground that he has expressly precluded himself from doing so or that such an alteration affects some right of property of the *shebait* so appointed or the right of a third party which had already been created, provided always that any such alterations do not affect any of the fundamental gifts.

All the *shebaits* if they agree, and if it is for the benefit of the endowment, may introduce changes without changing the rules of the founder in any vital matter.

Additional endowments, if allowed, must be accepted with the terms and conditions in the deed but subject always to the limitation that such endowments are for the benefit of the *Thakur* and the new rules are not inconsistent with the rules already made.

The right of a *pujari* of a *Thakur* is not that of a *shebait* and he is merely a servant appointed by the *shebait* for the performance of the ceremonies.

A dedication to a *Thakur* is irrevocable.

The rules laid down for the worship of a *Thakur* and for the management of the charities, if any, connected with the endowment are binding.

The rules laid down for the appointment of *shebaits* and their succession in the deed of endowment are binding.

A *shebait* has no right to the property but is merely an officer with the rights and limitations as are applicable to the guardian of a minor.

Hindu Law—contd.

The rules laid down in a deed of endowment are binding and are unalterable after the death of the donor by any successor in estate or office.

The office of a *shebait* is not transferable either by sale or gift.

A gift in favour of a co-*shebait* is not invalid provided it is for the benefit of the endowment. **C** SRIPATI CHATTERJEE *v.* KHUDIRAM BANERJEE **840**

——— **Relinquishment** *of limited estate, proof of—Failure to contest suit, effect of—Procedure —Events during pendency of suit, whether can be considered.*

The reversioners of a deceased Hindu claimed certain *kasht* land belonging to the latter on the allegation that his daughter, who was immediately entitled to the property and was a defendant in the suit, had relinquished the property in their favour. The contest was between the plaintiffs and the landlord. The daughter of the deceased did not enter appearance or contest the suit. There was no evidence of a relinquishment by her before the suit, but during the appellate stage she filed a petition expressing her willingness to relinquish her rights in favour of the plaintiffs :

Held, (1) that the failure of the daughter of the deceased to appear and contest the suit did not amount to a relinquishment ;

(2) that the petition filed by her before the Appellate Court did not affect the position of the parties, as the judgment of the Court must depend upon the rights of the parties at the date when the suit was instituted. **Pat** LALOO PRASAD SINGH *v.* LACHMAN SINGH, 3 Pat. 224; (1924) A. I. R. (Pat.) 438 **510**

——— **Succession**—*Legal and equitable estate, distinction between—Equity, justice and good conscience—Murderer, whether can succeed—Wife, position of* — Bandhus, *preference between—Statute, construction of.*

A Hindu murderer is wholly disqualified from succeeding to the estate left by the murdered person; even if there be no such rule in Hindu Law the principles of justice, equity and good conscience exclude the murderer from inheritance.

The murderer is, for the purposes of succession, non-existent and cannot be treated as one who forms the stock for a fresh line of descent.

The theory of legal and equitable estates is no part of Hindu Law.

Under Hindu family Law, a wife becomes a member of her husband's *gotra*, an actual relation of her husband's relations in her own right.

Under Hindu Law *bandhus* of equal degree succeed equally.

As between *bandhus* of equal nearness to the propositus, a male *bandhu* is entitled to preference over a female. **P. C.** KENCHAVA KOM SANYELLAPPA HOSMANI *v.* GIRIMALLAPPA CHANNAPPA SOMASAGAR, 26 Bom. L. R. 779; (1924) A. I. R. (P. C.) 209; 20 L. W. 417; 47 M. L. J. 401; (1924) M. W. N. 719; 48 B. 569; 22 A. L. J. 962; 40 C. L. J. 447; 35 M. L. T. 241 **966**

Hindu Law—contd.

——— **Widow**—*Debt of husband—Discharge by third person at her request—Liability of widow—Assets of deceased—Contract Act (IX of 1872), s. 70.*

It is the duty of a Hindu widow to pay up the debts of her husband out of the assets inherited by her and if instead of paying them herself out of the assets, she requests a relation of here to obtain a discharge for her from the liability to pay the same, she is liable to compensate her relative out of the assets in her hand under section 70 of the Contract Act, as she enriches the assets to that extent or strictly speaking confers benefit upon the estate by getting the debt paid up. **N** SUNDER *v.* BHOPAT, 7 N. L. J. 167 **586**

——— *Debts for necessity—Liability of reversioners.*

A debt incurred by a Hindu widow in circumstances of necessity is binding on the estate, and assets in the hands of reversioners after the widow's death are, therefore, liable for the discharge of such a debt. **M** GARIMELLA VENKAYYA *v.* MOKKARALA BANGARAYYA **464**

———, *decree against, when binds reversioners—Bond by widow, recitals in, value of.*

In deciding whether a sale in execution of a decree against a widow would bind the reversioners, the Court should look beyond the decree to the form of the suit or possibly even to the terms of the document on which the claim for the decree was based.

If the form of the suit is a claim based on a mortgage-deed, the widow in defending such a suit is acting in defence of the estate and on behalf of the reversioners, whereas if the form of the suit is a claim on a personal bond she can not be held to be acting on behalf of the reversioners.

A widow's personal bond even for legal necessity does not bind her husband's property.

The recitals in a bond executed by a widow that she had borrowed money for paying the debts of her deceased husband cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain. **O** RAJ KUNWARI *v.* MAHARAJ KUNWAR **832**

——— *Compromise by widow—Reversioners, when bound—Transfer of Property Act (IV of 1882), s. 91—Mortgage of property of last male holder—Reversioner, whether interested—Right of reversioner to redeem.*

A compromise by a Hindu widow admitting the claim of a mortgagee from her husband for an amount far in excess of what is really due cannot be said to be for the benefit of the estate and does not bind the reversioners.

A reversionary heir of the deceased husband of a Hindu widow has such an interest in the property within the meaning of section 91 of the Transfer of Property Act as would entitle him during the lifetime of the widow to redeem a mortgage made by the husband. **O** BASAWAN *v.* NATHA, 10 O. & A. L. R 857; 11 O. L. J. 452 **747**

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——— **Widow**—*Maintenance, right of—Charge on joint property.*

The right of a widow under the Hindu Law to be maintained out of her late husband's share in the family property in the hands of surviving co-parceners creates no immediate charge upon the property, but if it becomes necessary to do so, she can by proper steps obtain such a charge upon a reasonable portion of the joint property not exceeding her husband's share. **Pat** SHIVA PRASAD SINGH *v.* EMPEROR, (1924) Pat. 234; 5 P. L. T. 497; (1924) A. I. R. (Pat.) 679 **653**

——— *Surrender.*

A Hindu widow can renounce the estate in favour of the nearest reversioner and, by a voluntary act, efface herself from the succession as effectively as if she had then died. This voluntary self-effacement, sometimes referred to as a surrender and sometimes as a relinquishment or abandonment of her rights may be effected by any process having that effect, provided there is a *bona fide* and total renunciation of the widow's right to hold the property. **M** GUNTAKA VENKATADRI *v.* BATULA SUBBAREDDI **1025**

———, *transfer by—Reversioner, consent of—Transfer whether can be challenged—Estoppel.*

A reversioner in whose favour the succession has opened cannot be permitted to challenge the validity of a transfer by a Hindu widow when before her death he had elected to hold the transfer good. **A** BATKA *v.* SITMAN, (1924) A. I. R. (A.) 527 **372**

——— **Will,** *construction of—Property bequeathed to widow and on her death to cousin—Cousin predeceasing widow—Heirs of cousin, whether entitled—Vested and contingent interest.*

It is a settled principle of law that during the lifetime of a Hindu widow, no other person acquires a vested interest in the property held by her.

Therefore, where a Hindu testator directs in a Will that the property on his death would devolve on his widow in full ownership and upon the latter's death on his cousin, it conveys no more than a mere contingent interest to the cousin and, in the event of the cousin predeceasing the widow, his heirs have no right to inherit as against the reversioners of the testator. **O** JAGMOHAN SINGH *v.* SHEO MANGAL SINGH, 10 O. & A.L.R. 843 **583**

——— **Woman's estate**—*Suit for recovery of debt—Decree whether binds reversionary interest.*

A Hindu female heir represents the entire estate in respect of her own as well as the reversionary interest. Therefore, a creditor suing such a female should so frame his suit as to make it clear that he intends to bind the entire estate and not merely the limited or personal interest of the female, so as to put the other persons interested on their guard and to enable them to protect the estate if they care to do so; consequently, if the decree is a mere personal decree against the female, it binds only her personal and not the reversionary interest. **C** DAYAMOYEE RAY CHOUDHURANI *v.* LALIT MOHAL PAL RAY **1001**

Identification evidence, *when should be accepted.*

A witness's evidence of identification given in Court should only be accepted if he identified the same person whom he had previously picked out in the identification parade in the Jail. **L** MAHNI *v.* EMPEROR, 25 Cr. L. J. 1272 **280**

Income Tax Act (XI of 1922), ss. 2 (15), 12, 16, 55—*Undivided profits—Bonus shares—Income, profit or gain.*

Where a Limited Company in order to increase its capital allots its undivided profits to its share-holders in the form of fully paid up bonus shares, and no amount is taken from the Company or received by the share-holders, the acceptance of the allotted shares by the share-holders is not an acceptance of an income, profit or gain within the meaning of the Income Tax Act. **R** STEEL BROTHERS & Co. *v.* EMPEROR, 2 R. 211; (1924) A.I.R. (R.) 337 **665**

——— **ss. 3, 58** — *Super-tax — Assessment — Share-holder in limited company—Surplus profits —Distribution as additional shares—Capital or income—Liability to pay super-tax.*

If a limited Company, having a surplus accumulation of undistributed profits, takes, by special resolution, power to capitalise undivided profits and in pursuance thereof allots new additional shares to the share-holders representing their share in the surplus and issues scrips for the purpose, the share-holders are not liable to pay super-tax on the value of such newly issued shares, as such profits do not constitute "income" but are part of the capital. **M** COMMISSIONER OF INCOME-TAX, MADRAS *v.* BINNY & CO. LTD., MADRAS, (1924) M. W. N. 531; 47 M. L. J. 242; 20 L. W. 611; 47 M. 837; (1924) A. I. R. (M.) 802 **17**

——— **s. 66**—*Case stated—Commissioner, duty of—Royalty, whether income*—Salami, *character of—Liability to assessment—Finance Act (XII of 1922), Sch. III, Part II—Impartible estate—Income to whom belongs—Super-tax—Larger deduction, when made.*

While an Income Tax Commissioner may state his opinion on the questions involved, it is his first duty to state clearly and fully the material facts admitted or proved in evidence before him.

Royalties paid by a lessee to the lessor are income within the meaning of the Income Tax Act and are liable to assessment.

Where a lump sum is paid to the landlord under the name of *salami* for the granting of a lease, the sum so paid is in no sense income within the meaning of the Income Tax Act, but if the lease reserves rent or royalty, the sum so paid is income.

The Finance Act contemplates the larger deduction for purposes of super-tax only in a case where the income is that of an undivided family in which the members are all jointly interested and not in the case of an impartible estate where the income is the sole property of the holder for the time being. **Pat** SHIVA PRASAD SINGH *v.* EMPEROR, (1924) Pat. 234; 5 P. L. T. 497; (1924) A. I. R. (Pat.) 679 **653**

Injunction—Company—Directors preventing co-Director from acting—Suit for injunction, whether maintainable. *See* JURISDICTION OF COURT **405**

Interest—Executing Court, whether can allow interest—Inherent power, exercise of. *See* CIVIL PROCEDURE CODE, s. 34 **427**

——— *Post diem* interest. *See* MORTGAGE—(ENGLISH)—REDEMPTION **399**

——— on mortgage, whether charge on property —Mortgagee, whether entitled to recover. *See* MORTGAGE—REDEMPTION **622**

——— *Protracted proceedings—Interest during interval, nature of.*

In a case where proceedings have been protracted through the fault of both parties, interest for the period of suit partakes of the nature of damages and the Court may mould it according to its will. **A** BALGOBIND v. SHEO KUMAR, 22 A. L. J. 791; (1924) A. I. R. (A.) 818 **184**

Interests Act (XXXII of 1839), *whether exhaustive—Interest, award of—Discretion of Court.*

The Interests Act is not exhaustive of all cases in which interest is allowable. The award of interest is more or less a matter of discretion for the Court and not a matter of law. **M** VENKATACHALAM CHETTIAR *v.* PONNUSAMI AYYANGAR, (1924) M. W. N. 499; 20 L. W. 195; 47 M. L. J. 312 **536**

Interpretation of Statutes. *See* MADRAS CITY TENANTS' PROTECTION ACT, s. 2 (3) **445**

Interpretation of Statutes

Statutes interfering with vested rights have to be strictly construed. **N** RUPI *v.* SADASHEO **1038**

——— *Act imposing restrictions.*

An Act imposing disabilities should be strictly construed. **C** PROTAP CHANDRA *v.* JAGADISH CHANDRA, 40 C. L. J. 331 **886**

——— *Courts, duty of.*

The province of the Courts is confined to ascertaining the law and to applying it to the facts of each particular case, it is not for the Courts to judge of the consequences, good or bad or indifferent of the application of the law or the hardship resulting in any case or any class of cases. These are matters proper for the Legislature but not to be avoided by the Courts. **S** SODAWATERWALA *v.* VOLKART BROTHERS, (1923) A. I. R. (S.) 25 **81**

——— Fiscal Statutes. *See* COURT FEES ACT, s. 12 **292**

———*Fiscal Statutes.*

Although provisions in fiscal Statutes are not to be so construed as to furnish a chance of escape and a means of evasion, a fiscal Statute must be strictly construed, and liability or additional liability cannot be imposed on the subject except by clear and unambiguous terms. **C** NANDA LAL *v.* JOGENDRA CHANDRA, 39 C. L. J. 222; 28 C. W. N. 403; (1924) A. I. R. (C.) 881 **297**

——— Reference to legislation of other countries. *See* CONTRACT ACT, s. 16 **817**

——— *Statute for benefit of particular class—Public policy.*

When the provisions of a Statute have been contravened, if a question arises as to how far the proceedings are affected by such contravention the matter must be determined with regard to the nature, scope and object of the particular provision which has been violated. No hard and fast line can be drawn between a nullity and an irregularity.

Interpretation of Statutes—concld.

The mere fact that the provisions of a Statute are intended for the benefit of a class of persons does not necessarily show that the Statute is not based on grounds of public policy. **C** JOGGESWAR MAHATA *v.* JHAPAL SANTAL, 51 C. 224; 28 C. W. N. 556; (1924) A. I. R. (C.) 638 **848**

——— *Statutes relating to heirship or descent.*

Statutes regulating heirship or descent, or giving force to Wills and to the devises contained in Wills should be read as not intended to affect paramount questions of public policy or depart from well-settled principles of jurisprudence. **P. C.** KENCHAVA KOM SANYELLAPPA HOSMANI *v.* GIRIMALLAPPA CHANNAPPA SOMASAGAR, 26 Bom. L. R. 779; (1924) A. I. R. (P. C.) 209; 20 L. W. 417; 47 M. L. J. 401; (1924) M. W. N. 719; 48 B. 569; 22 A. L. J. 962; 40 C. L. J. 447; 35 M. L. T. 241 **966**

Jurisdiction, absence of—Objection by accused—Trial, whether vitiated—Second Class Magistrate, jurisdiction of. *See* PENAL CODE, s. 417 **57**

———, *how determined.*

Jurisdiction does not depend on the result of a suit or on the defence set up but on the nature of the claim as brought; that is to say, what decides the venue in a case is the nature of the claim as brought. **N** HARBAX *v.* LACHMAN **201**

———, *question of.*

The question of jurisdiction of Courts to try suits is merely mechanical and involves no equities. **M** SAHADEVA REDDI *v.* LINGAPPA ASARI 20 L. W. 451; (1924) M. W. N. 833; (1924) A. I. R. (M.) 867 **942**

——— Witness summoned under Presidency Towns Insolvency Act—Witness residing more than 200 miles away—Court, jurisdiction of. *See* PRESIDENCY TOWNS INSOLVENCY ACT, s. 36 **76**

Jurisdiction of Civil Court—*Kudivaramdar,* acquisition of *melwaram* right by—*Kudivaram* rights, if lost—Suit for possession. *See* MADRAS ESTATES LAND ACT, s. 3 **929**

——— Suit by alienee from office holder, whether barred. *See* MADRAS HEREDITARY VILLAGE OFFICES ACT, s. 13 **942**

Jurisdiction of Civil or Revenue Court—Tenant, dispossession of, by trespasser—Suit for recovery of possession. *See* AGRA TENANCY ACT, s. 79 **251**

Jurisdiction of Court—*Appeal, dismissal of—Court-fee, deficient, levy of.*

After a Court has dismissed an appeal, it is *functus officio* and has no power to order the appellant to make up a deficiency discovered in the Court-fee. **L** ABDULLAH *v.* SECRETARY OF STATE FOR INDIA **588**

——— *Company—Directors preventing co-Director from acting—Suit for injunction, whether maintainable.*

A Civil Court can grant an injunction on the application of a Director of a Company restraining his co-Directors from wrongfully excluding him from acting as Director. **C** SARAT CHANDRA *v.* TARAK CHANDRA, 28 C. W. N. 803; 51 C. 916; (1924) A. I. R. (C.) 982 **405**

——— to rectify error. *See* TRANSFER OF PROPERTY ACT, s. 89 **297**

Jurisdiction of Small Cause Court—Landlord and cultivator—Settlement of land on share of crop—Cultivator, whether tenant or servant—Suit by landlord—Small Cause Court, jurisdiction of. *See* PROVINCIAL SMALL CAUSE COURTS ACT, SCH. II, ART. 8 **94**

Jury, trial with—Judge disagreeing with Jury—Reference to High Court—High Court, when will interfere. *See* CRIMINAL PROCEDURE CODE, s. 307 **356**

Land Acquisition Act (I of 1894), ss. 12, 18—*Award—Reference to Court—Matters to be determined—Judge, jurisdiction of.*

The Court of the Land Acquisition Judge is a Court of special jurisdiction, the powers and duties of which are defined by Statute.

When a reference is made to the Land Acquisition Judge under section 18 of the Land Acquisition Act what has to be determined by the Judge is the matter of the award to the extent comprised within the objections contained in the reference. Apart therefrom the award is final. **C** PRAMATHA NATH MULLICK *v.* SECRETARY OF STATE FOR INDIA, 40 C. L. J. 105; (1924) A. I. R. (C.) 1036 **3**

——— **s. 23**—*Acquisition of land—Compensation, assessment of, mode of—Market value, ascertainment of—Speculative sales, value of.*

In assessing the amount of compensation to be paid for a piece of land which is being compulsorily acquired, the market value of the land should not be ascertained piecemeal.

The correct method is to determine the market value of the land as a whole having regard to the sales in the locality.

The mere fact that a parcel of land is bought by a speculator in land with the object of re-selling it at a profit is no ground for disregarding the sale in compensation cases under the Land Acquisition Act for the purpose of determining the market value of land. The real question is whether the price paid was such as a prudent man would have paid at the time the transaction took place

The expression "market value" means the price which a parcel of land would realise if sold in the market. The test is the test of a sale in the market. The seller must be a willing seller; a forced sale affords no criterion of market value. The purchaser must be a prudent purchaser, that is, one who makes his offer after making necessary inquiries as to the value of the land; an offer made by one who knows nothing of the value of the land in the locality and who makes no inquiries about it, affords no test of market value. The market may be dull or brisk, but whether it dull or brisk it cannot be excluded from consideration. **B** GOVERNMENT OF BOMBAY *v.* MERWAN MOONDIGAR AGA, 25 Bom. L. R. 1182; 48 B 190; (1924) A. I. R. (B.) 161 **796**

——— **s. 23**—*Land containing stone and moorum, valuation of—Basis of calculation—Toka lands—Government interest, valuation of.*

Where there is *moorum* and stone underneath a plot of land which is being compulsorily acquired, but the evidence shows that its value as a quarry is purely problematical and that a purchaser would not give more than a certain amount for it, taking all its potentialities into consideration, the land should not be valued on

Land Acquisition Act—concld.

a quarrying basis but should be valued on the basis of what a purchaser would be willing to offer for it.

In the case of compulsory acquisition of *toka* land, the difference between the market value of *toka* land as compared with free-hold, represents the then value of the Government interest in the land. When, however, no evidence is available to determine the value of the Government interest in this manner, the Court must arrive at the value as best as it can. No universal rule can be laid down applicable to all cases. **B** GOVERNMENT OF BOMBAY *v.* MOOS, 24 Bom. L. R. 471; (1922) A. I. R. (B.) 254; 47 B. 218 **641**

Landlord and tenant—Abatement of rent.

See CONSTRUCTION OF DOCUMENT **315**

——— *Ejectment, suit for—Burden of proof.*

In a suit for ejectment the plaintiff must first prove his right to eject, before the onus is shifted to the defendant to prove that he has a permanent right of occupancy, and, in order to prove a right to eject, the plaintiff must necessarily show that the tenancy is a terminable one and has been validly terminated. **M** BOLLAPRAGADA SUBBARAYUDU *v.* VALLURI NARASIMHA RAO, (1924) M. W. N. 553; 47 M. L. J. 558; (1924) A. I. R. (M.) 907 **623**

——— *Ejectment suit—Lease for fixed term—Burden of proof.*

The burden of proof is on the tenant when he is sued by his landlord for ejectment, to show that he has a right to stay on the land and cannot be ejected by the proprietor. The mere fact that the landlord describes the defendant in the plaint as a lessee does not imply that he says or means that the latter is holding for a term, as a lease may be from year to year. **A** CHOB SINGH *v.* DARYAI SINGH, (1924) A. I. R. (A.) 915 **594**

——— *Ejectment suit—Notice to quit—Validity of notice, whether can be questioned in appeal—Assignment by landlord—Notice before and after assignment.*

Where in a suit in ejectment the landlord alleges the termination of tenancy by a proper notice to quit and the tenant raises no objection in his written statement and no issue is framed as to the sufficiency or validity of the notice, it is not open to the tenant in appeal to raise the question.

The person who is the landlord and entitled to possession on the date of a notice to quit is the proper person to give the notice and an assignee within the currency of that notice can take advantage of the notice sent by his assignor and rely upon it when he brings a suit for recovering possession.

Where the assignor has under the terms of the assignment undertaken to get possession from the tenant and to hand over the property to the assignee, a notice to quit by the assignor, even after the assignment, is valid and effective. **M** NALLULI PANDARATHIL *v.* SECRETARY OF STATE FOR INDIA, 20 L. W. 433; (1924) M. W. N. 830; (1924) A. I. R. (M.) 904 **956**

——— *Ejectment suit—Plea of permanent tenancy—Onus of proof—Permanent right of occupancy, how acquired*—Kudivaram, *meaning of*—Melvaram, *meaning of—Uncertain vernacular terms, whether can be acted upon.*

Landlord and tenant—contd.

When in defence of an ejectment suit a tenant of lands sets up a permanent tenancy, the onus of proving that he has such a right is upon him.

A permanent right of occupancy in land is a right, subject to certain conditions, of a tenant to hold the land, which he occupies, permanently. It is a heritable and in some places may be a transferable right. This permanent right of occupancy may only be obtained by a tenant by custom, or by a grant from an owner of the land who happens to have power to grant such a right, or under an Act of the Legislature.

The presumption in favour of a permanent tenancy implies that there is ground for inferring that the tenure was always intended to be and always was hereditary, or that it acquired that character by subsequent grant. But a presumption in favour of a transaction assumes its regularity, it cannot be made in favour of that which offends legal principles.

When a tenancy in the Presidency of Madras commences under a terminable contract there is nothing to prevent the landlord from ejecting the tenant at the end of the term.

No tenant of lands can obtain any right to a permanent tenancy by prescription in them against his landlord from whom he holds the lands.

"*Kudivaram*" is a Tamil word which signifies a cultivator's share in the produce of land as distinguished from the landlord's share in the produce of the land received by him as rent, which is sometimes designated as "*Melvaram.*"

A vernacular term of uncertain meaning cannot be acted upon by Privy Council. **P C** NAINAPILLAI *v.* RAMANATHAN, (1924) A. I. R. (P. C.) 65; 19 L. W. 259; 22 A. L. J. 130; 34 M. L. T. 10; (1924) M. W. N. 293; 46 M. L. J. 546; 10 O. & A. L. R. 464; 47 M. 337; 28 C. W. N. 809 **226**

——— *Grant on fixed rent—Grant to two persons—Joint tenancy—Common tenancy—Right of re-entry—Contract Act (IX of 1872), s. 62—Novation—Terms of grant clear—Evidence of conduct—Suit for declaration and possession—Parties.*

Where according to the terms of a grant of lands to two brothers, the grant was perpetual (*istimrari*); the grantees and their descendants (*al aulad*) were to pay a fixed rent and enjoy the lands generation after generation (*pusht dar pusht*); the descendants (*al aulad*) of the grantor were to realize the fixed rent generation after generation (*pusht dar pusht*); and in the event of default in payment of the fixed rent for three *kists*, the fixed lease (*mukarrari*) was to be void:

Held, (*i*) that the grant was permanent in its duration, fixed in the rental, descendible to heirs both in the male and female lines and was to be held generation after generation: that is to say, the grant was an absolute, perpetual, heritable and transferable grant;

(*ii*) that the grant was not resumable.

The novation of a contract implies a fresh contract, directly or by implication, in place of the original contract. Therefore, if the holders

of a perpetual and heritable grant, subsequent to the grant, divide the subject-matter of the grant without reference to the grantor, so that their respective heirs might succeed to the specific properties, the principle of novation does not apply.

The incidents of a joint tenancy may be changed and a member of the joint tenancy may sever his connection by effecting partition of his interest and, after this is done, the rule of survivorship of succession will not apply, but the heirs of the separated tenant would succeed to his interest in the tenancy.

Upon the death of one of two joint grantees, the lessor does not become entitled to enter as to one half of the property demised, as the lease does not terminate till the death of the survivor of the two lessees, and, therefore, the landlord's right to re-enter does not arise till both the lessees are dead.

To a suit for a declaration that an entry in the Survey Record of Rights of a village is incorrect and for recovery of possession, if the plaintiff is deemed to be out of possession, all persons, recorded as in possession of the village and as claiming title adverse to the plaintiff, are necessary parties.

Per *Macpherson, J.*—Where the terms of a grant are unambiguous, evidence is not admissible of conduct of the parties leading to another inference. **Pat** GOPAL OJHA *v.* RAMADHAR SINGH **204**

——— House built by tenants in *abadi*—Tenant's right to transfer such house—Burden of proof. *See* CUSTOM **810**

——— Land given for cultivation—Lessee settling tenants—Lessee, whether *raiyat*—*Raiyat*, test of. *See* BENGAL TENANCY ACT, SCH. III, ART. 3 **79**

——— *Notice for enhancement of house rent—Option to vacate on non-acceptance of proposal—Tenant continuing in occupation—Implied agreement.*

A landlord served the tenant with a notice that he would charge a certain amount of enhanced rent from a given date. The tenant was allowed the option to vacate the house in case he did not accept the proposed enhancement of rent. The tenant continued in occupation of the house:

Held, that the tenant's conduct in not vacating the house amounted to an implied acceptance of the proposal and consequently he was liable to pay the enhanced rent. **O** BURGE *v.* MOHAMMAD INAM ULLAH KHAN, 10 O. & A. L. R. 819; 11 O. L. J. 561 **585**

——— *Occupancy rights, acquisition of, by proprietor—Proprietary rights, acquisition of, by occupancy tenant—Effect of such acquisitions.*

The acquisition by a proprietor of occupancy rights or the acquisition by an occupancy tenant of proprietary rights amounts to the same thing, as in either case the occupancy and proprietary rights are, after the transfer, combined in the same person. A co-sharer who purchases the holding of an absolute occupancy tenant becomes himself an absolute occupancy tenant. That is to say, when the rights of a co-sharer and an occupancy or absolute occupancy tenant coalesce in the same person, he is an occupancy or absolute occupancy tenant, according to the nature of the tenancy.

If an occupancy tenant purchases the land under his occupancy, his occupancy rights are not extinguished and he does not become an absolute owner or the land his *khudkasht*, unless he becomes the sole proprietor of the *patti* of the village in which the occupancy tenancy land is situated. **N** KESARBAI *v.* JAMADAR, 20 N. L. R. 162 **126**

——— *Occupancy tenant—Self sown tree—Right in fruit or wood—Custom—Contract.*

An occupancy tenant is entitled to the fruits or to the fallen wood of a self-sown tree unless some custom or contract to the contrary is proved. **A** SAGWA *v.* BHAGWAN DAS **385**

——— Possession of tenant, whether possession of landlord. *See* ADVERSE POSSESSION **861**

——— *Rent collected wrongfully by third person—Liability of Collector—Liability of tenant.*

Where rent is wrongfully collected from a tenant by a person other than the landlord, the latter can recover the same from the former in an action on tort, but the tenant is not thereby discharged from his liability to the landlord under the contract. **R** MA MA GUN *v.* MAUNG PO THAN, 3 Bur. L. J. 25; (1924) A. I. R. (R.) 282 **352**

——— *Suit for arrears of rent—Defendant in possession under oral lease—Written lease not executed—Registered* kabuliyat*—Compensation for use and occupation—Ex-proprietary tenancy—Rent less than statutory rate, whether recoverable—Agra Tenancy Act (II of 1901), ss. 10, 36—Mutation—Mortgagee entered as lessor on mortgagor's application—Presumption—U. P. Land Revenue Act (III of 1901), s. 44.*

Where there is an oral lease and a registered *kabuliyat* and rent has been paid and received for several years, the lessee is liable, even if the *kabuliyat* does not constitute a valid tenancy, to pay compensation for the use and occupation of the land, and the measure of that compensation is the amount agreed to be paid under the lease.

If a mortgagor of land applies for mutation of names and gets himself entered as lessee and the mortagee as lessor, the latter is entitled to rely on the presumption laid down in section 44 of the U. P. Land Revenue Act that the relation of landlord and tenant exists between the parties.

If the rent agreed on between the parties for land, in respect of which an ex-proprietary tenancy has arisen, is less than the statutory rate laid down in section 10 of the Tenancy Act, the rent is claimable even though formal proceedings under section 36 of the Land Revenue Act have not been taken. **A** NAND RAM SINGH *v.* HARI SARAN DAS **296**

——— *Suit for ejectment based on* kirayanama*—Court-fee paid on one year's rent—Question of title.*

Landlord and tenant—concld.

In a suit for ejectment based on a *kirayanama*, containing a condition for ejectment, and filed on Court-fee on only one year's rent, without any prayer for a declaration of title, the Court should not go into the question of title and should only determine whether the relation of landlord and tenant exists between the parties. **A** BHOLA SINGH *v.* BANWARI **350**

——— Suit for rent—Question of title, whether can be determined—Transaction in support of title—Defendant, whether can impeach by way of defence—Separate suit, whether necessary. *See* RENT **369**

——— *Tenancy for fixed period—Holding over—Adverse possession.*

Where a tenancy is for a fixed period and the tenant holds over for 12 years after termination of the tenancy (no new tenancy being created) the landlord's remedy to recover possession is barred and the tenant becomes absolute and complete owner of the property. **N** TUKARAM *v.* GANPAT **1031**

——— *Tenancy in existence—Suit for* khas *possession, whether competent—Declaration of title.*

A landlord has no cause of action to sue for *khas* possession of lands forming part of his tenants' holdings until the tenancies are determined, but he can get a decree declaring his title to the land and giving him possession through the tenants by receipt of rent.

Where a man, whether the owner or merely a tenant, creates a tenancy under him which entitles the tenant to the exclusive use of the land or of the house, as it may be, the man creating the tenancy cannot have any right to actual possession, unless he has by the lease or by agreement with his tenant reserved to himself a right to re-enter and take possession. **C** KUMUDINI DASI *v.* SURENDRABALA DASI **22**

Lease—*Amaldari* lease—Registration. *See* CONSTRUCTION OF DOCUMENT **949**

——— Lesser transferring property leased—Rights and liabilities of transferee—Termination of lease—Lessee, whether can dispute title of transferee. *See* TRANSFER OF PROPERTY ACT, s. 109 **616**

——— Potta *holder, whether lease-holder—Panch Mahals—Naiks, status of.*

The mere fact that a document of title held by certain persons is called a *potta*, and that they executed a *kabuliyat* in similar terms is not conclusive of the question of whether they were mere lease-holders, *i.e.*, farmers of revenue, or were true proprietors paying a *jamabundi* to the overlord. The term "*potta*" might quite appropriately be used for the instrument fixing such *jamabundi*.

The Naiks in Panch Mahals do not possess rights of hereditary proprietorship. **P C** NAYAK VAJESINGJI JORAVARSINGJI *v.* SECRETARY OF STATE FOR INDIA, (1924) A. I. R. (P. C.) 216; (1924) M. W. N. 694; 47 M. L. J. 574; 26 Bom. L. R. 1143; 22 A. L. J. 951; 40 C. L. J. 473; 48 B. 613 **779**

Legal Practitioner—*Professional misconduct—Certificate cancelled—Character reinstated—High Court's duty to give another chance after 7 years.*

If a Legal Practitioner, whose certificate is cancelled for a serious offence in the course of his professional duties, realising the gravity of his offence, makes up his mind for the future to live a straightforward and honest life and the High Court is satisfied that since the cancellation of his certificate, 7 years back, he has honestly endeavoured to reinstate his character, it is the manifest duty of the High Court to give him another chance by cancelling the order debarring him from further practice. **Pat** MATHURA PRASAD SINGH *v.* EMPEROR, 25 Cr. L. J. 1274 **282**

Legal Practitioners Act (XVIII of 1879), s. 13—*Legal Practitioner—Professional misconduct—Leaving client undefended—Pleaders, duties of.*

When in pursuance of a resolution of the Bar Association to boycott a Magistrate's Court, a Pleader throws out his client's brief and leaves him in the lurch without first obtaining his consent, he is guilty of professional misconduct and an arrangement made with his client subsequent to his failure to appear would not absolve him from the liability.

Pleaders have duties and obligations to their clients in respect of the suits and matters entrusted to them which are pending in different Courts, in addition to their duties to co-operate with the Court in the orderly and pure administration of justice. **R A** PLEADER, *In the matter of*, 2 R. 265; (1924) A. I. R. (R.) 320; 25 Cr. L. J. 1352 **712**

Letters Patent, (Cal.), 1865, cl. 41—*Leave to appeal to His Majesty in Council—Judgment, order or sentence passed by High Court in criminal appeal—Limitation Act (IX of 1908), Sch. I, Art. 181.*

The High Court has no power to grant leave to appeal to His Majesty in Council from its judgment, order or sentence pronounced in a Criminal appeal; nor is a person aggrieved by such judgment, order or sentence entitled to invite the High Court to give him leave to appeal to His Majesty in Council, either under clause 41 of the Letters Patent or under any other provision of the law.

Quære.—Whether the period applicable to an application for leave to appeal to His Majesty in Council from the judgment, order or sentence passed by the High Court in a criminal appeal is not three years under Art 181, Sch. I, Limitation Act. **C** BILLINGHURST *v.* EMPEROR, 33 C. L. J. 406; (1924) A. I. R. (C.) 338; 25 Cr. L. J. 1371 **763**

Limitation—Mortgage decree for sale of properties and for recovery of balance from person of mortgagor—Execution of latter part of decree—Limitation. *See* CIVIL PROCEDURE CODE, s. 48 **827**

Limitation Act (IX of 1908), s. 5—*Appeal filed beyond time—Delay due to Pleader's clerk—Sufficient cause—Extension of time.*

A mistake of the clerk of the Counsel engaged in a case resulting in the filing of an appeal after the expiry of the period of limitation does not stand on a higher plane than a mistake of a party

and is not sufficient for extension of time under section 5 of the Limitation Act. O GANESH DAT *v.* HIRDE BIHARI 484

——— **s. 5**—*Appeal filed in wrong Court*—Bona fide *mistake—Presumption—Extension of time.*

Where an appeal is filed in the wrong Court and prosecuted there without objection on the part of the Court or any of the parties, the mistake must be taken to be a *bona fide* one, until the contrary is shown, and the appellant must be given the benefit of section 5 of the Limitation Act. A CHOB SINGH *v.* DARYAI SINGH, (1924) A. I. R. (A.) 573 & 915 594

——— **s. 5**—*Appeal—Incomplete judgment filed —Extension of time.*

The appellant filed with the appeal a copy only of the final judgment under appeal but did not file a copy of the order referred to therein as forming part thereof until he was called upon to do so by the office which was after the expiry of the period of limitation :

Held, (1) that the appellant ought to have filed a copy of the previous order along with the appeal and the judgment as filed was incomplete ;

(2) that under the circumstances of the case, time could be extended under section 5 of the Limitation Act. L KHAN MOHAMMAD KHAN *v.* NUR JAHAN BEGAM, 6 L. L. J. 340; (1924) A. I R. (L.) 731 609

——— **s. 6**, applicability of. *See* HINDU LAW —JOINT FAMILY 307

——— **s. 7**—*Civil Procedure Code (Act V of 1908), O. XXXII, r. 6—Decree obtained by Hindu father and minor sons—Discharge by father—Execution application—Limitation.*

Where a Hindu father and his minor sons (suing through their father as their next friend and guardian) obtain a decree, section 7 of the Limitation Act applies to an application for execution of the decree, inasumch as, the father cannot give a discharge without the leave of the Court under O. XXXII, r. 6 of the Civil Procedure Code. M LAKSHMANAN CHETTY *v.* SUBBIAH CHETTY, 20 L. W. 342; 47 M. L. J. 389; (1924) M. W. N. 773 785

——— **s. 14**—Plaint originally presented within time—Return for presentation to proper Court—Suit time-barred—Amendment of plaint showing exemption from limitation, whether necessary. *See* CIVIL PROCEDURE CODE, O. VII, R. 6 866

——— **s. 15**—*Execution of decree—Petition for insolvency by judgment-debtor—Exclusion of time spent in insolvency proceedings.*

The mere presentation of an insolvency application by the judgment-debtor does not prevent execution of the decree.

In order to bring section 15 of the Limitation Act into operation it is necessary that execution shall have stayed by an injunction or order. A RAM BHAROSAY *v.* SOHAN LAL, (1924) A. I. R. (A.) 707 1

——— **s. 19**—*Acknowledgment—Construction.*

The question whether a statement by a debtor is an acknowledgment of debt within the meaning of section 19 of the Limitation Act is one that has to be considered on the merits and having regard to the exact language used.

A statement by a debtor was as follows:—"The debt due to the creditor *K B* was a mortgage debt. It ripened into a decree. He gave me a letter that he would proceed against the mortgaged properties only and would not proceed against my person." At the end were these words, "these debts were due by me along with others but they were paid by me alone. I, therefore, owe no debts to any of my creditors":

Held, that the statement only meant there was no claim against the person of the deponent but there was a clear admission of the existence of a debt which amounted to an acknowledgment within the meaning of section 19, Limitation Act. M TALLAPRAGADA SATYANARAYANA MURTHY *v.* MADDU RAMIREDDY, 20 L. W. 562; (1924) M. W. N. 877 (1924) A. I. R. (M.) 856 933

——— **s. 19**—*Mortgage-debt—Acknowledgment by female heir and trespasser, whether good.*

An acknowledgment of a mortgage-debt by a limited female heir does not extend limitation as against the reversionary owner, much less does a renewal mortgage by a trespasser extend it. N LAXMI *v.* VENKATRAO 1052

——— **s. 20, Sch. I, Art. 182**—*Payment out of Court towards decree—Step-in-aid of execution —Payment not certified, effect of.*

A payment out of Court towards a decree does not give a fresh start to limitation under Art. 182 (5) of Schedule I to the Limitation Act. It is not the payment but the application to certify it which constitutes a step-in-aid of execution.

Where the decree-holder when applying for execution wishes to rely upon section 20 of the Limitation Act, the fact he has not certified the payment until making his application is by itself no obstacle. M NARAYANAN NAIR *v.* RAMAN NAIR, 20 L. W. 190; (1924) M. W. N. 674 743

——— **s. 23, Sch. I, Arts. 36, 37, 39**—*Tank closed—Crops damaged—Suit for compensation—Continued obstruction—Limitation, operation of.*

A suit for compensation for injury caused to crops by the closing of the main sluice of a tank is governed by Art. 39 and not Art. 36 of the Limitation Act, and if it is alleged by the plaintiff that the obstruction caused continued and he was prevented from removing it by threats of violence, it is a continuing wrong and under Art. 37 read with section 23 of the Limitation Act, the suit would be within time if brought within three years of the last day to which the wrong continued. N SONA PATIL *v.* LAXMAN 482

——— **s. 25**—*Computation of time—'Month,' meaning of—Principle applicable.*

If the starting point is to be calculated, as so many months or so many years from a particular date, that point must be calculated according to the Gregorian calendar. On the other hand, if the starting point is otherwise fixed by the stipulation itself, the Court cannot apply section 25 of the Limitation Act. Really it is a matter of interpretation in every case. A ROSHAN LAL *v.* BASHIR AHMAD, 22 A. L. J. 902; 10 O. & A. L. R. 1302 330

Limitation Act—contd.

——— **Sch. I, Art. 11A**—Auction-purchaser—Delivery of possession—Obstruction—Suit for recovery of possession—Limitation. *See* CIVIL PROCEDURE CODE, O. XXI, R. 95 **865**

——— **Art. 14,** application of—Suit to restrain Collector — Limitation. *See* BOMBAY REVENUE JURISDICTION ACT, S. 4 (*a*) **577**

——— **Arts. 36, 37, 39**—Tank closed—Crops damaged—Suit for compensation—Continued obstruction—Limitation, operation of. *See* LIMITATION ACT, S. 23 **482**

——— **Art. 47**—Proceedings under section 145, Criminal Procedure Code—Civil suit—Limitation. *See* CRIMINAL PROCEDURE CODE, S. 145 **691**

——— **Arts. 64, 65, 115,** *applicability of—Account in terms of grain—Suit to recover value of grain—Limitation.*

Article 64 of Schedule I to the Limitation Act can apply only where the money found to be due is a definite sum entered in the account-books of the plaintiff.

Where a suit is based on an account which is kept throughout in terms of grain, the article applicable is Art. 65 or Art. 115 and not Art. 64 of Schedule I to the Limitation Act. **L** RAM *v.* GAMAN RAM, (1923) A. I. R. (L.) 465 **91**

——— **Art. 75**—*Waiver.*

If a creditor simply sleeps on his right and does nothing for three years, it cannot be implied from this that he had agreed to waive his right to recover the whole amount of the bond, which accrued to him when the default occurred. **B** GANPAT BALAJI *v.* NARAYAN SAWALIRAM, (1924) A. I. R. (B) 301 **203**

——— **Arts. 91, 144**—*Suit to recover possession of property on allegation that certain transfer is inoperative—Limitation.*

A suit to recover possession of immoveable property on the allegation that a deed of transfers executed in favour of the defendant was inoperative and a mere paper transaction is governed by Art. 144 and not by Art. 91 of Schedule I to the Limitation Act. **B** SANGAWA *v.* HUCHANGOWDA, 25 Bom. L. R. 1207; 48 B. 166; (1924) A. I. R. (B.) 174 **533**

——— **Art. 115,** applicability of—Account in terms of grain—Suit to recover value of grain—Limitation. *See* LIMITATION ACT, SCH. I, ART. 64 **91**

——— **Art. 132.** *See* MORTGAGE — (ENGLISH)—REDEMPTION **399**

——— **Art. 132**—Prior and puisne mortgagees—Each suing without other — Puisne mortgagee's rights—Redemption—Limitation—Starting point. *See* MORTGAGE **864**

——— **Art. 132** — *Unpaid purchase-money, suit for—Date of payment postponed—Limitation, operation of.*

A claim for unpaid purchase-money is governed by Art. 132 of Schedule I to the Limitation Act and the starting point of the period of limitation is the date of sale and not the date to which the payment of the purchase-money is postponed.

A lien for unpaid purchase-money is a statutory charge and parties cannot extend the time given by law for the enforcement of such a charge by simply putting off the date of payment.

It is however open to them to create a charge by a proper document and fix a period for the payment of the amount due. **M** AUTHINARAYANA IYER *v.* KRISHNASWAMY IYER, 20 L. W. 484; (1924) M. W. N. 755; (1924) A I. R. (M.) 854 **481**

——— **Sch. I, Art. 144**—Suit to recover possession of property on allegation that certain transfer is inoperative—Limitation. *See* LIMITATION ACT, SCH. I, ART. 91 **533**

——— **Art. 147.** *See* MORTGAGE — (ENGLISH)—REDEMPTION **399**

——— **Art. 166,** *scope of—Rent-decree—Sale in execution—Application to set aside sale—Bengal Tenancy Act (VIII of 1885), s. 173—Limitation—Legislation, policy of.*

Article 166 of Sch. I to the Limitation Act is quite general in its terms and governs all applications to have an execution sale set aside.

An application under section 173, Bengal Tenancy Act, is cognizable under section 47, Civil Procedure Code, and is, therefore, governed by Art. 166 of Sch. I to the Limitation Act.

The policy of the Legislature is that questions arising in execution should be brought before the Courts and decided without the least possible delay. **C** HARIPADA HALDAR *v.* BARADAPROSAD ROY **322**

——— **Art. 181**—Leave to appeal to His Majesty in Council—Judgment, order or sentence passed by High Court in criminal appeal—Limitation. *See* LETTERS PATENT (CAL.), CL. 41 **763**

——— **Art. 182**—Payment out of Court towards decree—Step-in-aid of execution—Payment not certified, effect of. *See* LIMITATION ACT, S. 20 **743**

——— **Art. 182 (5)**—*Payment of process fee for arrest warrant without application therefor—Step-in-aid of execution.*

The mere payment of process fee for issue of a warrant of arrest in execution of a decree without a formal application, oral or written, for the issue of such warrant is not a step-in-aid of execution so as to save limitation. **M** ARUNACHALAM CHETTIAR *v.* LATCHMANAN CHETTIAR, 47 M. L. J. 537; 20 L. W. 713; (1924) M. W. N. 840; (1924) A. I. R. (M.) 906 **497**

Lower Burma Land and Revenue Act (II of 1876), Rules under, rr. 51, 69—*Possession of waste land in anticipation of sanction—Liability for payment of revenue and ejectment—Trees planted by would-be grantee—Grant refused—Would-be grantee ordered to remove trees—Failure to remove trees—Occupation—Grazing ground.*

A person who is given possession of some State waste land and brings into cultivation

Lower Burma Land and Revenue Act—concld.

is liable under r. 51, of the Rules made under the Lower Burma Land and Revenue Act, to pay revenue and is also liable to ejectment but he cannot be ordered by the Revenue Authorities to remove the trees planted by him on the land and the mere fact that such trees remain on the land after it is constituted a grazing ground and he is ejected therefrom does not constitute occupation of the grazing ground by him and, therefore, he is not punishable under r. 69 of the said Rules. **R** MAUNG PE *v.* EMPEROR, 3 Bur. L. J. 73; (1924) A. I. R. (R.) 289; 25 Cr. L. J. 1264 **272**

Madras City Tenants' Protection Act (III of 1922), ss. 2 (3), 9—*Trustee—Landlord—Idol—Construction of Statutes.*

Section 9 of the Madras City Tenants' Protection Act applies to landlords who hold their lands as trustees of a religious institution.

Per *Coutts-Trotter, C. J.*—It is wrong to seek to control a Statute, which is obviously intended to overrule the ordinary law, by general considerations imported from the Hindu Law or what is called the Common Law of India.

Per *Ramesam, J.*—An idol of a temple can be a landlord within the definition of the term "landlord" in section 2, sub-section (3), Madras City Tenants' Protecton Act. **M** DORAIVELU MUDALIAR *v.* NATESA GRAMANI, 20 L. W. 165; 47 M. L. J. 211; 47 M. 761 **445**

——— **s. 9**—*Tenant against whom decree has been passed but not executed, whether entitled to apply for sale.*

A tenant against whom a decree has been passed but not executed is a "tenant against whom a suit in ejectment has been instituted" within the meaning of section 9 of the Madras City Tenants' Protection Act and he is, therefore, entitled to apply for sale, under the section. **M** OOMER SAHIB *v.* GOPAUL, 47 M. L. J. 350; 20 L. W. 444; (1924) M. W. N. 687; 47 M. 813 **454**

Madras Estates Land Act (I of 1908), ss. 3 (5), 6, 8—Kudivaramdar, *acquisition of* melwaram *rights by*—Kudivaram *rights, if lost*—*"Land-holder," meaning of—Suit for possession—Jurisdiction of Civil Courts.*

When a *kudivaramdar* gets by transfer or otherwise the *melwaram* interest in the land, he does not lose his *kudivaram* interest thereby, and the persons who were in occupation of the lands as tenants under him as *kudivaramdar* do not become "*raiyats*" and do not get *kudivaram* rights automatically transferred to them by the transfer of *melwaram* rights to him.

Such a *kudivaramdar* is not a "land-holder" within the meaning of section 3 (5), Madras Estates Land Act, and a suit by him in ejectment against the tenants in possession can be tried by a Civil Court.

Section 8 of the Madras Estates Land Act must be read subject to the Explanation to section 6 of the Act. **M** GANJAM MANIKYAMBA *v.* PASALA MALLAYYA, 20 L. W. 387; 47 M. L. J. 393; (1924) M. W. N. 779; (1924) A. I. R. (M.) 782 **929**

——— **s. 6**—*Yearly tenancy*—Waram, *payment of—Tenants, whether can convert themselves into occupancy* ryots—Kamatam *land—Rights of occupancy, whether can be acquired.*

Tenants paying *waram* under a yearly tenancy cannot convert themselves into permanent occupancy *ryots* by a mere assertion that they hold the land under such a right.

No rights of occupancy can be acquired in *kamatam* land by virtue of section 6 of the Madras Estates Land Act.

Quære.—Whether a tenant can acquire by adverse possession a title to permanent occupancy right by denying the landlord's title and by not paying rent to him. **M** PALANI NAYAKKAN *v.* PARVATI AMMAL **597**

——— **s. 125**—*Rent sale of holding—Encumbrances, whether operative—Decree on mortgage of occupancy holding—Subsequent rent sale—Purchase by landlord—Occupancy rights not determined by legal proceedings—Execution of mortgage-decree—Mortgagee, rights of.*

Under section 125 of the Madras Estates Land Act, under a sale for arrears of rent, the purchaser takes subject to any encumbrance created before the passing of the Act.

Where under a mortgage of occupancy rights, created before the Madras Estates Land Act, the mortgagee obtains a decree, and subsequently the landlord brings the holding to sale under a rent-decree, but does not put an end to the occupancy rights of the defaulter by any real and legal proceedings under his rent sale, and the occupancy tenancy is still in the holding and possession of the defaulter when the mortgagee executes his decree and obtains possession, his rights under the Court sale cannot be interfered with by the landlord's rights under the rent sale. **M** SUNDARAMMAL *v.* PRAYAGA DOSJEE VARU, (1924) M. W. N. 670; (1924) A. I. R (M.) 918 **721**

Madras Hereditary Village Offices Act (III of 1895), ss. 13, 21—*Jurisdiction of Civil Court—Suit by alienee from office holder, whether barred.*

Section 21 of the Madras Hereditary Village Offices Act, must be read with section 13 of the Act. The jurisdiction of the Civil Court is taken away only in those cases in which it is conferred on the Revenue Court by section 13.

A lessee from the holder of enfranchised service *inam* lands is a mere alienee and is not debarred by section 21 of the Madras Hereditary Village Offices Act from maintaining a suit in the ordinary Civil Courts. **M** SAHADEVA REDDI *v.* LINGAPPA ASARI, 20 L. W. 451; (1924) W. M. N. 833; (1924) A. I. R. (M.) 867 **942**

Madras Hindu Transfers and Bequests Act (I of 1914), s. 2, *scope of—Retrospective effect—Will—Bequest in favour of unborn son of daughter—Birth and death of son before vesting, effect of—Construction of Will—Bequest, whether valid—"Disposition," meaning of.*

A testator who died in 1877 by Will executed in English a few months before death gave certain property to his wife and daughter with rights of survivorship to each other. The Will

further provided that if his daughter did not beget male issue in her lifetime, the property given to the wife and daughter was after their lives to go to his brother and his male heirs. If a male was born to the daughter, it was to *inherit* the real property given to them. A son was born to the daughter in 1881 but died after living for a day. The widow died in 1903 and the daughter in 1918. In a suit for possession by the sons of the testator's brother against the son-in-law of the testator who claimed the property as the heir of his deceased child :

Held, (1) that after the death of the testator's widow his daughter took an estate for life;

(2) that there was no intestacy of the remainder;

(3) that the word "*inherit*" used in the Will did not indicate that the daughter's sons were intended to succeed as on an intestacy after the daughter's death;

(4) that the daughter's sons were intended to be devisees under the Will, and to take a contingent remainder, which would be converted into a vested remainder after the birth of the daughter's first son, subject to its diminution as the number of daughter's sons was augmented by further births ;

(5) that no child having been born to the daughter during the testator's lifetime, the disposition in favour of the daughter's son was, however, void, and there being no vesting of any estate in or after 1914 to be validated, the Madras Hindu Transfers and Bequests Act was inapplicable and the disposition was not validated thereby.

Per *Ramesam, J.*—The Madras Hindu Transfers and Bequests Act is not declaratory in the sense that it declares what the law always was. Still it is certainly intended to be retrospective.

The words "come into operation in section 2 clause (2) of the Madras Hindu Transfers and Bequests Act are intended to include all cases of vesting after the Act, though the testator died before the Act.

The Madras Hindu Transfers and Bequests Act applies to all Wills made after it and to all Wills made before it, when the testators die after it.

When the testator dies before the Act :—

(*a*) If the vesting is *after the Act* and the legatee lives up to the termination of the preceding estate the Act applies.

(*b*) If the vesting is *after the Act* the Act will apply even though the legatee died before the termination of the preceding estate.

(*c*) If the vesting is *before the Act*, still the Act will apply if the devisee survives until after termination of the preceding estate.

(*d*) If the vesting is *before the Act*, and the devisee lives until after the Act, but may not or does not live until the termination of the preceding estate, the Act will apply to him and he will transmit the vested estate to his heirs.

(*e*) But when the vesting was *before the Act* and the devisee does not live upto the termination of the preceding estate nor even upto beyond the date of the passing of the Act so as to give an opportunity for the Act to operate upon his *contingent and void* estate and convert it to a vested and valid estate, the Act does not apply.

All that the Act does is, that it validates certain dispositions which, but for it, would be void. But one has to stop its application when the application sought is not the mere validation of a disposition but involves the transmission by inheritance of the interest which never existed upto the time of the succession.

Per *Jackson, J.*—"Disposition" is a word of most general import and includes distribution.

There is nothing in the language of the Madras Hindu Transfers and Bequests Act to give it such comprehensive character as to make it applicable to every disposition in a Will executed before it. **M** SIVARAMA AIYAR *v.* GOPALAKRISHNA CHETTIAR, 47 M. L. J. 337 **1044**

Madras Land Encroachment Act (III of 1905), ss. 6, 14—*Notice to quit—Possession not disturbed—Limitation, when commences—"Deeming themselves aggrieved by proceedings", what amounts to.*

A person who has had notice of eviction from the Government under section 6 of the Madras Land Encroachment Act but continues to remain in undisturbed possession cannot be held to have been evicted so as to render the period of limitation under section 14 of the Act applicable to a suit by him against the Government. Where there are a series of proceedings against the person under the Act, being mere notices without any further attack against his title and enjoyment, it is open to him to choose the last of such proceedings and "deem himself aggrieved" by that and not by the earlier proceedings.

The mere fact that such a person applied to review an earlier notice to quit does not necessarily show that he deemed himself aggrieved by the notice when he does not allege it in his plaint as his cause of action. **M** KUMMATI VEETTIL *v.* SECRETARY OF STATE FOR INDIA, 20 L. W. 288; 47 M. L. J. 379; (1924) M. W. N. 765; (1924) A. I. R (M.) 825 **414**

Madras Local Boards Act (V of 1884), s. 73—*Licensee to tap trees under* Inamdar *if "tenant"—Liability to pay land-cess.*

A licensee under the holder of an *inam* in a *zemindari* for a period of years of the right to tap trees in the *inam* lands is not a "tenant" within the meaning of section 73 of the Madras Local Boards Act so as to render him liable to his licensor for the land-cess payable by the latter under the Act. **M** CHINTAKAYALA KAMMAIAH NAIDU *v.* ATHITI MUSALIAH, 20 L. W. 453; 47 M. L. J. 383; (1924) M. W. N. 769; (1924) A. I. R. (M.) 818 **391**

Maintenance deeds, construction of—Gift with "absolute rights." *See* REGISTRATION ACT, s. 49 **67**

——— —, meaning of—"Educational expenses," whether come within "maintenance". *See* CRIMINAL PROCEDURE CODE, s. 488 **257**

———, order for, form of—Magistrate, whether can direct separate residence for wife. *See* CRIMINAL PROCEDURE CODE, s. 488 **279**

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———, right to. *See* HINDU LAW—MITAKSHARA 886

———, widow's right of—Charge on joint property. *See* HINDU LAW—WIDOW 653

Malabar tarwad—*Maintenance grant—Encumbrance by grantee prohibited—Encumbrance effected against prohibition*—Tarwad, *whether liable for encumbrance on grantee's death.*

If the member of a Malabar *tarwad* is given *tarwad* property for his life with an express prohibition against encumbering it, and he encumbers it, after his death, the *tarwad* is not liable for the encumbrance. M THITHI KUTTI *v.* NELLAYA VARIATH, (1924) M. W. N. 526 183

Malicious prosecution—*False charge before Police—Setting law in motion—Liability, test of—Conduct of complainant before and after charge—Damages, measure of.*

If a complainant does not go beyond giving what he believes to be correct information to the Police, and the Police without further interference on his part, except giving such honest assistance as they may require, think fit to prosecute, it is improper to make him responsible in damages for the failure of the prosecution.

On the other hand if the charge is false to the knowledge of the complainant, if he misleads the Police by bringing suborned witnesses to support it, and if he influences the Police to assist him in sending an innocent man for trial before the Magistrate, it is improper to allow him to escape the liability because the prosecution has not technically been conducted by him.

The mere setting of the law in motion is not the criterion in deciding who the prosecutor is. The conduct of the complainant before and after making the charge must also be taken into consideration.

The foundation of an action for malicious prosecution is malice, and malice may be shown at any time in the course of the inquiry.

A prosecution, though at the outset, not malicious, as having been undertaken at the dictation of a Judge or Magistrate, or if spontaneously undertaken, from having been commenced under a *bona fide* belief in the guilt of the accused, may nevertheless become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired positive knowledge of the innocence of the accused, perseveres *malo animo* in the prosecution with the intention of procuring *per nefas* a conviction of the accused.

An award of all legitimate expenses incurred by a successful accused person for his or her defence and for establishing his or her innocence in criminal cases, is always justifiable as those expenses are the direct and necessary consequences of the false and malicious prosecution. N VITHOBA *v.* BHIMAI 1014

Mandamus, writ of—High Court, discretion of—Writ, whether can be granted *ex debito justitiæ*—Application for writ, contents of—Remedy, whether summary—Legislative Councils, procedure of—President, powers of—Writ, whether can be issued to President to exercise his powers in particular way. *See* SPECIFIC RELIEF ACT, s. 45 374

Marumakkathyam Law—*Partnership—Malabar* tavazhi—Tavazhi *property, investment of, in partnership with stranger—Individual* tavazhi *members, if partners—Surrender of property by* karnavan—*Alienation—Right of junior members to follow property—Dissolution of partnership—Junior member's right to sue for accounts.*

Where the property of a Malabar *tavazhi* is invested in partnership trade with a stranger, the *karnavan* of the *tavazhi* is the trading partner and represents the interests of the joint family. In such a case each member of the *tavazhi* does not himself become a partner and would have no right to interfere with the management of the affairs of the partnership so long as it is a joint concern.

But the *karnavan* has no right without the consent of the adult members to surrender the interests of the *tavazhi* without any consideration, as such an act amounts to an alienation of *tavazhi* property; and as he is in a fiduciary position, the junior members thereof are entitled to follow the *tavazhi* property into the hands of those in whose favour it has been alienated.

Where the partnership of the *tavazhi* with the stranger has been dissolved by the death of the latter, a suit by the junior members for an account of the partnership and recovery of the property wrongly alienated is not unsustainable merely because plaintiffs were not members of the partnership. M OTTAPURAKKAL THAZHATH SOOPI *v.* KOOTHALANTAVIDA PARKUM CHAKKAN ABDULLA, 20 L. W. 390; 47 M. L. J. 554; (1924) M. W. N. 782; (1924) A. I. R. (M.) 909 198

Master and servant—*Neglect of duty—Incompetence—Dismissal without notice.*

It is open to a master, before the expiry of the full term of service and without serving any notice beforehand, to dispense with the services of a skilled servant employed for a particular work, on the ground that he found him unfit for it.

There is no difference in principle between a dismissal for incompetency or for negligence or misconduct. There is no fixed rule of law defining the degree of misconduct which will justify a dismissal. Of course there may be misconduct in a servant which will not justify the determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfilment of the express or implied conditions of service will justify dismissal. Similarly even a single act of negligence may, in some circumstances, justify a dismissal. In both cases the question is one of fact and degree depending on the circumstances of each particular case.

Where a skilled labourer, artizan or artist is employed there is on his part an implied warranty that he is of skill reasonably competent to the task he undertakes—"*Spondes peritiam artis*".

If a master can show that he has a good cause for dismissing his servant, he may dismiss him notwithstanding that the contract or agreement between them is for a fixed period, and it is not necessary for him to go through the form of suing for the cancelment of the engagement. N PANDURANG *v.* JAIRAMDAS 727

Minor—*Assignment of debt in favour of minor—Consideration, payment of—Minor, whether can sue.*

A minor is not precluded from suing on an assignment of a debt in his favour when the consideration for it has been paid for in full to the assignor. L THAKUR DAS *v.* PUTLI, 5 L. 317; (1924) A. I. R. (L.) 611 **96**

——— *Decree against minor, whether binding—Prejudice, question of, whether material—Civil Procedure Code (Act V of 1908), O. XXII, r. 6, scope of—Death of party after hearing and before judgment—Decree against minor representative—Abatement of suit, if prevented—Procedure, rules of—Breach, effect of.*

A decree passed against a minor is null and void, and is liable to be set aside at the instance of the minor.

In such a case the Court is not concerned with the question whether the minor has or has not suffered any prejudice by the decree.

Per *Dalal, J.*—Order XXII, r. 6 of the Civil Procedure Code covers cases where the Court is unaware of the death of a party and proceeds on the assumption that the parties are alive. It has no reference to a decree passed against a living person, a minor brought on the record as the legal representative of a deceased party.

Where the record of a suit itself shows that a minor is wholly unrepresented, or that he is represented by a guardian disqualified from acting as such a guardian under the express provision of a Statute, the result is that the minor is not properly a party to the suit, and a judgment rendered against the minor is without jurisdiction and null and void. But where he is properly a party to the suit—and as he is properly a party if he is represented in the record by a guardian not disqualified from acting—the jurisdiction of the Court to try and determine the cause as against the minor is complete, and such jurisdiction will not be ousted on proof that the Court did not follow the appropriate procedure for the appointment of the guardian.

Per *Mukerjee, J.*—Where a minor has been substantially represented and has not been prejudiced in the litigation, it is not open to him to obtain the relief of a declaration that the decree is not binding on him.

The objective law, namely the law of procedure, is merely a hand-maiden to justice and where substantial justice has been done a breach of a rule of procedure cannot by itself be a ground for a suit.

Where there is no prejudice, there is no grievance to be redressed. The mere fact that there has been a defect in following the procedure cannot be made a matter of grievance and there can be no redress.

A decree, however proper it may be, passed against a person who is already dead can be of no effect against the estate of the deceased and is a mere nullity.

In principle, there is nothing to differentiate the case of a decree passed against a dead man from a decree passed against a person who is suffering from the disability of minority without

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having a person appointed to look after his interest. A CHAMPI *v.* TARA CHAND, 22 A. L. J. 655; (1924) A. I. R. (A.) 892; 46 A. 744 **516**

——— Parties to arbitration—Award, how far binding. *See* ARBITRATION **219**

——— *Specific performance—Agreement for sale of immoveable property by guardian—Benefit of minor—Subsequent better terms, effect of.*

A decree for specific performance can be passed in certain circumstances against a minor on a contract entered into by his guardian.

Specific performance of a valid agreement by a guardian, for sale of immoveable property belonging to a minor at a price proper and adequate at the time of the agreement, cannot be refused merely because subsequently some body else is prepared to offer a better price for the property. M KASIVASI CHIDAMBARA SWAMIGAL *v.* RAMAKRISHNA REDDIAR, 20 L. W. 559; 47 M. L. J. 683; (1924) M. W. N. 878; (1924) A. I. R. (M.) 863 **926**

Mortgage by conditional sale—Suit for foreclosure—Year of grace expiring after passing of Punjab Alienation of Land Act—Act, whether applicable. *See* PUNJAB ALIENATION OF LAND ACT, s. 9 **987**

——— decree—Error in description of property—Jurisdiction of Court to rectify error. *See* TRANSFER OF PROPERTY ACT, s. 89 **297**

——— Decree, form of—Mortgage suit—Preliminary decree for foreclosure—Decree not in accordance with judgment, effect of—Subsequent proceedings, whether valid. *See* CIVIL PROCEDURE CODE, O. IX, R. 13 **184**

——— *Decree on prior mortgage without impleading puisne mortgagee—Fresh mortgage to discharge decree—Suit by last mortgagee—Subrogation—Priority—Civil Procedure Code (Act V of 1908), s. 47, whether bars suit.*

Where to discharge a decree on a prior mortgage in a suit brought without impleading the puisne mortgagee as a party, the mortgagor executes a third mortgage, the third mortgagee is entitled to priority over the puisne mortgagee and section 47, Civil Procedure Code, is not a bar to a suit brought by him to enforce his mortgage. M AVUDAI AMMAL *v.* CHINNA RAMASAMI NAICK, 20 L. W. 651 **846**

——— Dispossessed mortgagee, suit by—Section 9, Specific Relief Act (I of 1877), whether applies. *See* SPECIFIC RELIEF ACT, s. 9 **324**

——— *Forfeiture clause—Adverse possession by mortgagee—Suit for redemption.*

A mortgagee's possession under the clause, "if interest is not paid in any year the mortgagee shall take over the land as owner" is as owner and adverse to the mortgagor and if it exceeds 12 years, it bars a suit for redemption. R MG. SAN CHEIN *v.* MA DAUNG U, 3 Bur. L. J. 95; (1924) A. I. R. (R.) 290 **829**

——— Mortgaged land—Government waste adjoining—Mortgagee, cultivation by—Land capable of separate enjoyment and use—Waste

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whether accretion—Mortgagor, whether can sue for redemption. *See* TRANSFER OF PROPERTY ACT, s. 63 **787**

——— of non-transferable rights, validity of. *See* AGRA TENANCY ACT, s. 20 **289**

——— *Prior and puisne mortgagees—Each suing without other—Puisne mortgagee's rights—Redemption—Limitation—Starting point—Limitation Act (IX of 1908), Sch. I, Art. 132.*

When two mortgagees bring suits each suing without making the other mortgagee a party, the rights of either mortgagee are not affected by the suit brought without making the other party. Where one of them purchases the property in such a suit, his purchase does not give him a fresh starting point of limitation to redeem or sell the property. **M** BITRAGUNTA APPAYYA *v.* ADDANNKI VENKATARAMANAYYA, 20 L. W. 620 **864**

——— Prior mortgagee obtaining foreclosure decree—Puisne mortgagee's remedy. *See* TRANSFER OF PROPERTY ACT, s. 74 **77**

——— *Profits in lieu of interest—Stipulation to pay fixed sum as* malikana*—Mortgagee, whether liable to account—Transfer of Property Act (IV of 1887), s. 77.*

The principal terms of a mortgage-deed were that the mortgagees were to take possession and to receive the profits in lieu of interest, but they were to pay to the mortgagors an annual sum of Rs. 25 described as *malikana*. In a suit for redemption of the mortgage:

Held, (1) that the fact that a fixed sum was stipulated every year instead of a variable amount to be determined after calculating the profit or loss of the particular year did not affect the question of the mortgagee's liability;

(2) that the mortgagees were bound to account to the mortgagors for the *malikana* they had undertaken to pay. **A** BEHARI LAL *v.* SHIB LAL, 22 A. L. J. 579; 46 A. 633; (1924) A. I. R. (A.) 591 **25**

——— *(English)—Redemption—*Post diem *interest—Limitation Act (IX of 1908), Sch. I, Arts. 132, 147—Transfer of Property Act (IV of 1882), ss. 58* (d), *76* (h)*—Accounts.*

In a suit for redemption of an English mortgage, in which a definite term is fixed for repayment of the principal and interest, the plaintiffs are bound to pay *post diem* interest up to the date of redemption, after taking credit for sums which the mortgagee got from the mortgaged property during the period he was in possession, unless the terms of the document show that the intention of the parties was that no interest should be paid subsequent to the date when the mortgage-money became due.

The granting of the power of sale in a mortgage is only a remedy which is usually given and the mortgagee is not bound to exercise the power any more than he is bound to sue on the expiry of the due date under the penalty of his losing subsequent interest.

The period of limitation applicable to a suit for redemption or recovery of possession of immoveable property under mortgage is 60 years under Art. 148 of the Limitation Act and liability to pay *post diem* interest is not, therefore, confined to twelve years only under Art. 132.

The Transfer of Property Act only codifies the general principles of equity and section 76 (*h*) applies as to the manner in which accounts are to be taken in regard to an English mortgage, executed before and sought to be redeemed after the Act. **M** AGNES ISABELLA CAMPBELL *v.* AUDIKESAVULU NAYADU, 20 L. W. 153; (1924) A. I. R. (M.) 736 **399**

——— *Redemption—Interest on mortgage, whether charge on property—Mortgagee, whether entitled to recover.*

In the absence of a contract to the contrary, a mortgagee is entitled, in a settlement of his account with his mortgagor, to treat the interest due under the mortgage as a charge on the estate and to realise all interest due under the mortgage within 12 years from the date of suit. **L** BANWARI LAL *v.* KALLU KHAN, 6 L. L. J. 331 **622**

——— *Redemption—Owner of partial equity of redemption—Right to redeem entire mortgage—Safeguarding of rights of others.*

The owner of a partial equity of redemption is entitled to redeem the entire mortgage, subject to the safeguarding of the equal title to redeem of any other person who has a right of redemption. **M** DEYNANTHAKATH *v.* PATINHARAYIL AVULLA **943**

———, suit on—Necessary parties—Non-joinder of all persons interested, effect of—Mortgage-debt, whether may be split up—Mortgaged property, extent of, liability of—Decree proportionate to defendant's share, whether legal. *See* CIVIL PROCEDURE CODE, O. I, R. 9 **638**

——— *Tenancy created in favour of mortgagor by prior mortgagee—Subsequent mortgagee redeeming prior mortgage, whether bound by such tenancy—Tenancy free of rent—Subsequent mortgagee, rights of—Equity.*

Where a prior mortgagee creates a rent free tenancy, over a part of the mortgaged property, in favour of the mortgagor, the subsequent mortgagee is not entitled to obtain cultivating possession of the tenancy land by ousting the mortgagor but he is not bound by the contract exempting the mortgagor from paying rent for the land.

The rule that, "where upon a sale by a first mortgagee the property is brought in by the mortgagor himself, he can only acquire the estate subject to the second mortgage", has no application to a case where the subsequent mortgagee takes his mortgage with full knowledge of the liabilities and risk created under the first mortgage, and actually undertakes to free the property from that mortgage, and still fails to carry out the obligations incurred by him.

A subsequent mortgagee redeeming the prior

Mortgage—concld.

mortgage stands in the shoes of the prior mortgagee and is, therefore, bound by a grant or disposition, as also by the covenants and equities, made by or existing against him and in favour of the mortgagor. **N** AMAR CHAND *v.* SARDAR SINGH **190**

——— *Usufructuary mortgage—Suit for redemption—Mortgagor receiving earnest-money and undertaking to execute sale-deed in favour of mortgagee—Parties, intention of—Interest in lieu of profits—Mortgagor, whether liable to render accounts—Transfer of Property Act (IV of 1882), s. 77.*

A suit for redemption of a usufructuary mortgage was contested on the ground, among others, that the mortgagee had acquired the equity of redemption. It appeared that the mortgagor executed in favour of the mortgagee a document reciting receipt of earnest-money and stating that the mortgagor would execute a sale-deed in respect of the mortgaged property six months before the expiry of the term of the mortgage. The mortgage-deed provided that the mortgagee shall appropriate the property in lieu of interest and shall bear no claim for interest against the mortgagor who in his turn would have no claim for profits against the mortgagee :

Held, (1) that the intention of the parties was not to effect a transfer of property but merely to contract for such a transfer;

(2) that this contract of sale had no effect on the status of parties and they remained after it, as before, mortgagor and mortgagee;

(3) that section 77 of the Transfer of Property Act applied to the case and the mortgagee was not liable to render accounts to the mortgagor. **O** SITLA SAHAI *v.* DHUM SINGH, 10 O. & A. L. R. 655; 11 O. L. J. 543 **406**

——— *Usufructuary mortgagee—Delay in filing suit—Right to claim interest.*

A usufructuary mortgagee by making a delay of some years in bringing the suit for his mortgage money does not debar himself from claiming interest. **O** BASAWAN *v.* NATHA, 10 O. & A. L. R. 857; 11 O. L. J. 452 **747**

Motor Vehicles Act (VIII of 1914), s. 11, *rules framed under—Calcutta Rules, Part II, rr. 3, 16—Driving lorry at excessive speed—Owner of lorry, whether liable.*

Where a particular intent or state of mind is not of the essence of an offence, a master can be made criminally liable for his servant's acts, if an act is expressly prohibited, but not otherwise, and he cannot be so made liable if the act provides for liability for permitting and causing a certain thing, unless it can be shown that the act was done with the master's knowledge and assent, express or implied.

The owner of a motor lorry was prosecuted on the ground that he allowed the driver of the lorry to drive at an excessive speed. It appeared that he was not in the motor lorry at the time of the alleged offence and had cautioned the driver not to exceed the regulation speed and to drive with due care and caution:

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Held, that in the circumstances of the case, having regard to the terms of rule 3 of Part II of the Rules regulating Motor Vehicles in Calcutta, made under section 11 of the Motor Vehicles Act, the owner was not liable. **C** VARAJ LALL *v.* EMPEROR, 28 C. W. N. 854; 51 C. 948; 25 Cr. L J. 1209; (1924) A. I. R. (C.) 985 **137**

Muhammadan Law—*Ancestral and self-acquired property, whether distinguished.*

There is no distinction in Muhammadan Law between self-acquired and ancestral property. **O** ABADI BEGAM *v.* AHMAD MIRZA BEG **691**

——— *Legitimacy—Child born 11 months after father's death—Unchastity of mother—Presumption.*

Assuming that the presumption under the Muhammadan Law that a child born within two years of the conclusion of a valid marriage is to be considered a legitimate child of its mother's husband is binding on the Indian Courts, the presumption is a rebuttable one.

Where, therefore, a Muhammadan is born 331 days or full eleven months after his alleged father's death and it is found that his mother had illicit connection with another man, it is sufficient to rebut the presumption of his legitimacy and to justify the Court in finding that he is not the son of his alleged father. **A** FATTEH DIN *v.* UMRAO, (1923) A. I. R. (A.) 440 **592**

——— Succession—Pathans of Kutel, District Karnal. *See* CUSTOM **609**

Municipal Committee of Pen—*Bye-laws for privies—Bye-law No. 9—Privy erected without permission—Non-compliance with Bye-laws.*

The Bye-law No. 9 of the bye-laws for Privies, made by the Pen Municipal Committee, does not apply where a privy has been erected without the permission of the Committee. In such a case there is no obligation under the said bye-law on the owner to communicate the fact of the completion of the privy to the Chairman, Managing Committee ; nor is he under any obligation not to commence to make use of the privy before obtaining the written order to that effect from the Chairman. The bye-law, as it stands, relates to the privy in respect of which an application has been made under bye-law No. 7, and for which permission has been granted under bye-law No. 8, and not a privy which has been constructed without permission of the Municipality. **B** EZEKIEL MOSES PENKAR *v.* EMPEROR, 26 Bom. L. R. 715; (1924) A. I. R. (B.) 484 **362**

Mutation order, effect of. *See* CRIMINAL PROCEDURE CODE, s. 145 **691**

——— Person entitled to possession, whether determined. *See* CRIMINAL PROCEDURE CODE, s. 146 **170**

Negotiable Instruments Act (XXVI of 1881), ss. 9, 58—*Forged endorsement of instrument, effect of—Holder, whether holder in due course—Negligence of true owner—Contract Act (IX 1872), s. 178—War Bonds, purchase of, through broker—Broker pledging bonds with Bank by*

Negotiable Instruments Act—concld.

forged endorsement—Pledge, validity of—Conversion.

A forged endorsement of an instrument is a nullity and conveys no title to endorsee. It is as much a nullity as a forged cheque or a forged *hundi*, provided there has been no negligence on the part of the true owner in allowing the instrument to come into the hands of the forger. A holder under a forged endorsement is not a holder in due course.

Where a share and insurance broker purchases War Bonds for a customer, but pledges them to secure a personal loan after forging endorsements in his own favour, the true owner cannot be said to be guilty of negligence if he relies upon the statement of the forger to the effect that the instruments are not ready for issue, and takes prompt measures to notify the fraud and recover the instruments when he comes to know of the forgery.

Possession of War Bonds by a share and insurance broker which come to him in the course of business for handing them over to a customer and which he pledges to a Bank for his personal loan after forging endorsements in his favour, is not such juridical possession as will under section 178, Contract Act, give the Bank any title to the bonds as against the customer. In such a case, the Bank cannot hold the bonds against the true owner, and the Bank by accepting them as security for the advance and by resisting the demand of the true owner, is guilty of conversion. **S** KODUMAL KALUMAL *v.* KARACHI BANK, LTD., 15 S. L. R. 93 **730**

——— **s. 43**—*Pro-note—Consideration, failure of—Fraud, effect of.*

Where a seller has no title to property sold a pro-note executed in part payment of the price creates no obligation, notwithstanding that the seller is able to give possession to the purchaser.

Fraud vitiates all agreements and this principle extends to pro-notes which are given on the faith of fraudulent misrepresentation. **L B** MC AYOOB *v.* SOWDAGER, (1923) A. I. R. (R.) 127 **789**

——— **ss. 58, 85**—Forged endorsements, whether confers title. *See* CONTRACT ACT, s. 178, PROVISO **998**

Northern India Canal and Drainage Act (VIII of 1873), s. 70 (12)—*Opening closed outlet, proof of—Irrigation of fields, whether sufficient.*

A person cannot be convicted under section 70 (12) of Northern India Canal and Drainage Act, for opening an outlet closed under the orders of the Canal Authorities, when the only fact against him is that he irrigated his fields with the canal water. **L** SHEO RAM *v.* EMPEROR, (1923) A. I. R. (L.) 603; 25 Cr. L. J. 1199 **63**

Oaths Act (X of 1873), s. 11—*Special oath—Conclusive proof of statement made—Statement can be proved to be false.*

The evidence given under section 11 of the Oaths Act is not conclusive proof of the matter stated, but is conclusive proof of the matter stated as against the person who offers to be bound by the special oath. Therefore, it can be proved that a statement made on a special oath

Oaths Act—contd.

was false, and false to the knowledge of the person making it. **B** RAMDAS VISHNUDAS *v.* EMPEROR, 26 Bom. L. R. 713; (1924) A. I. R. (B.) 511; 25 Cr. L. J. 1287 **359**

Oudh Estates Act (I of 1869), ss. 15, 22—Talukdari *estate—Primogeniture, entry of—Estate taken out of Act—Custom of primogeniture — Succession, how governed* — Gaddinashini—*Females, succession of.*

Where a *talukdari* estate governed by the Oudh Estates Act, and recorded in list II of the Act, as an estate ordinarily devolving upon a single heir, is, by operation of section 15 of the Act, taken out of the provisions of the Act, the incident of single heir succession attached to the estate does not come to an end, if the estate was subject to a custom of single heir succession prior to its coming under the operation of the Act.

Succession to an estate removed from the operation of the Oudh Estates Act is governed by personal law as modified by custom of the family.

A family custom may be set up in regard to a property even though it has been withdrawn from the scope of the Oudh Estates Act.

The whole idea of *gaddi-nashini* in Oudh pre-supposes inheritance by a male and not by a female. **O** ABADI BEGAM *v.* AHMAD MIRZA BEG **691**

Oudh Rent Act (XXII of 1886), s. 108, cl. (10)—Muafidar *becoming under-proprietor—Illegal ejectment—Recovery of possession—Interest of* muafidar, *whether assignable—Transferee of* muafi *rights, position of.*

A *muafidar* who has attained the position of an under-proprietor under section 107 H, Oudh Rent Act, can sue his landlord for recovery of possession as an under-proprietor on his ejectment without any process of law.

The interest of a *muafidar* being untransferable, a transferee of such interest does not acquire such a title as he can enforce in a Civil Court. **O** BALA DIN *v.* AJUDHIA, 10 O. & A. L. R. 978 **443**

Partition between family members—One member agreeing to take annuity instead of his share—Stipulation to resume share if annuity not paid—Penalty—Question of law. *See* CONTRACT ACT, s. 74 **751**

——— *Partition of portion of estate—Decree effect of—Question involving title, when should be decided.*

Although co-owners cannot enforce a partition of a part only of the common lands, leaving the rest undivided, and although the entire property must be included in the partition, yet if, by mistake, fraud or like reason, or by consent of the co-owners acting innocently and fairly, a partition of a portion only of their estate has been made, whether by order of the Court or otherwise, there is no reson why the Court should not subsequently grant a division of the remainder at the instance of one or more of the co-owners

The effect of a decree in a partition suit leaves untouched the joint title and possession of the parties in the remainder,

Penal Code—contd.

The law will presume the intention—whether good or bad—from the language and conduct of the accused, and it will be then for him to show that his words were harmless and his motives innocent. **L** JIWAN SINGH *v.* EMPEROR, 6 L. L. J. 379, 25 Cr L. J. 1342 **574**

——— **ss. 143, 144, 379**—*Common object—Theft—Separate sentences.*

Where the common object of an unlawful assembly was theft, the members of the assembly cannot be sentenced separately under sections 379 and 143 or 144, Penal Code. **Pat** PRAYAG GOPE *v.* EMPEROR, (1924) Pat. 247; 5 P. L. T. 571; 3 Pat. 1015; 25 Cr. L. J. 1276 **284**

——— **s. 144,** operation of. *See* PENAL CODE, s. 397 **45**

——— **ss. 147, 148, 149**—Unlawful assembly—Common object. *See* PENAL CODE, s. 97 **156**

——— **ss. 147, 296**—*Common object—Single motive—Series of attacks—One offence.*

A continuous series of attacks made with the same common object by the members of a crowd actuated by a single motive, constitutes a single riot and not a number of separate riots, even though the composition of the crowd may vary.

Where the common object of the members of an unlawful assembly is to insult and attack *tazias* and they commit a riot in prosecution of that object, they commit one offence only and not two and are not liable to be punished separately under sections 147 and 296, Penal Code. **O** PRAG *v.* EMPEROR, 10 O. & A. L. R. 871; 25 Cr. L. J. 1169 **33**

——— **s. 149**—Charge under sections 326, 149, Penal Code—Conviction under s. 326—Legality—Prejudice. *See* CRIMINAL PROCEDURE CODE, s. 233 **465**

——— **ss. 149, 325**—*Riot—Grievous hurt—Accused, liability of.*

In a case of rioting resulting in grievous hurt convictions and separate sentences under section 325 read with section 149 of the Penal Code are legal against all those accused who actually joined in the assaults, though some assaults resulted in simple hurt and others in grievous hurt. **R** NGA SAN MIN *v.* EMPEROR, 3 Bur. L. J. 49; (1924) A. I. R. (R.) 291; 25 Cr. L. J. 1305 **473**

——— **s. 154**—*Owner of land failing to give information of riot—Ingredients of offence.*

Per *C. C. Ghose, J.*—The ingredients necessary for a prosecution under section 154 of the Penal Code are the following:—

(*a*) Unlawful assembly or riot.

(*b*) Accused is the owner or occupier of the land or has or claims to have an interest in the land.

(*c*) Either the accused or his agent or manager knew that the offence was being or had been committed or had reason to believe that it was likely to be committed.

(*d*) With such knowledge that the offence was being or had been committed, or having reason to believe that it was likely to be committed the accused did not give notice to the nearest Police Station.

Penal Code—contd.

(*e*) The accused having reason to believe that the offence was about to be committed, did not use all lawful means in his power to prevent the offence or in the event of its taking place, did not use all lawful means in his power to disperse or suppress the riot or unlawful assembly.

It is not necessary, however, in order to render the owner of land on which a riot takes place criminally liable that he should be aware of the likelihood of such an occurrence and it is enough that his factor or agent should have taken an active part in the riot to warrant the conviction of the owner under section 154, Penal Code.

The very greatest caution is required before proceedings are started against a person under section 154 of the Penal Code. **C** NRIPENDRA BHUSAN *v.* GOBINDA BANDHU, 39 C. L. J. 236: 25 Cr. L. J. 1258; (1924) A. I. R. (C.) 1018 **266**

——— **ss. 182, 211**, *distinction between—Ingredients of offences.*

To constitute an offence under section 182, Penal Code, the information given to a public servant should not only be false in fact but it must be false to the *knowledge* or to the *belief* of the informant and it is not sufficient that the accused had reasons to believe it to be false; whereas, under section 211 it is sufficient if the accused makes his complaint without any just grounds and when he acts without due care or caution. **S** X *v.* EMPEROR, 25 Cr. L. J. 1358 **718**

——— **ss. 182, 211**—"*False report*" *and* "*false charge,*" *distinction between—Intention.*

If the complainant confines himself to reporting what he knows of the facts, stating his suspicions, and leaving the matter to be further investigated by the Police, or leaving the Police to take such course as they think right in the performance of their duty, he may be making a report, but he is not making a charge. But if he takes the further step, without waiting for any official investigation, of definitely alleging his belief in the guilt of a specified person, and his desire that the specified person be proceeded against in Court, that act of his, whether verbal or written, if made to an officer of the law authorised to initiate proceedings based upon the complainant's statement, whether amounting to an expression of the complainant's belief in the guilt of the specified person, or his desire that Court proceedings be taken against him, amounts to making a charge. **A** KASHI RAM *v.* EMPEROR, 22 A. L. J. 829; 10 O. & A. L. R. 918; 25 Cr. L. J. 1239; (1924) A. I. R. (A.) 779 **167**

——— **ss. 186, 189**—*Arrest—Obstruction—Threat of violence—Offence.*

Where a person arrested in execution of a decree refuses to follow the peon who arrests him, and threatens to use violence, the whole occurrence amounts to one offence under section 189, Penal Code, and a conviction for two offences under sections 186 and 189, Penal Code, is not justified. **Pat** JAGARNATH *v.* EMPEROR, 25 Cr. L. J. 1237 **165**

——— **s. 193**—*Application to refer case to Jirga under Frontier Crimes Regulations—Summary enquiry—Proceedings whether judicial—Magis-*

Penal Code—contd.

trate whether can administer oath—Giving false evidence, charge of, whether can be sustained.

A applied to the District Magistrate stating that his son had been murdered by certain persons and asking that the case be referred to a Council of Elders under the Frontier Crimes Regulations of 1901. The District Magistrate directed the Magistrate *Ilaqa* to make a summary enquiry into the case and the Magistrate *Ilaqa* thereupon took the statement on oath of the applicant and his four witnesses. The applicant's story having been found to be false, complaints were framed against him and his witnesses under section 193, Penal Code:

Held, that as the statements of the accused were not taken by the Magistrate in the course of any judicial proceeding and as he had no authority to administer an oath, the accused could not be convicted of giving false evidence under section 193, Penal Code. **L** JAHANGIR *v.* EMPEROR, 6 L. L. J. 375; 25 Cr. L. J. 1350; (1924) A. I. R. (L.) 729 **710**

——— **s. 193**—Perjury—Contradictory statements in civil and criminal proceedings—Alternative charge—Series of acts—Sanction to prosecute—Application to both Courts, whether necessary. *See* CRIMINAL PROCEDURE CODE, s. 195 **59**

——— **ss. 201, 302**—*Murder, charge of—Alternative charge of causing evidence of offence to disappear—Prejudice—Test.*

It is not illegal to charge an accused person first, with having committed a murder, and secondly, in the alternative, if the evidence does not show that he committed the murder, of having been guilty of causing evidence of the offence to disappear, with the intention of screening the offender. The real test is, whether the accused has been prejudiced by the alternative charge made in one trial. **B** HANMAPPA RUDRAPPA *v.* EMPEROR, 25 Bom. L. R. 231; (1923) A. I. R. (B.) 262 **709**

——— **s. 211.** *See* PENAL CODE, s. 182 **718**

——— **s. 211**—"False report" and "false charge," distinction between—Intention. *See* PENAL CODE, s. 182 **167**

——— **ss. 295, 447**—*Offences under sections, whether separate offences—Consecutive sentences, propriety of.*

When a Hindu temple is entered into and its property damaged, the offence under section 447, Penal Code, cannot be dissociated from the offence under section 295, Penal Code, which only had expression in the entry into the temple. The two offences are really one and it is improper to pass consecutive sentences of imprisonment for each of them. **O** BAHRA *v.* EMPEROR, 25 Cr. L. J. 1173 **37**

——— **s. 296**—Common object—Single notice—Series of attacks—One offence. *See* PENAL CODE, s. 147 **33**

——— **s. 302**—Murder, charge of—Alternative charge of causing evidence of offence to disappear—Prejudice—Test. *See* PENAL CODE, s. 201 **709**

Penal Code—contd.

——— **s. 302**—Unlawful assembly—Common object—Murder—Right of private defence. *See* PENAL CODE, s. 97 **156**

——— **ss. 304, 436**—*Fire to building—Conviction under s. 436—Proof, nature of—"Ordinarily used," meaning of—Attack on village* Chamars—*Child deserted by* Chamars *in* chaupal—*Accused setting fire to* chaupal—*Death of child.*

It is absolutely necessary, in order to convict under section 436 of the Penal Code, to prove that the building which the accused destroyed came within one of the three classes mentioned in the section, and the words "ordinarily used" do not mean that other buildings are from time to time used for purposes such as those stated in the section but they mean that that particular building is itself used.

Certain villagers were convicted under sections 304 and 436, Penal Code, for having made an attack on the *Chamars* of the village, resulting in the destruction by fire of their *chaupal*, and the death of a child therein. It appeared that on being attacked, the *Chamars* fled from the spot and left the child inside the *chaupal*. There was no evidence that the *chaupal* was ordinarily used as a human dwelling or for one of the other purposes specified in section 436. Nor did the accused know that the child was inside when they set fire to it:

Held, that under the circumstances no offence under section 304 or section 436, Penal Code, had been established. **A** KHANJAN *v.* EMPEROR, 25 Cr. L. J. 1190; (1924) A. I. R. (A.) 781 **54**

——— **s. 304 (2)**—*Sudden fight—Knife stab causing death—Dangerous weapon.*

A dispute having arisen between the accused and another person about drawing water from a tap, they abused each other and the accused drew out his knife and stabbed the latter with it. The knife pierced the chest and cut the heart causing death. The knife had a blade of three or four inches, and the Counsel for the accused contended that it was not a dangerous weapon:

Held, (1) that a knife which actually caused the fatal injury was undoubtedly a dangerous weapon;

(2) that the accused did not intend to cause death or to cause such injury as was likely to cause death;

(3) that, however, he must have known that he was likely to cause death and was, therefore, guilty of an offence under section 304, Part II of the Penal Code. **L** KHAN MIR *v.* EMPEROR, 25 Cr. L. J. 1289 **361**

——— **s. 325**—Conviction under section 325 set aside—Re-trial for offence under sections 34, 325. *See* CRIMINAL PROCEDURE CODE, s. 236 **364**

——— **s. 325**—Riot—Grievous hurt—Accused, liability of. *See* PENAL CODE, s. 147 **473**

——— **s. 326**—Charge under ss. 326, 149, Penal Code—Conviction under s. 326—Legality—Prejudice. *See* CRIMINAL PROCEDURE CODE, s. 233 **465**

Penal Code—contd

——— **s. 376**—Rape, offence of—Woman crying and weeping—Statement to persons, admissibility of—Explanation of conduct—Corroboration—Ravished woman, evidence of, value of—Punishment, measure of. *See* EVIDENCE ACT, s. 8 **142**

——— **s. 376**—*Rape, proof of—Probabilities of case.*

Accused was charged with rape of a girl of seventeen in a place where the girl could not easily have been forced to go against her will. There was no physical proof of the rape, and the inference from the medical evidence was that at the time of the alleged offence the girl was not a virgin:

Held, that the offence had not been established against the accused. **L** AMIR-UD-DIN *v.* EMPEROR, (1923) A. I. R. (L.) 238; 25 Cr. L. J. 1254 **64**

——— **s. 379**—Common object—Theft—Separate sentences. *See* PENAL CODE, s. 143 **284**

——— **ss. 397, 398, 114, 34**—*Dacoity—Dangerous weapons used—Offence—Sticks, whether "dangerous weapons"—Ss. 34, 114, operation of.*

Section 397 and not section 398, Indian Penal Code, applies to a case in which a dacoity has been committed, not merely attempted, and weapons were not merely carried by the dacoits but were actually used by them, if only by being shown or brandished, even without verbal threats of using them.

The words of section 397 of the Penal Code do not exclude the operation of the provisions of sections 114 and 34 of the Code.

Obiter.—Sticks are deadly weapons within the meaning of section 397, Penal Code, in a country where many, if not most, murders are committed with sticks. **N** GHASSU *v.* EMPEROR, 25 Cr. L. J. 1181 **45**

——— **s. 406**—*Criminal breach of trust—Sale of goods taken on approval with condition to pay cash—Title of buyer of such goods—Criminal Procedure Code (Act V of 1898), ss. 517, 590—Contract Act (IX of 1872), s. 78—Passing of property in goods.*

Where goods are taken on approval under the arrangement that property in them will pass to the person, who has taken them, only

(*i*) when he exercises his approval and

(*ii*) pays cash for the goods,

the trust continues and the property in the goods does not pass to him until both the conditions are fulfilled.

A buyer of the goods from such a person, before the property in them has passed to their seller, acquires no title to them and is not entitled, therefore, on the conviction of the latter for criminal breach of trust, to get the goods from the Court. **C** KSHITISH CHANDRA *v.* EMPEROR, 51 C. 796; (1924) A. I. R. (C.) 816; 25 Cr. L. J. 1235 **163**

——— **s. 409**—Criminal breach of trust—Offence where triable. *See* CRIMINAL PROCEDURE CODE, s. 171 **131**

——— **s. 411**—Dishonestly receiving stolen property—Youthful first offender—Sentence of six months' rigorous imprisonment or detention in Reformatory School—High Court, whether can interfere. *See* CRIMINAL PROCEDURE CODE, s. 439 **480**

Penal Code—contd.

——— **ss. 417, 420**, *distinction between—Jurisdiction, absence of—Objection by accused—Trial, whether vitiated—Second Class Magistrate, jurisdiction of.*

No Tribunal can properly clutch jurisdiction by intentionally ignoring facts of aggravation which make the offence really cognizable only by a higher Tribunal; and where the accused himself has objected to the jurisdiction, in the lower Courts, the High Court will interfere in revision and set aside the conviction.

Section 417, Penal Code, deals with cheating generally; but section 420 deals with that aggravated species of cheating which involves delivery of property or destruction of valuable security.

A Second Class Magistrate has no jurisdiction to try an offence under section 420, Penal Code, though one under section 417 is triable by him. **M** SETTI RANGAYYA *v.* SOMAPPA, 25 Cr. L. J. 1193 **57**

——— **s. 420**—Attempt to cheat—Abetment—False claim against Insurance Company—Conspiracy. *See* PENAL CODE, s. 107 **39**

——— **s. 420**—*Cheating—Creditor receiving payment of debt—Subsequent denial—Offence.*

Accused received from the complainant, his debtor, cash and cattle in payment of the debt due by the latter. Subsequently he gave the complainant notice calling upon him to pay the debt and denied the receipt of the cash and cattle:

Held, that, in the absence of proof that the accused received payment of the debt with the pre-conceived intention of denying it later on, he could not be held to have committed an offence under section 420 of the Penal Code. **L** RAM SARAN *v.* EMPEROR, (1923) A. I. R. (L.) 621; 25 Cr. L. J. 1311 **479**

——— **s. 420**—Conspiracy to cheat—Charge covering three transactions—Different overt acts—Charge, whether bad—Transactions intervening overt acts, effect of—Cheating, charge of, what must contain—Omission to mention persons deceived, whether fatal—Fraudulent bills presented at different times—Offences, whether separate—Evidence of cheating, whether material for proving conspiracy. *See* PENAL CODE, s. 120B **545**

——— **s. 436**—Fire to building—Conviction under s. 436—Proof, nature of—"Ordinarily used," meaning of. *See* PENAL CODE, s. 304 **54**

——— **ss. 447, 295**—Offences under sections, whether separate offences—Consecutive sentences, propriety of. *See* PENAL CODE, s. 295 **37**

——— **s. 448**—*House trespass—Criminal intent—Bona fides.*

The offence of house trespass is not complete unless there is an intent to commit an offence or to intimidate, insult or annoy some one in possession of property. It is not enough that the accused should know that his act is likely to have such an effect.

When the action of an accused is open to two constructions, one criminal and the other honest, the Court should not assume that it was criminal,

Penal Code—contd.

On information that the complainant had a pot of toddy in his house in excess of the quantity which one individual may possess without license, the accused, a village *taliari*, went inside the house, brought out the pot and placed it on the verandah and remained guarding it till the Police, to whom he sent a message about the commission of the offence, arrived. On revision against conviction for house trespass :

Held, that although the accused as a *taliari* had no authority to seize and detain liquor which he believed was liable to confiscation under the Abkari Act, his conduct in entering the house was *bona fide* and without any criminal intent, and his conviction could not stand. **M** NARAYANA, *In re*, 20 L. W. 239; (1924) A. I. R. (M.) 816; 25 Cr. L. J. 122 **149**

——— **s. 457**—*House trespass with intent to commit adultery—Husband's consent or connivance, proof of.*

The Court has got to be satisfied before convicting a person of an offence under section 457 of the Penal Code, when the offence charged is of house trespass with intent to commit adultery, that there was no consent or connivance by the husband. **C** BALARAM KUNDU *v.* EMPEROR, 25 Cr. L. J. 1186 **50**

——— **ss. 465, 467, 471**—*Forgery—Offence, nature of.*

The nature of the offence of forgery does not depend on the use to which the document is put. If it is used fraudulently or dishonestly and if it purported to be a valuable security, the punishment provided by section 467 and not that provided by section 465, Penal Code, would be that to which the accused would be liable under section 471. **C** EMPEROR *v.* SAGARMAL, 28 C. W. N 947; 40 C. L. J. 135; 25 Cr. L. J. 1217; (2924) A. I R. (C.) 960 **145**

——— **s. 467**—*Forgery—Writer of forged receipt.*

The writer of a forged receipt cannot be convicted of an offence under section 467 in the absence of evidence that he was present at the execution of the receipt or that he helped any person to use it. **C** MAZHER AHMAD *v.* EMPEROR, 25 Cr. L. J. 1253 **261**

——— **s. 494**—*Bigamy*—Mona *Sikh*—Anand *marriage, validity of.*

A Hindu professing the Sikh religion though a *Mona* may have his marriage performed according to the *anand* rites, and such a marriage would be valid for all intents and purposes, such as an offence under section 494, Penal Code. **L** WALU RAM *v.* EMPEROR, 25 Cr. L. J. 1269 **277**

——— **s. 511**—Attempt to cheat—False claim against Insurance Company — Conspiracy—Attempt and preparation, distinction between. *See* PENAL CODE, s. 107 **39**

——— **s. 511**—Charge of cheating—Evidence sufficient to prove attempt to cheat—Accused, whether can be convicted of attempt. *See* PENAL CODE, s. 120 B **545**

Pensions Act (XXIII of 1871), s. 6—*Suit relating to share of* jagir—*Collector's certificate, whether necessary—Certificate not obtained—Procedure.*

Pensions Act—concld.

A suit for a declaration that plaintiff is the sole owner of a certain share in a *jagir* cannot proceed without a certificate from the Collector under section 6 of the Pensions Act.

But the absence of a certificate is not a sufficient ground for the summary rejection of the plaintiff's appeal and the hearing may be adjourned to enable the plaintiff-appellant to obtain the certificate. **L** BARKAT ULLAH *v.* FASIH ULLAH, 6 L. L. J. 313 **486**

Pleadings. *See* ACT OF STATE **779**

———, amendment of. *See* PROCEDURE **964**

———, amendment of, object of—Pending suit—Fresh defence, whether can be taken—Court, discretion of. *See* CIVIL PROCEDURE CODE, s. 153 **65**

——— Amendment of plaint—Fresh allegation of fraud, whether permissible. *See* CIVIL PROCEDURE CODE, O. VI, R. 17 **492**

——— Inconsistent pleadings—Alternative relief—Intention to defraud Court—"*In pari delicto*," maxim of. *See* CIVIL PROCEDURE CODE, O. II, R. 3 **333**

——— *Inconsistent pleadings, whether permissible.*

The Code of Civil Procedure does not prohibit inconsistent pleadings, and there is nothing to prevent either party from setting up two or more inconsistent sets of material facts and claiming relief thereunder in the alternative. A plaintiff may rely upon several different rights alternatively, although they may be inconsistent ; so, a defendant may raise, by his statement of defence, without leave, as many distinct and separate, and, therefore, inconsistent, defences as he may think proper. **C** BHUBANMOHINI DASI *v.* KUMUDBALA DASI, 28 C. W. N. 131; 39 C. L. J. 140; (1924) A. I. R. (C.) 467 **934**

——— *Limitation, plea of.*

A plea of limitation may be taken at any stage of the litigation. **A** MUHAMMAD ABDUL HASAN *v.* FIDA HUSAIN, (1924) A. I. R. (A.) 473 **736**

——— Objection to mode of proof, when to be taken. *See* EVIDENCE ACT, s. 72 **974**

——— *Second appeal—Admissibility or relevancy of evidence, question of.*

The question whether a document is admissible or not for want of registration or irrelevancy, can be raised at any stage of the case. **C** SUBDI BEPARI *v.* BUDHAI **949**

Practice—*Counter-claim—Specific performance of contract—Temporary sale.*

Though there is no provision relating to counter-claims in the Civil Procedure Code, there is nothing to prevent a Judge treating a properly stamped counter-claim as the plaint in a cross-suit and hearing the two together.

The equitable and discretionary relief of specific performance cannot be granted where the transaction is described as a temporary and not as an outright sale. **R** SAYA BYA *v.* MAUNG KYAW SHUN, 2 R. 276; (1924) A. I. R. (R.) 346 **721**

Practice—concld.

——— Right of accused to reply. *See* CRIMINAL PROCEDURE CODE, s. 423 **37**

——— Right of appellants' Counsel to reply. *See* CRIMINAL PROCEDURE CODE, s. 423 **33**

——— *Unreported judgment of High Court, exhibiting of.*

Courts should depend upon reported cases for guidance.

The practice of exhibiting certified copies of judgments in unreported cases of the High Court is deprecable. **M** SAHADI WA REDDI *v.* LINGAPPA ASARI, 20 L. W. 451; (1924) M. W. N. 833; (1924) A. I. R. (M.) 867 **942**

Precedents, *value of.*

A case is an authority only for what it decides and is no authority for what may seem to follow from the reasonings adopted in the case. **A** DURGA PRASAD *v.* TAMESHWAR PRASAD, (1924) A. I. R. (A.) 897; 46 A. 754 **243**

Pre-emption—*Permanently settled area—Revision of records—Entry of contract for pre-emption—Parties, heirs of, whether bound.*

In a permanently settled area, where there is no settlement but only a revision of records for which no time is fixed, if there is an entry of a contract for pre-emption in the record of revision, the contract will not bind the heirs of the original parties to the contract, an agreement of this nature being against the rule against perpetuities. **A** BALLI SINGH *v.* RAGHUBAR SINGH, 21 A. L. J. 113; 45 A. 492; (1923) A. I. R. (A.) 511 **643**

——— Wajib-ul-arz *giving full liberty of transfer—Partition of village—Agreement between proprietors recognising pre-emption—Agreement, nature of—Successors-in-interest of proprietors, whether bound.*

A custom excluding the right of pre-emption can be validly superseded by the agreement of the proprietors of the village and such an agreement binds their successors-in-title.

In a suit for pre-emption of a sale the defence was the existence of a custom contrary to the right of pre-emption. The *wajib-ul-arz* of the village provided that every co-sharer was at liberty to transfer his share to any one he pleased. Another *wajib-ul-arz* prepared subsequently at the time of the partition of the village modified this provision by saying that in case of a sale the pre-emptor had the right to pre-empt:

Held, (1) that the original *wajib-ul-arz* did establish a custom excluding the legal right of pre-emption, but this custom was abrogated by the agreement of the proprietors at the time of the partition of the village;

(2) that the agreement to supersede the custom was an agreement in relation to the right of transfer of the proprietary interest in the soil of the village and must run with the land;

(3) that consequently the agreement was binding on the successors-in-interest of the proprietors. **O** MAQBUL-UN-NISSA *v.* BANSIDHAR, 11 O. L. J. 319; (1924) A. I. R. (O.) 382 **92**

——— Wajib-ul-arz—*Interpretation—Ambiguity, effect of—Pre-emptive clause containing extraneous matter—Presumption of custom, whether arises—Custom of pre-emption—Burden of proof.*

Plaintiffs sued for pre-emption alleging that they were co-sharers in the *thok* while defendants were strangers. It appeared that the village comprised two *thoks*, that the plaintiffs were co-sharers in the *thok* in which the property in suit was situated and that the defendants were co-sharers in the other *thok*. The paragraph of the *wajib-ul-arz* dealing with the right of pre-emption provided that in the case of a transfer by sale or mortgage but not by a gift, the claim to the right of pre-emption shall belong first to an own brother, and nephew, then to a paternal cousin, a partner in the property, then to the co-sharer in the *thok* and then to the co-sharer of the village. It provided further that "gift will be made in favour of an own brother and nephew or daughter's son or for a charitable purpose and not otherwise":

Held, (1) that the inclusion of extraneous matters in the same clause which could not possibly be the subject of a custom, precluded the possibility of the clause being treated as a record of custom in regard to any of the matters of which that clause formed a part;

(2) that the terms of the *wajib-ul-arz* were ambiguous and capable of two interpretations;

(3) that for these reasons the plaintiffs' claim was bound to fail.

Per *Kanhaiya Lal, J.*—A *wajib-ul-arz* is in the absence of intrinsic or extrinsic evidence to the contrary a *prima facie* evidence of the custom it records.

Each *wajib-ul-arz* must be interpreted according to its own terms, and in the absence of any terms of limitation in a pre-emption clause confining its operation to a transfer in favour of a stranger, the right of pre-emption can be enforced, so far as it may be, between the persons belonging to the different categories mentioned in the *wajib-ul-arz inter se.*

Where all the lands belonging to the parent *khatas* are held in severalty, the mere existence of a common *khata* containing certain barren, uncultivated or *abadi* lands, which usually remain the property of all the co-sharers of the village till a partition is formally effected, cannot make a person who belongs in other respects to one class or category, a joint co-sharer with another who belongs to another class or category, as regards any separate interest the latter may sell.

Where a *wajib-ul-arz* contains matters which cannot properly or possibly be the subject of a custom, then the ordinary presumption that the *wajib-ul-arz* is a *prima facie* record of a custom is overturned by the internal evidence afforded by the other terms embodied therein though they may be separable from the rest.

Per *Sulaiman, J.*—The burden of proving the custom of pre-emption lies on the plaintiff. The plaintiff pre-emptor cannot succeed by merely proving that a custom of pre-emption exists in the village. He has to show that that particular custom exists which would entitle him to a decree against the defendant vendee.

Pre-emption—concld.

If the only evidence which the plaintiff can produce is ambiguous, that is to say, is capable of two interpretations, and if on one of such interpretations the suit cannot succeed, then the suit must fail, and it is not the duty of the Court to give it necessarily the other interpretation which would entitle the plaintiff to a decree.

If the clause of pre-emption contains matters which cannot possibly be a record of custom, then the ordinary presumption which arises that the entry is one of custom, is negatived. A LALCHAND *v.* RAM CHAND, (1924) A. I. R. (A.) 753 **526**

——— *Wajib-ul-arz* — Presumption — Non-existence of custom in neighbouring *mahal*, effect of —Evidence—"Co-sharer," meaning of—Proprietor not having specified share, whether co-sharer —Right to pre-empt. *See* CUSTOM—PRE-EMPTION **196**

Presidency Towns Insolvency Act (III of 1909), ss. 7, 52 (ii) (c)—*Mercantile document —General words following specified words—Construction*—Ejusdem generis, *doctrine of.*

In mercantile documents where there are general words following particular and specific words, the general words must be confined to the things of the same kind as those specified.

The doctrine of *ejusdem generis* does not apply unless there is a genus or class or category.

In a hypothecation instrument where there is a distinct category dealing with various kinds of timber which constituted the stock-in-trade of the mortgagor who was a timber trader and a saw mill owner, the words "goods, chattels, and stock-in-trade" must be read *ejusdem generis* with the preceding words so as not to include cargo boats. R JOSEPH, *In re*, 2 R. 272; (1924) A. I. R. (R.) 318 **702**

——— **ss. 36, 90**—*Civil Procedure Code (Act V of 1908), O. XVI—Witness summoned under Act, position of—Court, jurisdiction of—Witness residing more than 200 miles away.*

A person summoned under section 36 (1) of the Presidency Towns Insolvency Act does not, at any rate in all cases, fall within the category of an ordinary witness to whom the provisions of O. XVI of the Civil Procedure Code relate.

The proviso to section 90 of the Insolvency Act makes it quite clear that it was not intended to fetter the Court in the exercise of its jurisdiction under section 36 by any limitation imposed by the Code of Civil Procedure.

The Court has power under section 36 of the Presidency Towns Insolvency Act to summon before it persons who reside at a greater distance than 200 miles.

In such cases proper travelling and other expenses should be tendered and so far as possible the convenience of persons required to attend should be considered. C DINARAM SOMANI, *In re*, 27 C. W. N. 370; (1923) A. I. R. (C.) 427 **76**

Presumption—Alienation by Hindu widow—Reversioners, consent of—Necessity—Presumption. *See* HINDU LAW—ALIENATION **5**

Presumption—concld.

——— Appeal filed in wrong Court—*Bona fide* mistake—Presumption. *See* LIMITATION ACT, s. 5 **594**

——— as to person's death. *See* EVIDENCE ACT, s. 107 **27**

——— Legitimacy—Child born 11 months after father's death—Unchastity of mother—Presumption. *See* MUHAMMADAN LAW **592**

——— of advancement—Criterion. *See* BENAMI TRANSACTION **832**

——— of genuineness of document—Period of 30 years, computation of. *See* EVIDENCE ACT, s. 90 **487**

——— Record of Rights. *See* BENGAL TENANCY ACT, s. 103 (*b*) **879**

——— Sedition—Intention, how determined—Prosecution, whether bound to produce direct evidence—Presumption. *See* PENAL CODE, s. 124 A **574**

——— Transfer of property by Anglo-Indians—Presumption of advancement, whether arises. *See* BENAMI TRANSACTION **686**

——— Urgent need of money—Usurious interest —Presumption of undue influence, whether arises. *See* CONTRACT ACT, s. 16 **817**

——— *Wajib-ul-arz*, entries in. *See* CUSTOM —PRE-EMPTION **196**

Principal and agent—*Purchase by agent—Agent, whether acquires property in goods bought —Goods destroyed by fire—Agent, liability of.*

When a relationship of agent and principal exists between two persons and the agent enters into a contract for purchase of goods on behalf of his principal, property in the goods bought does not pass to the agent as against the principal.

Therefore, where goods purchased by an agent on behalf of his principal are destroyed by fire, the principal and not the agent must bear the loss. C DHANPAT SINGH *v.* HARI CHARAN, 29 C. W. N. 121 **683**

Probate and Administration Act (V of 1881), s. 23—*Hindu joint family—Letters of Administration—Co-parcener, whether can apply.*

A co-parcener in a Hindu joint family has no *locus standi* to apply for Letters of Administration on the death of another co-parcener.

A co-parcener cannot make a Will of his undivided share in a Hindu joint family property and when he dies, he cannot be said to be intestate. Section 23, Probate and Administration Act, deals only with the administration of the estate of an intestate person. R RAMAGIRI *v.* GOVINDAMMAH, 3 Bur. L. J. 116; (1924) A. I. R. (R.) 329 **824**

——— **ss. 41, 78**—*Appointment of administrator —Considerations for Court—Unwilling person as administrator—Security.*

A Court in exercising its discretion in appointing an administrator under section 41 of the Probate and Administration Act, will have regard to consanguinity, amount of interest, the safety of the estate and probability that it will be

Probate and Administration Act—concld.

properly administered. It is not to be guided by the wishes or feelings of parties, it is to look to the benefit of the estate and to that of all persons interested in the distribution of the property. Therefore, it is not in the interest of the property to appoint a person who is in involved circumstances and whose creditors have already taken proceedings against him for the realization of their dues; nor should administration be forced upon a person unwilling to take it or not ready to furnish security to the satisfaction of the Court in accordance with section 78 of the Act. **C** SIVADAS MUKERJEE *v.* SURENDRA NATH CHATTERJEE, 40 C. L. J. 24 **382**

——— **ss. 70, 71, 83**—*Civil Procedure Code (Act V of 1908), O. VI, r. 15—Caveat, form of—Procedure in contentious cases.*

In contentious cases under the Probate and Administration Act the provisions of that Act read with the Civil Procedure Code should be followed with regard to the filing and the form of caveats and the procedure to be adopted.

Caveats under section 70 of the Probate and Administration Act should be in the form prescribed in section 71 and in contentious cases, the objections to the grant and the reply thereto should be in the form of pleadings properly verified in accordance with the provisions of O. VI, r. 15, Civil Procedure Code. The proceedings thereafter should take the form of a suit in which issues should be framed and parties examined on oath. **R** U SHWE MIN *v.* MAUNG MAUNG GYI, 3 BUR. L. J. 68; (1924) A. I. R. (R.) 273 **973**

Procedure—*Party entitled to equitable relief—Court, duty of—Pleadings, amendment of.*

When a Court is able to discover an equitable relief to which the plaintiff is entitled, it would be well-advised to allow the plaintiff, where the defendant has been obviously in default, to take advantage of any such equitable relief to which he is entitled under the law, and if necessary, to treat his pleadings as amended for that purpose even at the appellate stage of the suit. **C** DINANATH *v.* GOUR NATH **964**

Provident Funds Act (IX of 1897), ss. 2 (4), 4 (1)—"Compulsory deposit," what is—Deposit, whether ceases to be compulsory on death or retirement—Deposit, whether liable to attachment. *See* CIVIL PROCEDURE CODE, s. 60 (1) (*k*) **69**

Provincial Insolvency Act (III of 1907), ss. 2 (1), 16—*Hindu Law—Joint family—Father adjudicated insolvent—Sons' interest whether vests in Official Receiver—Nature of father's powers—Suit by sons for partition—Decree, nature of.*

On the adjudication as an insolvent of an undivided Hindu father what, in addition to his interest, vests in the Official Receiver is not only the power to dispose of the sons' shares for the satisfaction of the debts which are neither illegal nor immoral but the entire property inclusive of the shares of the sons therein.

Provincial Insolvency Act—1907—concld.

Nor is such vesting conditional, contingent upon or proportionate to the debts of the father which are neither illegal nor immoral.

The property, however, so vests only for the purpose of enabling the Receiver to exercise the power of sale which the father had of disposing of the property for discharge of debts of an unobjectionable character. The sons, therefore, can in proper proceedings require to have it determined in respect of which debts such power can be exercised and in respect of which not, and to have made over to them what is left after the administration of the insolvent's estate and the due exercise of the powers by the Official Receiver.

A suit by Hindu sons for partition is not barred by the adjudication of the father as insolvent. In such a suit, the question of the illegality or immorality of the father's debts should be tried and the sons declared separate in status from the father, only the actual division by metes and bounds and the passing of the final decree must be deferred till the completion of the administration of the estate and its divestment from the hands of the Official Receiver.

Per *Srinivasa Iyengar, J.*—The power of a father to dispose of his sons' shares also, for the payment of his debts is not in the nature of a latent power which comes into existence on the coming into existence of certain conditions precedent but a potential power over the entire property exercisable by him validly, subject only to the sons successfully questioning the same in proper proceedings.

The vesting of the interest in the Official Receiver on a Hindu father's insolvency must be regarded as in the nature of a trust for the exercise of the father's power of disposal of the family property for his antecedent debts on the one hand and on the other for the ascertainment and delivery over to the sons of the remainder of the property, if any. **M** KUPPUSAMI GOUNDAN *v.* MARIMUTHU GOUNDAN, 47 M. L. J. 487; (1924) M. W. N. 807; 20 L. W. 783 **438**

Provincial Insolvency Act (V of 1920), s. 6, cl. (g)—*Notice to creditors suspending payment of debts—Act of insolvency.*

A notice by a debtor to his creditors that he had suspended payment of debts is a sufficient act of insolvency so as to justify a petition under section 6 clause (*g*) of the Provincial Insolvency Act. **O** BANARSI DAS *v.* BALDEO DAS-BANARSI DAS **742**

——— **s. 53**—*Release in favour of father—Subsequent insolvency—Anticipatory fraud—Onus of proof*—Bona fides.

It is not necessary that a man should actually be indebted at the time he enters into a voluntary settlement to make it fraudulent; if he does it with a view to his being indebted at a future time, it is equally fraudulent, and ought to be set aside. A man can commit what may be termed compendiously "anticipatory fraud" and effect a transfer of his properties with a view to get into debt and prevent his creditors getting at his property.

Provincial Insolvency Act—1920—concld.

Under section 53 of the Provincial Insolvency Act, every transaction which an insolvent enters into within two years previous to his insolvency is treated as *prima facie* invalid and the burden is on the insolvent or the alienee to show that the transaction impeached is a valid and *bona fide* one.

Both good faith and valuable consideration have to be proved. The circumstances under which the deed came to be executed, the covenants made therein, the conduct of the parties both at the time and subsequently have all to be taken into consideration. If the transfer was really intended to be carried out and was made *bona fide* for saving the insolvent from incurring debts and ruining himself, the transfer would not be interfered with, but if circumstances show that the transferor was actually screening his properties from the reach of his future creditors, the transfer would be a fraudulent one. **M** OFFICIAL RECEIVER, TANJORE *v.* VEDDAPPA MUDALIAR, (1924) M. W. N. 506; 47 M. L. J. 431; 20 L. W. 683; (1924) A. I. R. (M.) 865 **450**

——— **s. 53**—*Sale by insolvent—Vendee paying off mortgage—Sale held fraudulent—Vendee whether entitled to redemption amount.*

If a person, in whose favour a sale is executed by an insolvent, pays off a mortgage on the transferred property, he is entitled to be entered as a scheduled creditor to the extent of the amount paid by him, even though the sale is set aside by the Insolvency Court under section 53 of the Provincial Insolvency Court as fraudulent and void as against the Receiver.

The principle that where both parties to a void agreement are equally to blame in the matter the law will restore to neither of them any advantage that he may have allowed the other to get from him has no application to a case where the object of the fraud has been wholly frustrated. **N** RAMPRASAD *v.* JASKARAN **489**

Provincial Small Cause Courts Act (IX of 1887), s. 17—"Attachment" and "order of attachment," distinction between—"Interlocutory order," meaning of—Small Cause Court, whether has inherent powers—Small Cause Court, whether can order attachment before judgment of immoveable property. *See* CIVIL PROCEDULE CODE, s. 7 **109**

——— **Sch. II, Art. 8**—*Landlord and cultivator—Settlement of land on share of crop—Cultivator, whether tenant or servant—Suit by landlord—Small Cause Court, jurisdiction of.*

Plaintiff settled certain land with the defendant, the latter stipulating to deliver to him a half share of the paddy and straw to be grown on the land, and in case of default, to deliver 25 per cent. more as interest in accordance with local usage. In a suit by the plaintiff to recover the price of his share:

Held, that there was nothing to suggest that the defendant was a tenant, and not a servant and the suit was not for rent so as not to be cognisable by a Court of Small Causes.

In a suit by a landlord, against a person cultivating the land, to recover a sum agreed to be paid to him for its use, the question whether the defendant is a tenant or a servant of the plaintiff depends upon the terms of the agreement and all the circumstances of the case. **C** JADAB CHANDRA SANTRA *v.* GOPAL CHANDRA DEBNATH 28 C. W. N. 848; (1924) A. I. R. (C.) 837 **94**

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——— **Sch. II, Art. 18**—*Suit for recovery of money from trustees personally and from trust estate, nature of.*

A suit for recovery of money from the trustees of a temple personally and from out of the temple funds is not one "relating to a trust" within the meaning of Art. 18 of Sch. II to the Provincial Small Cause Courts Act and is, therefore, one of a small cause nature.

The fact that it may be necessary to determine in a suit whether the trust property is liable cannot make the suit one relating to a trust. **M** VATAKKEPAT KOVILAKATH *v.* RAMA PISHARODY **1006**

Public Gambling Act (III of 1867), s. 13—*Legislature, intention of—"Public place," meaning of—Question, how determined.*

In enacting the Public Gambling Act the Legislature had in view the prevention of public injury to moral standards and cannot be conceived of as having been even remotely concerned with the protection of public title to any particular property.

For the purpose of determining whether a place is a public place within the meaning of section 13 of the Public Gambling Act, what has to be taken into consideration is not the question of title to the place nor the nature of its metes and bounds but the use to which the place is put. **A** TULSHI DAS *v.* EMPEROR, 22 A. L. J. 741; (1924) A. I. R (A.) 768; 46 A. 787 **476**

Public highway—*Immediate access, right of—Private right—Infringement—Special damage.*

A right of immediate access from private property to a public highway, as a private right, is distinct from the right of the owner of that property to use the highway itself as one of the public. An infringement of such private right of access amounts to special damage to found a private action thereon against the infringement. **A** HANUMAN PRASAD *v.* RAGHUNATH PRASAD, 22 A. L. J. 568; 46 A. 573; (1924) A. I. R. (A.) 715 **659**

Punishment—*Continuing offence—Daily fine—Order, legality of.*

It is bad in law to impose a daily fine in anticipation of the commission of an offence. **Pat** PANCHAM SAO *v.* EMPEROR, 25 Cr. L. J. 1357 **717**

Punjab Alienation of Land Act (XIII of 1900), s. 9—*Mortgage by conditional sale—Suit for foreclosure—Year of grace expiring after passing of Act—Act, whether applicable—Widow of agriculturist—Decree,* ex parte, *for possession against widow—Interest of reversioners not protected—Reversioners, whether bound.*

The Punjab Alienation of Land Act applies to a suit for foreclosure of a mortgage by conditional sale in which the year of grace expires after the passing of the Act. The proceedings in such a suit remain pending until the year of grace has expired and the mortgagor has debarred himself from tendering the mortgage money either to the

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Court which issued the notice or to the mortgagee himself.

If the widow of an agriculturist refuses to accept a modification of the mortgage-deed executed by her husband before the passing of the Punjab Alienation of Land Act, in the terms of the Act, and allows a decree for foreclosure of mortgage by conditional sale to be passed against her *ex parte*, she does not do all in her power to protect the estate, and the reversioners of her husband, after her death, are not bound by that *ex parte* decree. **L** BAJRANG DAS *v.* GHANI RAM, (1923) A. I. R. (L.) 299 **987**

Punjab Land Revenue Act (XVII of 1887), s. 117 (2)—*Order determining title—Appeal, where lies.*

An appeal from an order passed by a Revenue Officer acting under section 117 (2) of the Punjab Land Revenue Act would lie to the District Judge or to the High Court according to the value of the subject-matter. **L** BHAGWANI *v.* NET RAM **243**

Punjab Pre-emption Act (I of 1913), s. 5 (a)—*Property sold consisting of house and shop—Separate units—Pre-emptor, how far can succeed.*

Where in a suit for pre-emption the property sold consists of two units, a house and a shop, and both these buildings were regarded as separate by the Municipal Committee as well as the vendor who received separate prices for both in the sale-deed, the suit of the plaintiff to pre-empt can succeed only in respect of the house and not in respect of the shop. **L** NARAIN SINGH *v.* MUL SINGH, 6 L. L. J. 345 **596**

——— **s. 30 (1)**—*"Physical possession," meaning of—Report to* patwari, *whether enough—Physical possession, why necessary—Symbolical possession—Property in possession of tenant of mortgagee incapable of physical possession by vendee.*

The mere reporting to the *patwari* that the vendor has relinquished possession and that the vendee has assumed possession is no proof that there was a giving and taking of physical possession within the meaning of section 30 of the Pre-emption Act.

The law of pre-emption insists on physical possession, because physical possession is visible to all concerned. It is a notice to all would-be pre-emptors that a change has occurred in the enjoyment and possession of the land in question and puts them to inquiry.

In the case of cultivated land physical possession may be taken even symbolically, but there must be some evidence of symbols employed.

Property in the possession of a mortgagee and in the cultivating possession of a tenant under him at the time of sale, is not capable of being taken into physical possession by the vendee. **L** THAKUR SINGH *v.* KARAM SINGH **203**

Railway receipt—*Transfer by endorsement.*

The title of the consignor of goods to a Railway Company can be conveyed to another person by an endorsement on the Railway receipt. **A** FIRM PEARE LAL-GOPI NATH *v.* EAST INDIAN RAILWAY CO., 22 A. L. J. 663; 10 O. & A. L. R. 883; (1924) A. I. R. (A.) 574; 46 A. 691 **351**

Railways Act (IX of 1890), s. 72—*Contract Act (IX of 1872), s. 151—Bailment of goods—Station Master retaining goods—Liability of Railway—Bailee, duty of.*

Where goods are delivered to a Station Master to be booked, but he being unable to book on account of stoppage of booking, keeps the goods on the Railway premises, under cover of a roofed platform, till the booking re-opens, never definitely directing the plaintiff to remove the goods, or telling him in unmistakable terms that the goods are kept at his own risk, nor at the same time definitely accepting the goods at Railway risk, and the goods are damaged in the retention, he by his conduct in keeping the goods in the Railway shed satisfactorily proves that he accepted the bailment of the goods on behalf of the Railway Company and under section 72 of the Railways Act makes the Railway Company responsible for the loss.

A bailee is bound to take care of the goods as he would have taken of his own goods of a similar nature and is bound in damages for loss resulting from his negligence. **A** MUNNA LAL *v.* EAST INDIAN RAILWAY COMPANY, (1923) A. I. R. (A.) 71 **772**

——— **s. 72**—*Risk Note, Form B, signed by person delivering goods to Company, whether valid—"Robbery", and "theft," whether synonymous—Theft from running train—Liability of Railway Administration.*

A Risk Note in Form B signed by the person delivering the goods to the Railway Company is validly executed within the meaning of section 72 of the Railways Act.

The word "robbery" as used in Risk Note B is synonymous with "theft".

Under the Risk Note B, where a plaintiff depends for his cause of action on wilful neglect on the part of either the Railway administration or any of its servants, he cannot succeed if it is shown that the loss of the goods was due to theft from a running train. **A** FIRM GOPAL RAI-PHUL CHAND *v.* GREAT INDIAN PENINSULA RAILWAY, (1924) A. I. R. (A.) 621 **313**

Rangoon Rent Act (Bur. Act II of 1920), ss. 2 (c), 10 (1) and (5)—*Daily tenant—Verbal agreement—Transferee for value—Tenant, whether 'landlord'—Ejectment of sub-tenant—Transfer of Property Act (IV of 1882), ss. 105, 106, 107.*

A daily tenant under a verbal agreement holds a lease of the premises within the meaning of sections 105, 106 and 107 of the Transfer of Property Act and all leases for whatever term are transfers for value provided the rent is payable.

A lease is a limited transfer of the premises yet it is a transfer thereof and if the rent is payable the lessee is a transferee for value within the meaning of section 10 (5) of Rangoon Rent Act, and is entitled to the benefit of proviso to section 10 (1) of the Act.

Where premises are occupied for the purposes of a person's business they are occupied by the person himself even though they are in the actual occupation of his workmen. **R** AZEE MEAH *v.* JEEWA, 3 Bur. L. J. 36; (1924) A. I. R. (R.) 278 **381**

Receiver — *Account — Vouchers — Uneconomical management—Objection—Proper course for dissatisfied party.*

A Receiver should produce vouchers in support of his expenditure. The vouchers will be admitted as evidence of the payment of the sums therein specified, and credit given to the accounting party in the account, unless the other side shows some reasonable ground for impeaching the vouchers; but if any party objects, the affidavit or oral evidence of the person who received the money is required, and if this cannot be had, then proof must be given of his signature to the voucher.

The question that the management by a Receiver has not been economical does not properly arise when he submits his account in order that it may be passed. In other words, questions with regard to the soundness or prudence of the system of management adopted by a Receiver or charges of wilful default or neglect are not matters that can be disposed of in the shape of exceptions to account.

The proper course open to a party litigant, who is dissatisfied with the mode of management, is to draw up a scheme and to submit it for the orders of the Court. **C** TELLER RAHMAN *v.* GOLAM GONE, 40 C. L. J. 28; (1924) A. I. R. (C.) 1063 **419**

——— Mortgagee—Decree-holder allowed to remain in possession—Receiver appointed subsequently—Receiver's right to remove decree-holder from possession. *See* CIVIL PROCEDURE CODE, O. XXXIV, R. 4 **794**

———, *powers of—Auction sale by order of Court —Highest bid, whether to be accepted.*

The Receiver is an Officer of Court and whatever powers he exercises are delegated powers of the Court which it expressly gives him. He has no powers except what the Court grants him.

The ordinary rule regarding private auction is that where an auction is held without any reservation, there is an implied condition that the highest bid will be accepted. But that rule does not apply to a sale by a Court Officer under the directions of the Court.

In such a case it is acceptance by the Court that constitutes the contract, and the person who asserts that the Court Officer had power to bind the Court by his acceptance of a bid must prove it. The mere absence of a statement in the published conditions of sale that it is subject to the confirmation of Court cannot be treated as implying that the Court had abandoned its power of confirming the sale before it could take effect. **M** RATNASAMI PILLAI *v.* SABAPATHY PILLAI **793**

Reformatory Schools Act (VIII of 1897), s. 16 —Dishonestly receiving stolen property—Youthful first offender—Sentence of six months' rigorous imprisonment or detention in Reformatory School—High Court, whether can interfere. *See* CRIMINAL PROCEDURE CODE, s. 439 **480**

Registration—*Amaldari* lease, whether requires registration. *See* CONSTRUCTION OF DOCUMENT **949**

Registration Act (XVI of 1908), s. 17—*Agreement to re-purchase, whether requires registration —Time, whether of essence of contract—Tender —Avoidance by vendee, effect of—Extension of time.*

A mere option to re-purchase which has not the effect of reducing the original conveyance to a mortgage and does not give rise to a right of redemption, does not require registration.

In the case of an agreement to re-purchase time is of the essence of the contract, and the doctrine that time may not be of the essence of the contract which arises on the construction of contracts of sale of immoveable property, is not applicable; for the right to re-purchase, being *an option*, must be exercised according to the strict terms of the power.

But although time is of the essence of the contract in the case of an agreement to re-purchase, a default by the payee such as renders proper tender by the purchaser by due date impracticable, would be interpreted by the Courts as extending time, when it is clear that the purchaser was prepared with a ready and willing tender. **R** MAUNG WALA *v.* MG. SHWE GUN, 2 Bur. L. J. 188; 1 R. 472; (1924) A. I. R. (R.) 57 **610**

——— **s. 17**—*Construction of document—Sale-deed—Agreement to reconvey—Mortgage or option of re-purchase—Registration, whether necessary.*

The parties to a registered sale-deed executed an agreement contemporaneous with the sale-deed, whereby the vendee agreed that if the vendor re-paid to him the purchase-money with interest at a certain rate within two years he would re-convey the property to the vendor :

Held, that the agreement was a mere option of re-purchase and did not amount to a mortgage and was, therefore, not compulsorily registrable. **R** MAUNG PAUNG *v.* MA ON, 2 Bur. L. J. 89; (1923) A. I. R. (R.) 242 **606**

——— **s. 17 (1) (b), (c), (2) (v)**—*Agreement to reconvey property—Registration, whether necessary.*

An agreement by a purchaser of immoveable property to reconvey the property to the vendor at any time that the latter requires, does not fall within the purview of clauses (*b*) and (*c*) of sub-section (1) of section 17 of the Registration Act, and is, in any case, covered by clause (*v*) of sub-section (2) of the section, and does not, therefore, require registration. **B** SANGAWA *v.* HUCHANGOWDA, 25 Bom. L. R. 1207; 48 B. 166; (1924) A. I. R. (B.) 174 **533**

——— **s. 28**—*Sale-deed—Inclusion of property for obtaining registration at particular place—Jurisdiction.*

Where a transaction is a *bona fide* one, the inclusion of a property for the sake of obtaining the registration of the document at a particular place will not oust the jurisdiction of the Sub-Registrar to register the document. **A** DURGA PRASAD *v.* TAMESHWAR PRASAD, (1924) A. I. R. (A.) 897; 46 A. 754 **243**

——— **s. 49**—*Registration of mortgage-deed—Mortgagor's title, question of, whether relevant.*

The condition of the mortgagor's real title to the property does not affect the question of registra-

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tion, where the parties *bona fide* intended to deal with the property. **A** MUHAMMAD ABDUL HASAN *v.* FIDA HUSAIN, (1924) A. I. R. (A.) 473 **736**

——— **s. 49**—*Unregistered deed of gift—Admissibility in evidence—Nature of donee's possession—Construction of deeds—Maintenance deeds—Gift "with absolute rights."*

An unregistered deed of gift confers no title on the donee, but if he has been in possession longer than the prescriptive period, the deed may be admitted in evidence to ascertain the nature and character of donee's possession.

There is no warrant for the proposition that in maintenance deeds the words "with absolute rights, etc.," ought to be construed in a manner different from the way in which they would be construed if they occurred in other documents. **M** NARAYANASWAMY *v.* THANGAVELU, (1924) M. W. N. 571; (1924) A. I. R. (M.) 800 **67**

——— **s. 50** — Agricultural lease — Registered lease, whether takes priority. *See* AGRA TENANCY ACT, s. 79 **251**

——— **s. 77**—*Refusal of Registrar to register document—Suit for registration—Court, duty of.*

In a suit under section 77 of the Registration Act, against the refusal of the Registrar to register a document, the same considerations should guide the Court which should guide the Registrar in considering his duty to register or refuse registration.

The question for consideration would be whether the document tendered for registration was actually in the state in which it was executed by the parties to it.

Where it is found that the document tendered bears the most apparent traces of having been tampered with, after the execution of the document in its original state, the Court should refuse to direct registration. **M** BOLLA GROVAYYA *v.* CHERUKURI VENKATARATHNAM, 47 M. L. J. 271; 47 M. 833; (1924) A. I. R. (M.) 810; 20 L. W. 977 **483**

Rent, *suit for—Question of title, whether can be determined—Transaction in support of title—Defendant, whether can impeach by way of defence—Separate suit, whether necessary.*

It cannot be affirmed as a broad proposition of law that a question of title may not be incidentally investigated in a suit for arrears of rent.

Where a tenant-defendant disputes the extent of the title of the plaintiff-landlord to the arrears demanded, it is incumbent on the Court to determine the point before the claim is allowed or disallowed. But, subject to this reservation parties should not be added in a suit for rent so as to alter its nature and scope and to transform it into a suit for determination of a complicated question of title to land.

It is an elementary proposition that if the plaintiff relies upon a transaction in support of his title, the defendant is entitled to impeach its validity by way of defence to the claim and is

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not bound to have recourse to a separate suit for that purpose. **C** ABDUL GAFUR *v.* ALI MIAH, 28 C. W. N. 805 **369**

Res judicata. *See also* CIVIL PROCEDURE CODE, s. 11

——— *Alienation by Hindu widow—Declaratory decree by presumptive reversioner—Vendee, whether bound against inheriting reversioner.*

A declaratory decree obtained by the presumptive reversionary heir, against a Hindu widow and an alienee from her, as to the alienation being not binding on the reversionary body after the lifetime of the widow, is binding as between the alienee and any reversioner in whose favour the reversion actually opens.

In a case such as the above the reversionary heir sues in a representative capacity so that the corpus of the estate may pass unimpaired to those entitled to the reversion. **P C** KESHO PRASAD SINGH *v.* SHEO PARGASH OJHA, (1924) A. I. R. (P. C) 247; 10 O. & A. L. R. 1105; 40 C. L. J. 461; 47 M. L. J. 824 **962**

Restitution, order for—Appeal—Court-fee payable. *See* COURT FEES ACT, SCH. I, ART. 1 **321**

——— of conjugal rights, decree for—Subsequent ill treatment—Order for maintenance—Wife, whether can be absolved from living with husband—Decree, how far binding—Court, discretion of. *See* CRIMINAL PROCEDURE CODE, s. 488 (3), PROVISO **174**

Sale of goods, contract for—Provision for arbitration in case of dispute—Dispute as to quality—Reference to Arbitrators—Burden of proving defectiveness in quality—Arbitrators, jurisdiction of—Stipulation for survey of goods — Award made without survey, whether valid. *See* ARBITRATION **341**

——— taken on approval with condition to pay cash—Title of buyer of such goods. *See* PENAL CODE, s. 406 **163**

——— Vendee's failure to take delivery—Repudiation of contract—Vendor's lien on goods sold—Re-sale. *See* CONTRACT ACT, s. 95 **850**

Specific performance—Agreement for sale of immoveable property by guardian — Benefit of minor—Subsequent better terms, effect of. *See* MINOR **926**

——— *Assignment—Agreement to assign decree—Judgment-debtor's insolvency, whether affects agreement—Assignor's right to recover full amount agreed upon—Damages.*

An agreement to accept the assignment of a decree, on the payment of a fixed amount, does not become invalid, if the judgment-debtor becomes insolvent; and the assignor in such a case is not entitled only to damages but to the full amount fixed in the agreement.

There is no invariable rule that in cases of specific performance relating to moveable property

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damages only can be awarded. **M** KRISHNA IYER *v.* GYANADIKKAM PILLAI, 20 L. W. 328; (1924) M. W. N. 693; (1924) A. I. R. (M.) 801 **78**

——— Formal deed of conveyance, whether necessary. *See* BENAMI TRANSACTION **333**

——— of contract—Temporary sale. *See* PRACTICE **721**

——— or damages, suit for—Damages, award of—Suit whether of small cause nature — Second appeal. *See* CIVIL PROCEDURE CODE, s. 100 **123**

———, *suit for—Delay, how far effective reply—Abandonment—Waiver—Time not of essence of contract.*

Delay in itself is no reply to a suit for specific performance unless it amounts to a waiver or abandonment of the contract or to latches on the part of the party seeking specific performance.

Mere delay does not amount to waiver or abandonment.

A plea of delay should not be allowed to prevail if the parties have not by their words or conduct or by express stipulation made time of the essence of the contract. **N** ABDUL MAJID KHAN *v.* BALAPPA **105**

Specific Relief Act (I of 1877), s. 9—*Benefit of section, how to be taken—Possessian on basis of title, suit for—Failure to establish title—Decree for possession, whether can be given—Occupancy holding—Mortgage, whether legal—Dispossessed mortgagee, suit by—Section, whether applies.*

When a plaintiff is dispossessed otherwise than in due course of law and wishes to take the benefit of section 9 of the Specific Relief Act, he ought to institute his suit on that ground alone and not on title.

Therefore, when a plaintiff sues for possession on the basis of a title and fails to establish his title, his suit for possession based on title cannot be converted into a suit for possession under section 9 of the Specific Relief Act, and a decree for possession cannot be granted to him under that section.

Section 9 of the Specific Relief Act does not apply to a suit by a dispossessed mortgagee for recovery of possession and in the alternative for recovery of the mortgage-money. **A** GANESHRAI *v.* BHUSHI RAI **324**

——— **s. 35, last para.**—*"In the same case," construction of—Vendor in possession.*

The words "in the same case" in the concluding paragraph of section 35 of the Specific Relief Act are not restricted to the previous paragraph alone and apply not only when the purchaser is in possession of the subject-matter, but also when the vendor is in possession. **S** RAMJI HANSRAJ *v.* CHINAI **73**

——— **s. 41**—Improvement—Compensation. *See* CONTRACT ACT, s. 11 **250**

——— **s. 42**—*Bombay High Court Rules, r. 214—Originating Summons—Declaratory decree, whether can be granted.*

Specific Relief Act—contd.

A declaratory decree can be passed in an Originating Summons provided the case falls within the provisions of section 42 of the Specific Relief Act. **B** DINKARRAO GANPATRAO *v.* NARAIN VISHWANATH, 24 Bom. L. R. 449; (1922) A. I. R. (B.) 84; 47 B. 191 **628**

——— **s. 42**—*Declaratory suit—Consequential relief, question of—Duty of Court.*

It is not open to a Court to dismiss a suit filed under section 42, Specific Relief Act, on the ground that a mere declaration will not suffice, without taking evidence and going into the facts. **C** KRISHNA MOHAN *v.* GOUR SUNDAR **851**

——— **s. 45**—*Court's jurisdiction, nature of—Specific remedy available—High Court, whether will take action—Bengal Electoral Rules, r. 31—Election, whether can be questioned in Court.*

The jurisdiction given to the High Court under section 45 of the Specific Relief Act is a discretionary jurisdiction and is limited by provisos and exemptions which are set out in the section.

One *H* applied under section 45 of the Specific Relief Act for an order requiring the Returning Officer to accept his nomination paper for election to the Bengal Legislative Council and reject that of his rival candidate *M*. The application having been rejected *H* appealed but during the pendency of the appeal the Returning Officer declared *M* to be duly elected:

Held, (1) that inasmuch as it was open to *H* to contest the election of *M* by an election petition, he had another specific and adequate legal remedy, and the Court had, therefore, no jurisdiction to make an order under section 45 of the Specific Relief Act;

(2) that as *M* had been declared to be duly elected the Court had no jurisdiction to interfere with that declaration in those proceedings. **C** HALDER *v.* MALLAK, 28 C. W. N. 127; (1924) A. I. R. (C.) 454 **930**

——— **s. 45, provisos (a) to (e)**—*Writ of mandamus—High Court, discretion of—Writ, whether can be granted* ex debito justitiæ *—Application for writ, contents of—Remedy, whether summary—'Property' in proviso (a), meaning of—"Franchise," what includes—Legislative Councils, procedure of—President, powers of—Writ, whether can be issued to President to exercise his powers in particular way—Judiciary, whether can interfere with Legislature—English practice—Justice, denial of—Question of law or fact.*

The jurisdiction of the High Court to make orders under section 45 of the Specific Relief Act is entirely discretionary and in dealing with an application under Chapter VIII of the Act, the principles applicable to a writ of mandamus should be followed.

The writ of mandamus is a high prerogative writ and is granted to ampliate justice and to preserve a right where there is no specific legal remedy. Therefore, it cannot be demanded *ex debito justitiæ* but issues only in the discretion of the Court.

In the case of a writ of mandamus, the rights to be enforced must be of a public natur

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affecting the public at large and also those which although of a public nature specially affect the rights of individuals, and the person applying must show that he has a real and special interest in the subject-matter and a specific legal right to enforce.

There must be a sufficient demand to perform the act sought to be enforced and a refusal to perform it. It is not necessary that the word 'refuse' or some equivalent of it, should be used but there should be enough to show that the party withholds compliance and distinctly determines not to do what is required of him. There must also be a possibility of effective enforcement of the writ which will not issue if alternative remedies or remedy are or is open to the applicant.

An applicant for a writ of mandamus must fulfil all the conditions laid down in provisos (*a*) to (*e*) of section 45 of the Specific Relief Act. These conditions are cumulative and all of them must be fulfilled.

The Court in such cases is invested with very large powers and the remedy is of a summary nature and coercive in its character and it is elementary that the wider the power, the greater must be the caution with which the power is exercised.

Where, therefore, a member of the Bengal Legislative Council applied to the High Court for the issue of a writ of mandamus against the President of the Council ordering him to decide and to disallow a motion about the estimates to be presented to the Council for a supplementary or additional grant on account of the salaries of Ministers, when such grants had been on a previous occasion disallowed by the Council and the petitioner as a member of the Council had exercised his motion in favour of disallowing the motion, and further prayed that his property, franchise and personal right as a member of the said Council and otherwise, would be injured if the President was not directed to decide on the lines indicated above:

Held, (1) that as the applicant paid revenue from which Ministers drew their salaries along with thousand others, a denial of his prayer, did not cause such injury to his 'property,' as was contemplated by proviso (*a*) to section 45 of the Specific Relief Act;

(2) that the word 'franchise' in the proviso did not include the right to vote in the Legislative Council though in its electoral sense it denoted both the right of voting at elections and the qualifications upon which that right was based;

(3) that if the applicant's notions of what was legal or illegal under the Rules and Standing Orders, were hurt, that did not mean that his 'personal rights' had been injured.

Whether there has been a denial of justice or not, is a mixed question of law and fact. **C** JATINDRA MOHAN SEN GUPTA, *In re*, 40 C L. J. 44; 51 C. 874 **374**

Stamp Act (II of 1899), s. 35, proviso (a), *scope of—Non-payment of stamp duty, effect of—Penalty.*

Stamp Act—concld.

The proviso (*a*) of section 35 of the Stamp Act is of equal ambit with the body of the section, and just as an instrument cannot be acted upon, that is to say, nothing can be recovered under it unless it has a proper stamp, so the proviso provides that if there is not a proper stamp it may be put on afterwards on payment of a penalty and the instrument then becomes effective. **P C** LACHMI NARAYAN *v.* RAMESHWAR PRASAD, 5 P. L. T. 570; 47 M. L. J. 300; (1924) A. I. R. (P. C.) 221; 26 Bom. L. R. 1140; 20 L. W. 811; 40 C. L. J. 443; 10 O. & A. L. R. 1272 **789**

——— ss. 35 (a), 36, Sch. I, Art. 5, cl. (c)—*Reference to arbitration not stamped—Arbitrators, power of—Procedure—Suit on award—Reference, whether can be challenged—Admission of reference on payment of penalty—Reference to arbitration properly stamped—Refusal of one of several Arbitrators to act—Substitution of another Arbitrator—Document, whether requires stamp.*

On a reference to arbitration not duly stamped, the Arbitrators can proceed to levy the duty and penalty under section 35 (*a*) of the Stamp Act, if the defect is brought to their notice, but in the absence of such notice, when once they have taken up their enquiry on the basis of the reference, the admission of the reference before them can no longer be called in question before them in view of section 36 of the Act.

But when a suit is brought on the award subsequently, the jurisdiction of the Arbitrators can be challenged on the ground that there was no valid reference, and it becomes the duty of the Court to investigate the assertion, who again is entitled, on ascertaining the true facts, to proceed under section 35 (*a*) of the Stamp Act.

Per *Suhrawardy, J.*—Where on a reference to arbitration duly stamped, one of the Arbitrators declines to act, and another person is substituted in his place by a second document, the latter document is not a reference to arbitration, but a letter of nomination or appointment of the substituted arbitrator. Such a document does not require to be stamped under the Stamp Act. **C** KALI CHARAN *v.* MANI MOHAN, 28 C. W. N. 871; (1924) A. I. R. (C.) 794 **416**

State Railway Open Line Code, Vol. II, App. I, rr. 22, 30—"Compulsory deposit," what is—Deposit, whether ceases to be compulsory on death or retirement—"Discharged" in rule 30, meaning of—Deposit, whether liable to attachment after retirement. *See* CIVIL PROCEDURE CODE, s. 60 (1) (*k*) **69**

Succession Certificate Act (VII of 1889), s. 16—Succession certificate, effect of. *See* CIVIL PROCEDURE CODE, s. 2 **604**

Suits Valuation Act (VII of 1887), ss. 4, 11—*Suit for possession of land—Market value less than plaintiff's valuation—Appeal, valuation for, purposes of—Proper forum, how determined.*

Suits Valuation Act—concld.

For the purpose of determining the course of appeal, the value of a suit for possession of a house is the market value of the house as ascertained by the Court and not the value as stated by the plaintiff in his plaint. **L** SUNDAR DAS *v.* UMDA, 6 L. L. J. 355; 5 L. 481 **614**

Summons case, *tried as warrant case—Accused not allowed to cross-examine prosecution witnesses on re-call—Prejudice—Procedure.*

A Magistrate tried a summons case as a warrant case and framed charge against the accused who intimated their desire to further cross-examine prosecution witnesses and produce defence. But when the witnesses were re-called, the Court discovering its mistake, cancelled the charge, refused to permit cross-examination and gave judgment against the accused:

Held, that the accused were prejudiced in their defence owing to the wrong procedure of the Court and must be given a further opportunity of cross-examining prosecution witnesses. **O** RAM RATAN *v.* RAM SAGAR **279**

Surety and debtor—*Contribution—One surety receiving counter-security from principal debtor.*

A surety who has received from the principal debtor a counter-security for the liability which he undertook jointly with other co-sureties is liable to bring in for the benefit of such co-sureties whatever he has received from that source. **M** MUTHUSAMI NAIDU *v.* RAYALU NAIDU, 20 L. W. 385; (1924) A. I. R. (M.) 848 **395**

Trade mark—*Exclusive use of imported article with particular trade mark—Infringement.*

An importer who by advertising and pushing the sale of goods under a particular mark secures a wide popularity for the mark in relation to the goods sold by him is entitled to the protection of the Court for that mark in the country of importation even against the producer of the goods. **R** COWIE & CO. *v.* PATEL BROTHERS, 2 R. 278; (1924) A. I. R. (R.) 333 **723**

Transfer of Property Act (IV of 1882), s. 6 (e)—*Right to sue for accounts, whether assignable—Suit on basis of assignment—Transferability, test of—Right arising out of contract, whether transferable—Title-deed, delivery of—Right, whether transferred.*

A right to sue for accounts is not assignable in law and, therefore, a suit on the basis of such assignment for recovery of the sum found due on the taking of accounts is not maintainable.

The test for determining the transferability or otherwise of an inchoate right is whether it can be attached in execution of a decree.

Section 6 (*e*) of the Transfer of Property Act applies not only to rights arising out of torts but also to rights arising out of contract.

The mere delivery of a document of title does not constitute a transfer of the right to the property. **C** PROHLAD CHANDRA DAS *v.* BISWA NATH, 28 C. W. N. 894; 40 C. L. J. 79; (1224) A. I. R. (C.) 1047 **411**

——— **s. 10**—Rule against perpetuity—Succession. *See* VENDOR AND PURCHASER **326**

Transfer of Property Act—contd.

——— **s. 14**—*Covenant for pre-emption—Perpetuities, rule against, applicability of—Covenant, whether runs with land—Construction of document—Intention of parties—Duty of Court.*

In construing a document the Court has to construe the words of the document as they stand according to their plain grammatical meaning and whatever the parties may have intended they must be bound by the plain meaning of the words to which they attached their signatures.

Covenants in a deed of transfer which cast a very onerous burden on the covenantor must be read strictly against the covenantee.

Although contracts for the sale of land which can be specifically enforced immediately, or contracts creating a right of pre-emption which cannot be specifically enforced until the proper occasion arises in the future, do not, according to the law in India, create an interest in land either equitable or executory, they do create rights which are capable of being enforced with regard to the land in certain circumstances against third parties and to that extent they are not ordinary personal contracts and stand in a category by themselves. The principle which underlies the rule against perpetuities and which is embodied in section 14 of the Transfer of Property Act is applicable to this class of contracts.

A covenant in a deed of sale reserving to the vendor and his heirs a right of pre-emption or first refusal to arise on an intended sale of the property is not a covenant which runs with the land at law, and, if it is unlimited in point of time, is void on the ground that it is obnoxious to the rule against perpetuities. **B** DINKARRAO GANPATRAO *v.* NARAYAN VISHWANATH, 24 Bom. L. R. 449; (1922) A. I. R. (B.) 84; 47 B. 191 **628**

——— **s. 52**—*Purchase of property* pendente lite—*Notice.*

A purchase made of property actually in litigation though for valuable consideration and without any express or implied notice, in point of fact affects the purchaser in the same manner as if he had such notice. **O** BASAWAN *v.* NATHA, 10 O. & A. L. R. 857; 11 O. L. J. 452 **747**

——— **s. 53**—*Fraudulent transfer—Impugning creditor, whether should be creditor at date of alienation—Consideration—Settlement on account of natural love and affection.*

It is not necessary under section 53 of the Transfer of Property Act that the creditor impugning the alienation should have been a creditor at the time of the alienation. If a person makes a transfer of his property in view of his becoming a debtor or of getting a decree passed against him in the future, and if the object of the transfer is shown to have been to defeat the claims of his creditors, section 53 will cover the case.

From the mere fact that a settlement deed was executed on account of natural love and affection, it does not follow that the intention was not to defeat creditors. The question has to be decided on evidence as to circumstances under which the

transfer was made. **M** RAJAGOPAL CHETTY *v.* SIVAGAMI AMMAL, 20 L. W. 538; (1924) A. I. R. (M.) 779; (1924) M. W. N. 869 **945**

——— **ss. 60, 98**—*Possessory mortgage—Provision to treat as sale in case of non-payment—Conversion into anomalous mortgage—Clog on equity of redemption—Right of redemption.*

The addition of a clause to an ordinary possessory mortgage to the effect that, should the mortgagor fail to pay the mortgage amount within a certain time, the transaction shall be treated as a sale, does not convert the usufructuary mortgage into an anomalous one.

The provisions of section 60 of the Transfer of Property Act are imperative and no mortgagor can lose his right to redeem even in the case of an anomalous mortgage. **M** CHELLAKUTTI NAIKEN *v.* VENGAPPA PILLAI **809**

——— **s. 63**—*Mortgaged land—Government waste adjoining—Mortgagee, cultivation by—Land capable of separate enjoyment and use—Waste, whether accretion—Mortgagor, whether can sue for redemption.*

Government waste land adjacent to a mortgaged holding which is brought under cultivation by the mortgagee and is capable of separate enjoyment and use, is not an accretion to the mortgage land under section 63 of the Transfer of Property Act and, therefore, the mortgagor cannot sue for its redemption. **L B** MAUNG SHWE ON *v.* PONNIAH MUDALIAR, (1923) A. I. R. (R.) 127 **787**

——— **s. 74**—*Prior mortgagee obtaining foreclosure decree—Puisne mortgagee's remedy.*

If a prior mortgagee obtains a decree for foreclosure against the mortgagor without joining the puisne mortgagee as defendant, because the suit against him is barred by time, the puisne mortgagee's right to redeem the prior mortgagee is not dead; in fact his only remedy is to redeem. **N** LAXMICHAND *v.* NARAYAN, (1923) A. I. R. (N.) 225; 6 N. L. J. 237 **77**

——— **s. 76 (h)**—Accounts. *See* MORTGAGE—(ENGLISH)—REDEMPTION **399**

——— **s. 77**—Interest in lieu of profits—Mortgagor, whether liable to render accounts. *See* MORTGAGE, USUFRUCTUARY **406**

——— **s. 77**—Mortgage—Profits in lieu of interest—Stipulation to pay fixed sum as *malikana*—Mortgagee, whether liable to account. *See* MORTGAGE **25**

——— **ss. 82, 95**—*Contribution between co-mortgagors.*

Section 82 of the Transfer of Property Act deals only with relations between mortgagor and mortgagee and has no application to the case of co-mortgagors which is dealt with by section 95 of the Act. **N** PUNDALIK *v.* KADTAI BAI **2**

——— **s. 89**—*Mortgage decree—Error in description of property—Jurisdiction of Court to rectify error.*

Under section 89 of the Transfer of Property Act, as soon as an order absolute for sale is made, the security is extinguished, and the relative rights of the mortgagor and mortgagee

are thenceforth regulated by the decree. But the mortgagee is not thereby debarred from proving that the description of the property mentioned in the schedule to the decree itself was erroneous; and if that is established to the satisfaction of the Court, it has ample authority to mould the relief accordingly as between the original parties or their representatives-in-interest. **C** NANDA LAL *v.* JOGENDRA CHANDRA, 39 C. L. J. 222; 28 C. W. N. 403; (1924) A. I. R. (C.) 881 **297**

——— **s. 91**—Mortgage of property of last maleholder—Reversioner, whether interested—Right of reversioner to redeem. *See* HINDU LAW—WIDOW **747**

——— **s. 95**—Contribution between co-mortgagor. *See* TRANSFER OF PROPERTY ACT, s. 82 **2**

——— **s. 98**—Possessory mortgage—Provision to treat as sale in case of non-payment—Conversion into anomalous mortgage. *See* TRANSFER OF PROPERTY ACT, s. 60 **809**

——— **ss. 105, 106, 107**—Daily tenant—Verbal agreement—Transferee for value. *See* RANGOON RENT ACT, s. 2 (c) **381**

——— **s. 109**—*Lessor transferring property leased—Rights and liabilities of transferee—Termination of lease—Lessee, whether can dispute title of transferee.*

When a lessor transfers his ownership in the property leased, under section 109 of the Transfer of Property Act, the transferee, in the absence of a contract to the contrary, possesses the rights and, if the lessee so elects, is subject to all the liabilities of the lessor. In such a case when the lease has terminated, it is open to the man in possession to dispute the lessor's title to the land on the ground that ownership of it has passed either by a transfer or operation of law to another **N** DAULAT *v.* SARDAR SINGH, (1923) A. I. R. (N.) 91 **616**

Trust—*Religious institution—Temple — Manager's position—Trustee—Alienation—Necessity —Duty to protect property—Alienation by Manager of temple, whether binding on his successor—Tenant—Adverse possession.*

A public temple is a religious institution, and is recognised in law as a juridical person, but it can act only through persons who have authority to act for it, and they can act for the temple only within the scope of their authority. The position of the *shebait*, the manager or the trustees of a temple, is, so far as their power to deal with the endowed lands of the temple is concerned, analogous to the position of a *Mahant* of a *mutt* to deal with the endowed lands of a *mutt*. They can sell or mortgage the endowed lands of the temple if there is an actual, special, and unavoidable necessity of the temple to do so, but the necessity would have to be proved by those who alleged that it existed. Except in a case of such unavoidable necessity the *shebait*, the managers or the trustees of a temple, or the *Mahant* of a *mutt*, have no power to sell or mortgage the endowed property in their custody, and obviously they have no right to impair the endowed property by creating or granting in

Trust—contd.

favour of any one rights of permanent occupancy in the endowed lands.

In the case of a *shebait* a grant by him, in violation of his duty, of an interest in endowed lands, which he has not authority as *shebait* to make, may, under some circumstances, be good as against himself by way of estoppel, but is not binding upon his successors. **P C** NAINAPILLAI *v.* RAMANATHAN, (1924) A. I. R. (P. C.) 65; 19 L. W. 259; 22 A. L. J. 130; 34 M. L. T. 10; (1924) M. W. N. 293; 46 M. L. J. 546; 10 O. & A. L. R. 464; 47 M. 337; 28 C. W. N. 809 (P. C.) **226**

——— Surviving descendant of founder of *chatram*, whether can appoint manager—Trust property described as private property—Appointment of manager of such property, validity of. *See* CIVIL PROCEDURE CODE, s. 92 **804**

Trusts Act (II of 1882), s. 82—*Benami* transaction—Presumption of advancement—Criterion. *See* BENAMI TRANSACTION **832**

U. P. Excise Act (IV of 1910), ss. 3 (2), 10—*"Excise Officer", meaning of—Police Officer specially invested with powers.*

Under section 10 of the U. P. Excise Act the Local Government has authority to empower, not only a Sub-Inspector of Police, but any Police Officer, to perform duties and exercise powers under that Act, including the conferment of authority to make a report or complaint.

A Sub-Inspector of Police who has been invested with powers under the Excise Act by the Government is an "Excise Officer" within the meaning of the Act and is competent to make a complaint or report to a Magistrate under section 71 (*a*) of the Act. **A** EMPEROR *v.* CHITAR SINGH, 21 A. L. J. 922; 10 O. & A. L. R. 293; 46 A. 158; (1924) A. I. R (A.) 267; 25 Cr. L. J. 1345 **705**

——— **s. 64 (c)**—*Sale by one partner out of prescribed hours—Other partner, liability of.*

For purposes of agency two partners stand to one another in the same relation as master and servant.

Where, therefore, one of the partners in a liquor shop commits a wilful breach of the license and sells liquor after prescribed hours, he does so as agent for the other partner who is, therefore, equally liable. **A** EMPEROR *v.* JWALA PRASAD, 45 A. 642; (1924) A. I. R. (A.) 101; 25 Cr. L. J. 1211 **139**

U. P. Honorary Munsifs Act (II of 1896), ss. 8 (2), 9—*Bengal, North-Western Provinces and Assam Civil Courts Act (XII of 1887), s. 21—Civil Procedure Code (Act V of 1908), s. 24—Small Cause case transferred to Honorary Munsif's Court—Appeal.*

Where a case is transferred from a Small Cause Court to an Honorary Munsifs Court under section 8 (2) of U. P. Honorary Munsif's Act and not under section 24, Civil Procedure Code, the Honorary Munsif, for the purpose of hearing the case, does not become a Small Cause Court Judge and, therefore, his decision is appealable. **A** MEGI MAL *v.* HIRA LAL, 22 A. L. J. 880; (1924) A. I. R. (A.) 76 **292**

U. P. Land Revenue Act (III of 1901), s. 44—Mortgagee entered as lessor on mortgagor's application—Presumption. *See* LANDLORD AND TENANT—SUIT **296**

——— **ss. 48, 49, 56, 86, 230**—*Power of recording cesses—Assistant Record Officer, when can make record—Cess recorded by Settlement Officer, when recoverable—Sanction of settlement operations, whether sufficient.*

The power of recording cesses conferred on the Record Officer by section 56 of the U. P. Land Revenue Act can be exercised by the Assistant Record Officer under section 230, subject to the control of the Record Officer.

Where there is no revision of records notified by the Local Government as required by section 48 of the U. P. Land Revenue Act and no Record Officer has been appointed by it under section 49, the Assistant Record Officer has no authority to make any record such as would make a cess valid under the provisions of section 56 of the Act.

A mere sanction of a settlement operation of a district does not include a definite sanction as is required by section 86 of the U. P. Land Revenue Act for the preparation of a list of cesses in accordance with village custom. **A** SUKURWA *v.* NAZIR AHMAD, 22 A. L. J. 900; 10 O. & A. L. R. 1155 **1027**

U. P. Municipalities Act (II of 1916), s. 128 (1) (ix)—*"Trade," meaning of—Tax on circumstances and property—Salaried clerk, whether liable to be taxed.*

"Trade" implies buying and selling or dealing in money or at least the making of some article for the purpose of sale. Further, a person can only be said to be carrying on trade in the ordinary sense of the word when he is working for his own profit and not when he is in receipt of a fixed salary.

Therefore, a person who resides outside the Municipal limits but is employed during business hours as a clerk on a salary within Municipal limits is not liable to be taxed under a tax on circumstances and property imposed on persons "residing or carrying on any trade or owning property within the limits of the Municipality" under clause (*ix*) of section 128 (1) of the U. P. Municipalities Act. **A** BRIJ BHUSHAN LAL *v.* MUNICIPAL BOARD OF KANAUJ, 22 A. L. J. 599; (1924) A. I. R. (A.) 567; 46 A. 685 **89**

Usurious Loans Act (X of 1918), s. 3—*Court, duty of.*

Under section 3 of the Usurious Loans Act a duty is cast upon the Court in cases to which the Statute applies, to apply its mind to its provisions even in a suit heard *ex parte* and to take up the question of its own motion, where it has not been raised by the defence. **C** NANA MIA *v.* MAUNG MIA **830**

Vendor and purchaser—*Some interest reserved by vendor in property sold—Transfer of Property Act (IV of 1882), s. 10—Rule against perpetuity—Succession.*

There is nothing to prevent a vendor from reserving a certain interest in the property comprised in the sale for the benefit of himself and

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his lineal male descendants without any power of alienation, subject to the reversion of that interest in case there were no male descendants left to enjoy the benefit of that reservation.

The reservation of such an interest does not offend against the rule of perpetuity or involve the laying down of a rule of succession varying the ordinary law. On the other hand it merely amounts to the cutting of a certain interest out of the property sold for a limited purpose; and the vendee becomes fully entitled to the whole, when the interest so created dies out. **A** SUKHDEO *v.* RAM NEWAS **326**

Way, *right of—Sale of land—Boundary described as pathway.*

The purchaser of a piece of land, one boundary of which is given in the sale-deed "as a pathway", is entitled to a right of way over the pathway. **M** KUPPAKKAL *v.* MATHAN CHETTIAR, 47 M. L. J. 477; (1924) A. I. R. (M.) 834 **430**

Whipping Act (IV of 1909), s. 3—*"Punishment," meaning of--Sentence of imprisonment or fine, if can be added to whipping.*

The word "punishment" in section 3 of the Whipping Act means "the total of punishments awardable." In lieu of punishing an offender with imprisonment and fine, the Court may punish him with whipping but it cannot sentence him to whipping and also impose a fine. **M** VARADARAJALU *v.* EMPEROR, 20 L. W. 881; 25 Cr. L. J. 1185 **49**

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———, *execution of, if amounts to alienation.*

The mere execution of a Will does not amount to alienation as it passes no property at the time. **C** PROTAP CHANDRA *v.* JAGADISH CHANDRA, 40 C. L. J. 331 **886**

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Workman's Breach of Contract Act (XIII of 1859), s. 2—*Failure to perform contract—Complaint, when must be made—Second Class Magistrate, jurisdiction of—Period of grace, whether should be allowed—Court, discretion of.*

A complaint with regard to a workman's default must be brought within three months of the neglect to perform the contract.

An Honorary Magistrate of the Second Class has jurisdiction to try a case under the Workman's Breach of Contract Act.

Some period of grace should be allowed to the accused for making the re-payment before sending him to Jail.

It is within the discretion of the Magistrate to fix the length of the period. A KHALBAL *v.* MUHAMMAD YUSUF, (1921) A. I. R. (A.) 616; 25 Cr. L. J. 1294 366

——— **s. 2 B**—*Frivolous or vexatious complaint—Compensation—Notice to show cause.*

An order under section 2B of the Workman's Breach of Contract Act directing compensation to be paid in respect of a frivolous or vexatious complaint cannot be legally made without calling on the complainant to show cause against the order. A EMPEROR *v.* ABDUS SAMAD KHAN, 45 A. 616; (1923) A. I. R. (A.) 599; 25 Cr. L. J. 1206 134

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